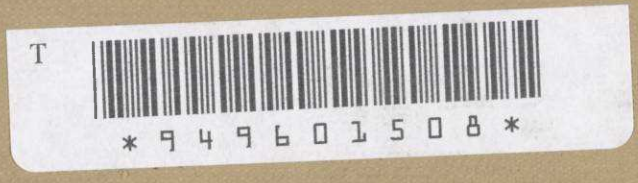

UNITED STATES REPORTS

VOLUME 130

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1888

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY

BANKS & BROTHERS, LAW PUBLISHERS

1889

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, 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.[1]
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

AUGUSTUS HILL GARLAND, Attorney General.
WILLIAM HENRY HARRISON MILLER, Attorney General.[2]
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Matthews, by reason of illness, took no part in the decision of any of the cases reported in this volume. He died at Washington, on the morning of March 22, 1889.

[2] Mr. Garland having resigned, Mr. Miller was appointed in his place, and qualified March 6, 1889.

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(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1888.

OREGON RAILWAY AND NAVIGATION COMPANY *v.* OREGONIAN RAILWAY COMPANY, LIMITED.

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

No. 26. Argued April 27, 30, May 1, 1888. — Decided March 5, 1889.

In the United States a corporation can only have an existence under the express law of the State by which it is created, and can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other legislative act.

When a statute makes a grant of property, powers, or franchises to a private corporation or to a private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government; and this general rule of construction applies with still greater force to articles of association organizing a corporation under general laws.

The power to lease a railroad, its appurtenances and franchises is not to be presumed from the usual grant of powers in a railroad charter; and, unless authorized by legislative action so to do, one company cannot transfer them to another company by lease, nor can the other company receive and operate them under such a lease.

The constitution and general laws of Oregon do not authorize a railroad corporation, organized under the laws of the State, to take a lease of a railroad and franchises.

The general laws of Oregon confer upon a foreign corporation no right to make a lease of a railroad within the State, but only the right to construct or acquire and operate one there.

Statement of the Case.

When a state constitution contains a general provision that corporations shall not be created by special laws, but may be formed under general laws, no private corporation can be created thereafter until such general law has been enacted.

When a corporation is organized through articles of association entered into under general laws, the memorandum of association stands in the place of a legislative charter in so far that its powers cannot exceed those enumerated therein; but powers enumerated and claimed therein which are not warranted by statute are void for want of authority. *Thomas* v. *Railroad Co.*, 101 U. S. 71, explained.

The use of the words "successors or assigns" in a proviso attached to a statute making specific grants to a corporation does not necessarily imply that the corporation can transfer all its property and its franchises to another corporation, to be exercised by the latter.

A provision in a general act for organizing corporations for the purpose of navigating streams, with power to construct railroads where portage is necessary, that a corporation organized under it shall not lease such a railroad, does not imply that without such a restraint the corporation could make such a lease.

A provision in a general act for the organization of corporations that a corporation organized under it may authorize its own dissolution and the disposition of its property thereafter, does not authorize such a corporation, not dissolving but continuing in existence, to dispose of all its corporate franchises and powers by lease.

The operation of a railroad and payment of rent for three years by a lessee under a lease of it for ninety-six years, which was executed in violation of the corporate powers both of the lessor and of the lessee, does not so far execute the contract of lease by part performance, as to estop the lessee from setting up its illegality in an action at law to recover after accruing rent.

THE case, as stated by the court in its opinion, was as follows:

This is a writ of error to the Circuit Court of the United States for the District of Oregon.

The Oregonian Railway Company, Limited, recovered a judgment against the Oregon Railway and Navigation Company for the sum of $68,131, on a contract for the lease of a railroad owned by the plaintiff in the suit, which had been leased to and used by the defendant. This sum was for the semi-annual payment of rent, in advance, for the half year beginning May 15, 1884.

The Oregonian Railway Company, Limited, was organized in Scotland, under what are called "The Companies' Acts," of

Parliament of 1862, 1867 and 1877, and in the memorandum of association it is declared that its principal office and place of business is at Dundee. The defendant in the action, the Oregon Railway and Navigation Company, was organized under articles of incorporation, filed June 13, 1879, according to the statutes of Oregon on that subject, and its principal office is declared in those articles to be at Portland, Oregon.

After many amendments to the original petition, and still more numerous amended answers, the case came to a hearing before the court on a demurrer to the answer and a motion to strike it out. This motion was denied, but the demurrer was sustained, and as the pleadings were supposed to present all the issues that could arise in the case a judgment was rendered for the plaintiff, to review which this writ of error is prosecuted. 22 Fed. Rep. 245, and 23 Fed. Rep. 232.

The amended petition of the plaintiff sets out the acts of Parliament under which it was organized as a corporation, or so much thereof as is necessary to an understanding of the questions presented by this record, and gives in full its "Memorandum of Association," and also what are called its "Articles of Association." This memorandum, after stating the name of the company as above given, and that its registered office will be situated in Scotland, proceeds to give the objects for which it is established, as follows:

"First. The building, constructing, reconstructing, equipping, owning, operating, leasing or selling, transferring, or disposing of, or purchasing or otherwise acquiring, holding and operating, or otherwise using, working, or dealing in all or any such railway or railways, railroad or railroads, in the State of Oregon and the Territory of Washington, in the United States of America, or in either of them, or between such points in said State or Territory or elsewhere in North America as may from time to time be resolved or determined upon by said company, and the carrying of passengers, goods and minerals and all other traffic and freight on, and the doing and performing of all other acts, deeds and other operations connected with railways and railroads in the said State and Territory, or either of them, or elsewhere in North America.

"Second. The building, constructing, equipping, owning and operating, or the leasing, selling, transferring, holding, or acquiring, by purchase or otherwise, and the working and using of one or more lines or portions of lines of railroad or railway, or parts thereof from (first) the city of Portland or the city of Astoria, in the State of Oregon, United States of America, or from either or both of said cities, or from some other point or place on the Willamette or Columbia rivers, in said State of Oregon, through any part or portion of the said State of Oregon lying west or south of the Cascade range of mountains, in said State, to some point at or near, in or upon said Cascade range of mountains; (second) from thence, or from any part or portion of the western or southwestern part of said State of Oregon, to and across and to the east side of said Cascade range of mountains, through a pass in said mountains at or near that fork or branch of the Willamette River, in said State of Oregon, known as the middle fork or branch of said river, or through some other pass in said mountains, within one hundred miles north or south of said middle fork or branch of said river, where shall be found to be on actual survey the easiest and most practicable route across the Cascade range of mountains; (third) thence through that portion of said State of Oregon lying east of said Cascade range of mountains and on through the Territories of Washington or Idaho, or the States of Nevada and California, in the United States of America, or through all or any one or more of said States and Territories to a connection with, or without making any connection with, any other railway or railways in either of said States of Oregon, California, or Nevada, or Territories of Washington or Idaho, and with or without one or more branch lines (*a*) running north, south, east, or west from said main line on the east side of said Cascade range of mountains, or (*b*) running from said main line on the west side of said Cascade range, in said State of Oregon, forming a junction, or one or more junctions, with said main line, at one or more points, to a terminus in said portion of the State of Oregon west of said Cascade range of mountains, or to a junction with said main line, or to a terminus or termini at one or more sea-

ports on the shores of the Pacific Ocean, all as may from time to time be determined by actual surveys; as also to purchase, build, construct, own, equip and operate, or to enter into agreements to run over or to lease (1) any line or lines, branch or branches, of railway or railways, railroad or railroads, that may connect with or become attached to, or meet or become a part of the said main line or its main branch or any of its branches hereinbefore designated; or (2) such other main or branch line or lines, or extensions of any railway or railways, railroad or railroads, made in connection with this company's main line, or of any of its branches, or separate and distinct therefrom, all in such manner of way or form and on such terms as said company shall from time to time deem advisable and for its interests, and the doing and performing of all other operations connected with said designated railway or railways, railroad or railroads, or branches thereof, or in connection with other railways of a similar or different nature, the doing and performing of which this said company shall at any time deem advisable and for its interests in the carrying out of its business.

"Third. The building, constructing, purchasing, or otherwise acquiring, holding, equipping, owning and operating, or the leasing and operating, or the leasing, equipping and operating, or the selling, transferring, or otherwise disposing of, and the working and using of any other railway or railroad, or of any wharves, jetties, steamboat, or steamship, stage, or of any canals, locks, bridge, clay road, plank road, turnpike, hack, truck, or express lines, or any other line, lines, or means for the transportation of freight or passengers, or either or both, now constructed or operated in whole or in part, or which may be hereafter constructed or operated in whole or in part, in either of the said States of Oregon, California, or Nevada, or said Territories of Washington or Idaho, and that whether in connection with or separate and distinct from, and as line or means independent of said railway or railways, railroad or railroads, so to be built, constructed, purchased, owned, equipped, or operated as aforesaid by this company."

The petition also avers that the company has complied with the statute of Oregon, which authorizes corporations of foreign

countries to do business in that State upon complying with certain requirements. On this averment no issue is raised.

It also alleges that on August 1, 1881, the plaintiff, by an indenture of lease, demised to the defendant a certain railway or railroad owned by the plaintiff, in the State of Oregon, with its stations, depots, and other property connected therewith, for a term of ninety-six years from the date of the lease; and that the defendant, by the terms of said indenture, covenanted and agreed to pay the plaintiff therefor the yearly rental of twenty-eight thousand pounds sterling, in equal half-yearly payments, on the 15th of May and the 11th of November in each year, in advance. It then proceeds to allege "that upon the execution of said indenture of lease the said defendant entered into possession of said demised property, and has continued in the enjoyment of the same to the present time, but that on the fifteenth of May, 1884, the defendant, pretending that neither it nor the plaintiff was authorized or empowered by law to enter into said indenture of lease, tendered and offered to restore possession of said demised property to plaintiff in its then condition," and, disavowing the obligation of the lease, refused to pay any further rent, wherefore the plaintiff prays judgment for the sum of $68,131.

The substance of the numerous answers and amended answers is, that the defendant denies that the plaintiff has any corporate existence; avers that it had no power or authority to make the contract or lease as stated in the petition, and that the contract, although signed by the president of the defendant company, with the seal of that company attached, and the signature of the secretary, by order of its board of directors, is also without legal authority, and is not binding upon the defendant. In fact, the essence of the defence and of the whole controversy is, whether these companies had power under their organization as corporations to make the contract of lease which is the foundation of this action.[1]

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[1] The following are some of the principal statutes cited and relied on in argument, or referred to in the opinion of the court:

(1) *The British Companies' Act of August* 7, 1862, 25 & 26 *Vict. c.* 89, *under*

The defendant avers that it has fully paid the rent due under the lease for the term ending May 15, 1881, from which

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which the Oregonian Railway Company Limited was organized. The following extracts from that act are from the brief of the defendant in error:

"SEC. VI. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability."

"SEC. VIII. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things (that is to say): (1) The name of the proposed company, with the addition of the word "limited" as the last word in such name: (2) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate: (3) The objects for which the proposed company is to be established: (4) A declaration that the liability of the members is limited: (5) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount: Subject to the following regulations: (1) That no subscriber shall take less than one share: (2) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

"SEC. IX. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things: (that is to say), (1) The name of the proposed company, with the addition of the word "limited" as the last word in such name: (2) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate: (3) The objects for which the proposed company is to be established: (4) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount."

"SEC. XI. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in *Scotland*, as well as in *England* and *Ireland:* It

time it disavowed the obligatory force of the contract, and offered to return and deliver up to the plaintiff all the property it held under the lease.

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shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act."

"SEC. XIV. The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: The articles shall be expressed in separate paragraphs, numbered arithmetically: They may adopt all or any of the provisions contained in the table marked A in the first schedule hereto: They shall, in case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration: In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes."

"SEC. XVI. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in *Scotland* as well as *England* and *Ireland:* When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be in the nature of a specialty debt.

"SEC. XVII. The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies hereinafter mentioned, who shall retain and register the same: There shall be paid to the registrar by a company having a capital divided into shares,

It appears also by the pleadings, both on the part of the plaintiff and defendant, that they entered into an agreement,

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in respect of the several matters mentioned in the table marked B in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares in respect of the several matters mentioned in the table marked C in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct: All fees paid to the said registrar in pursuance of this act shall be paid into the receipt of Her Majesty's Exchequer, and be carried to the account of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland.*

"SEC. XVIII. Upon the registration of the memorandum of association and of the articles of association in cases where articles of association are required by this act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned: A certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with."

(2) *The provisions in the constitution and laws of Oregon relating to the organization of corporations, of which the following are the most material:*

(a) *Constitution of Oregon, Article XI, Section* 2.

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

(b) *The Oregon Corporation Act of October* 14, 1862, *as amended October* 20, 1864, *and October* 24, 1866.

"SEC. 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act.

"SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer

by which the defendant company was to continue to use the road for the time being, in order to prevent serious loss arising

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authorized to take the acknowledgment of a deed; and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

"SEC. 3. The articles of incorporation, or a certified copy of the one filed with the Secretary of State or the County Clerk, is evidence of the existence of such corporation.

"SEC. 4. The articles of incorporation shall specify: 1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation if limited; 2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage; 3. The place where the corporation proposes to have its principal office or place of business; 4. The amount of the capital stock of the corporation; 5. The amount of each share of such capital stock; 6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge.

"SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power: 1. To sue and be sued; 2. To contract and be contracted with; 3. To have and use a corporate seal, and the same to alter at pleasure; 4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation; 5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation; 6. To make by-laws, not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; *Provided*, That no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs."

"SEC. 9. . . . From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, except as otherwise specially provided in this chapter."

"SEC. 11. . . . The powers vested in the directors may be exercised by a majority of them, and any less number may constitute a quorum at all regular or stated meetings authorized by the by-laws of the corporation in all

from the disruption of the relations of the two railroads, but that such use was not to be construed as being under the

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the cases when either the directors or incorporators shall have filed with the Secretary of State and county clerk a written statement designating such less number sufficient to form a quorum. . . ."

"SEC. 19. Any corporation organized under the provisions of this act may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property and dividing its capital stock; *provided, however*, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

"SEC. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macadamized road, plank road or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water, in like manner and with like effect as if such corporation had been specially formed for such purpose; but no corporation formed under this act or heretofore or hereafter incorporated by any special act of incorporation, passed by the Legislative Assembly of this State or otherwise, for the purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last-named corporation; *provided further*, that corporations heretofore incorporated or which may hereafter be formed under this act for the purpose of establishing and keeping a ferry across any stream or other water of this State or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road."

(c) *An act passed October* 18, 1878, *to amend section twenty* (*above quoted*) *so as to read as follows:*

"Any corporation formed for the purpose of navigating any stream or other water may, by virtue of such incorporation, construct any railway,

lease, nor as binding either party beyond what the law would imply if this arrangement had not been made. There is also

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macadamized road, plank road, or clay road, or canal, or bridge necessary or convenient for the purpose of transporting freight or passengers across any portage on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream, or other water, in like manner, and with like effect, as if such corporation had been formed for such purpose."

(d) "*An act to authorize foreign incorporations to do business and exercise their corporate powers within the State of Oregon, passed October* 21, 1878.

"SEC. 1. That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid under ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.

"SEC. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers, or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State."

(e) "*Act of* 22*d October*, 1880, *entitled an act to grant the Oregonian Railway Company, Limited, the right of way and station grounds over the state lands, and terminal facilities upon the public grounds at the city of Portland.*"

* * * * *

"*Whereas*, the Oregonian Railway Company, Limited, is now engaged in the construction of a system of railways in the State of Oregon, from the city of Portland, the most used shipping port of this State, to the head of the Willamette Valley, and to a connection with the systems of railroads having a connection with those States and Territories of the United States situate east of the Rocky Mountains, and the building of the railway of said company will be of great benefit and lasting advantage to the people of this State: . . . Now, therefore,

an averment in the petition that the property was not in the same condition when the offer to return it was made as it was

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"*Be it enacted, &c.*, That there by [be] and is hereby granted to the Oregonian Railway Company, Limited, a corporation at this time engaged in the construction and operation of a railway in the State of Oregon, and to its assigns, the owners and operators of the railway now being constructed by it, and for the use of said railway, in the construction, use and operation thereof, the rights, privileges, easements, and property following, that is to say:

"SEC. 1. Those certain premises situate in the city of Portland, in the State of Oregon, and commonly known as the public levee, . . . to be held, used and enjoyed for occupation by track, side track, water stations, depot buildings, wharves and warehouses, and such other buildings and erections of such form and manner of construction as may be found requisite, necessary or convenient in the receiving, shipping and storing of produce, goods, wares, merchandise and generally of all kinds of freight, and for use generally and in the manner usual and ordinary for depot purposes, and as such to be under the exclusive management and control of the owners of said railway;

"*Provided, always*, That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm or corporation, save only with and as part and parcel of, and as appurtenant to the railway now built and owned by said company, and now in process of construction by it. . . ."

(f) *The paper referred to by the Court in its opinion on page* 29, *entitled*, "*Public Statutes of Oregon recognizing the assignability of railroads.*"

"In addition to the Oregonian Railway Company's Act of 22 Oct., 1880, there are the following:

"1. *The Oregon Railway and Navigation Co.'s Act — Oregon Statutes*, 25 *Oct.* 1880 —

"Recites that 'the O. R. & N. Co. was duly incorporated on July 13, 1879, for the purpose, among other things, of,' etc. SEC. 1. That there be and there is hereby granted to the said O. R. & N. Co., its *successors and assigns*, the right of way through any and all lands belonging to the State of Oregon, etc. SEC. 2. Whenever said company, *its successors or assigns*, shall file, etc.

"2. *Statutes of Oregon for* 1880, *p.* 55 — *Astoria and Winnemucca Railroad Co.'s Act.*

"SEC. 1. That there be and is hereby granted to the A. & W. R. R. Co., *and its assigns*, the right of way, etc. . . . SEC. 4. That the same company shall have the right, and *it and its assigns* are hereby authorized to construct bridges, etc.

when it was received; but this is denied in the answer, and as no proof was taken in regard to that fact it can make no figure in the case as presented to this court.

Mr. J. N. Dolph and *Mr. James C. Carter* for plaintiff in error.

Mr. Sidney Bartlett also filed a brief for plaintiff in error.

Mr. Attorney General and *Mr. George F. Edmunds* (with whom was *Mr. Edmund Robertson* on the brief) for defendant in error.

I. The lease was within the corporate powers of the defendant. It is admitted that the contract in question is covered

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"3. *Oregon Statutes*, 1878, 55 — *Portland Bridge Co.'s Act.*

"SEC. 1. That it shall be lawful for the Portland Bridge Co., a corporation duly incorporated under and in conformity with the law of Oregon, or *its assigns*, and that said corporation or *its assigns* be and are hereby authorized and empowered to construct, build, etc.

"4. *Statutes of* 1882, 7 — *Oregon Short-Line Railway Co.'s Act* — 17 *October.*

"SEC. 1. That there be and hereby is granted the said O. S. L. R. Co., and *its successors or assigns*, the right of way, etc.

"5. *Statutes of* 1872, 16 — *Portland, Dalles and Salt Lake R. R. Co.'s Act* — 15 *Oct.*

"SEC. 1. Grants proceeds of land sales. SEC. 2. Grants rights of way. . . . SEC. 11. The rights and privileges of this company, hereby granted, shall not be assignable to any other company without the assent of the Legislature.

"6. *Statutes of* 1874, 14 — *Oregon Central Pacific Railway and Telegraphic Line* — 24 *Oct.* 1874.

"SEC. 1. That there be and is hereby granted to the Oregon Central Pacific Company *and its assigns* the right of way through any lands belonging to the State of Oregon, etc.

"The following act is posterior to the litigation in this case, viz., '*An act to provide for the completion of the narrow-gauge system.*' (24 Feb., 1885.) It recites the Oregonian Railway Co.'s Act of 22 Oct. 1880, and proceeds: *Whereas*, said Oregonian Railway Company, Limited, did, on the 1st day of August, 1881, then lease its constructed lines of railway in the Willamette Valley to the Oregon Railway and Navigation Company for the period of ninety-six years, etc."

by the express language of the act of incorporation; so that the defendant's contention practically is that its own articles of incorporation are illegal and void. The same considerations apply to the objection that the lease was *ultra vires* as to the plaintiff. Both companies are incorporated under general laws, by articles of essentially the same character, purporting to contain in each case the powers which are here challenged.

The law of Oregon authorizes corporations for any lawful business, enterprise, pursuit or occupation. This corporation is created under that law for the lawful business of leasing and operating a railroad in that State. The whole case of the defendant rests on a misapprehension of the rule laid down by this court in *Railroad Co.* v. *Thomas*, 101 U. S. 71. There the company was created under a special act of the legislature, which gave it power to *construct and operate*, but not *to lease;* and the court held that a lease of the company was *ultra vires.* "The powers of corporations," says Mr. Justice Miller, "organized under legislative statutes are such, and such only, as those statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." Had the defendant's articles been silent as to leasing, this case might have been cited as an authority against the validity of the lease, but with the articles as they are, it is an authority for the lease; and so, indeed, is every other case in the United States and England in which the contract of a corporation has been declared *ultra vires.*

The decision in *Railroad Co.* v. *Thomas* is avowedly based on the case of *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; and Mr. Justice Miller adopts the language used in that case. That case followed a long line of English cases in which companies organized under special acts were held incompetent to make contracts not falling within their purposes as defined by such acts. But that case has great value in the present controversy, inasmuch as, unlike its predecessors, but like this case, it concerns the power of a company incorporated, not by special act, but by articles of incorporation under a general act. The decision in that case assumes

that the memorandum of association is the equivalent of a legislative charter. It was so held by Lord Selborne and by Lord Cairns, and their declarations are repeated and commented on in *Railroad Co.* v. *Thomas.* See also *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290.

These decisions, the only ones relied on, show that the disputed power is contained in the charter. The defendant is then driven to attack the charter. In the vague proposition that a lease of a railroad is contrary to public policy lies its whole case, inasmuch as by the general law of Oregon, anything may be leased, including a railroad.

That a lease of a railroad without power to that intent conferred upon the company making the lease is against public policy, may be admitted on the ground that it involves an abandonment of franchise and duty. But what has to be established here is, not that a lease without authority of the State is bad, but that a lease is in itself an unlawful purpose, business, or enterprise; because, if it is a lawful purpose, business or enterprise, then the State has conferred the power on both companies.

At common law corporations could be created by the king for any purpose, and with any powers not contrary to general law, including that of leasing or taking in lease. See *Sutton's Hospital Case*, 10 Rep. 1, 30 b. Under the Oregon corporation laws, a corporation has powers analogous to those of a corporation at common law, created by the king. In the analogous system of England under the Companies' Act, it has been held that the power of leasing is implied, although not specified in the memorandum of association. *Featherston* v. *Lee Moor Porcelain Co.*, L. R. 1 Eq. 318.

In the laws of Oregon there is no public policy hostile to leasing. The constitution prohibits incorporation except under general laws. The general law, like the law of Great Britain, provides one code for all kinds of corporations. It defines the powers of such corporations including the power to "dispose of" their property. This power of disposition is again mentioned in the section which provides for the dissolution of corporations. As Judge Deady in the court below observes,

the power to "dispose" implies a corresponding power in corporations to take. Again, we submit, although it is not necessary for our case that these provisions may reasonably be construed as meaning that the power to acquire or assign, by lease or otherwise, is incident to all corporations, whether leasing be assumed as an object in the articles of incorporation or not. See *Miners' Ditch Co.* v. *Zellerbach*, 37 California, 543; *S. C.* 99 Am. Dec. 300.

In its original form § 20 of the corporation laws of Oregon prohibited the leasing of railroads to a certain class of corporations, and thereby, by implication, permitted it to all others. In its amended form this prohibition was withdrawn, and leasing became thereby open to all.

Finally the act of 1880 granting certain rights and interests to the Oregonian Railway Company and its assigns, is inconsistent with a policy hostile to leasing. Not only is the grant made to the company and *its assigns*, but the company's right to assign the whole property is recognized, and it is enacted that certain of the rights granted by the act shall be assignable *only with the whole railroad property of the grantee.* This statute is cited here only as part of the proof which negatives the theory of a public policy hostile to leasing. Its importance in other respects is noticed elsewhere. See on these points, *Oregon Cascade Co.* v. *Baily*, 3 Oregon, 164; *Fink* v. *Canyon Road Co.*, 5 Oregon, 301; *Branson* v. *Oregon Railway Co.*, 10 Oregon, 278.

The defendant company is not entitled to challenge the legality of its own articles of incorporation, or to repudiate as unlawful a purpose which it was formed to carry out. See *Ewing* v. *Robeson*, 15 Indiana, 26; *Dooley* v. *Cheshire Glass Co.*, 15 Gray, 494; *Darge* v. *Horicon Co.*, 22 Wisconsin, 417; *Racine &c. Railroad Co.* v. *Farmers' Loan and Trust Co.*, 49 Illinois, 331; *S. C.* 95 Am. Dec. 595.

II. The defendant is estopped from denying our corporate existence and powers.

The defendant's answer admits the contract as pleaded, *i.e.*, the admission that it was signed by the defendant's president and secretary, sealed with the corporate seal, and

authorized by the board of directors, is an admission of the contract as pleaded. The allegation that the rent provided for was paid for three years is in itself an admission of the lease and of the existence between plaintiff and defendant of the relations of landlord and tenant. The contract as pleaded is a contract between the Oregonian Railway Company Limited and the defendant. The lease as pleaded is a lease by the Oregonian Railway Company Limited.

The rule applicable to this state of facts is laid down in Field on Corporations (Wood's edition) in the following terms: "When the action is brought by the corporation on a contract executed by the defendant to it, the general rule is that the plaintiff need not offer to prove its corporate existence, and the defendant is estopped from denying it in the absence of fraud on the part of the corporation; and when a party is estopped from denying the existence of a corporation at the time he recognized it as such, if he denies its existence subsequently he must show how it ceased to exist." See also *Hubbard* v. *Chappel*, 14 Indiana, 601; *Jones* v. *Cincinnati Type Foundry*, 14 Indiana, 89; *Dutchess Cotton Manufacturing Co.* v. *Davis*, 14 Johns. 238; *S. C.* 7 Am. Dec. 459; *Cowell* v. *Springs Co.*, 100 U. S. 55; *Commissioners* v. *Shield*, 62 Missouri, 247; *Evansville Railroad* v. *Evansville*, 15 Indiana, 395; *Heaston* v. *Cincinnati and Fort Wayne Railroad*, 16 Indiana, 275; *S. C.* 79 Am. Dec. 430; *Brownlee* v. *Ohio and Indiana Railroad*, 18 Indiana, 68; *Douglas County* v. *Bolles*, 94 U. S. 104; *Methodist Church* v. *Pickett*, 19 N. Y. 482; *Swartwout* v. *Michigan Railroad*, 24 Michigan, 389; *Kennedy* v. *Cotton*, 28 Barb. 59; *Phœnix Bank* v. *Donnell*, 41 Barb. 572; *Jones* v. *Bank of Tennessee*, 8 B. Mon. 122; *S. C.* 46 Am. Dec. 540; *Helena* v. *Turner*, 36 Arkansas, 577; *Mutual Ins. Co.* v. *Wilcox*, 8 Bissell, 203; *Franz* v. *Teutonia*, 24 Maryland, 251; *Cahill* v. *Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124; *S. C.* 43 Am. Dec. 457.

It was suggested by the defendant in the court below that the estoppel is limited to alleged defects of organization. No such limitation is inferred or implied in any of the cases, but the true rule is that, while a party is not estopped to show

that the corporation could have no legal existence, yet if the court knows, judicially or otherwise, (as by admission in the pleadings,) that there is a law under which it might exist, then the fact of contracting with the corporation estops the party from denying its corporate capacity.

It happens that the law under which the plaintiff claims to exist is fully before the court. Defendant expressly admits the British Companies' Act, 1862, as pleaded. The court itself knows the Oregon law, 1878, (p. 95,) under which it may lawfully engage in railroad business in Oregon, and the further act of 1880, (p. 56,) which expressly recognizes the plaintiff as a corporation lawfully engaged in such business, and grants to it and its assigns certain rights and privileges therein. The British law of its creation, whereby a company may be created for any lawful purpose; the Oregon law under which it may act in Oregon; the Oregon law, recognizing its lawful existence under its corporate name, and granting it facilities for its corporate business; the contract in its corporate name with the defendant; all these conditions show a *de facto* corporation, using corporate rights under a law which permits its existence, and raise an estoppel against persons dealing with it which is absolute.

Against this full recognition by the legislature no plea questioning the plaintiff's corporate existence or power can be of any avail. Such recognition was long ago held by this court to be conclusive as to the corporate character, and to give the power in question, even if not possessed before. *Society for the Propagation of the Gospel* v. *Pawlet*, 4 Pet. 480. See also *Jameson* v. *People*, 16 Illinois, 257; *S. C.* 63 Am. Dec. 304; *Kanawha Coal Co.* v. *Kanawha and Ohio Coal Co.*, 7 Blatchford, 391.

MR. JUSTICE MILLER delivered the opinion of the court.

The two questions presented on this demurrer, and the only ones necessary to be considered, are:

First. Whether the plaintiff, the Oregonian Railway Company, Limited, organized under the laws of Great Britain,

with such aid as the statute of Oregon gives to it in reference to business done in that State, had the power to lease its railroad to the defendant company; and,

Second. Whether the Oregon Railway and Navigation Company, the defendant in the action, organized under the laws of the State of Oregon, had the legal capacity and lawful power to make said lease on its part.

Although the lease itself, which is the foundation of this action, is not found in the pleadings, nor in the record, the statements in regard to it made by the petition, amended petition and answers leave no question as to its nature or character so far as it affects the two questions here suggested.

It may be considered as the established doctrine of this court in regard to the powers of corporations, that they are such and such only as are conferred upon them by the acts of the legislatures of the several States under which they are organized. A corporation in this country, whatever it may have been in England at a time when the crown exercised the right of creating such bodies, can only have an existence under the express law of the State or sovereignty by which it is created. And these powers, where they do not relate to municipal corporations exercising authority conferred solely for the benefit of the public, and in some sense parts of the body politic of the State, have in this country until within recent years always been conferred by special acts of the legislative body under which they claim to exist. But the rapid growth of corporations, which have come to take a part in all or nearly all of the business operations of the country, and especially in enterprises requiring large aggregations of capital and individual energy, as well as their success in meeting the needs of a vast number of most important commercial relations, have demanded the serious attention and consideration of law makers. And while valuable services have been rendered to the public by this class of organizations, which have stimulated their formation by numerous special acts, it came at last to be perceived that they were attended by many evils in their operation as well as much good, and that the hasty manner in which they were created by the legislatures, sometimes with

exclusive privileges, often without due consideration and under the influence of improper motives, frequently led to bad results.

Whether it was this consideration, or mainly the desire to fix some more uniform rule by which the rights and powers of private corporations, or those for pecuniary profit, should come into existence, it is certain that not many years ago state constitutions which were formed or remodelled came to have in them a provision like that which is now to be found in the constitution of the State of Oregon, article 11, § 2:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all the States of the Union, which like Oregon have the common law as the foundation of their jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the States in which that common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter.

This proposition has been before this court more than once in recent years. It was very fully considered in *Thomas* v. *Railroad Co.*, 101 U. S. 71, which resembled the case before us in several important features.

The Millville and Glassboro Railroad Company, incorporated under the laws of New Jersey, entered into an agreement with Thomas and others for the lease of its railroad to them for twenty years. It was agreed that the company might at any time terminate the lease and retake possession of the railroad; in which case any loss or damage incurred by the lessees should be equitably adjusted by arbitration, and the amount be paid by the company. This contract was made in 1859, and the les-

sees took control of the property and used it until 1867, when they were served with a notice by the lessor terminating the lease. A suit was brought to recover the damages mentioned in the contract, which came from the Circuit Court of the United States for the Eastern District of Pennsylvania to this court, where it was very elaborately argued, and received the earnest consideration of the court, as may be perceived from the report of the case. The opinion, which was concurred in by all the judges who sat in the case, contains a full review of the decisions of the English courts on the subject discussed, and also of previous decisions of this court.

The question turned altogether upon the power of the railroad company, under its charter and the laws of New Jersey, to make the lease by which its road was turned over for twenty years to the absolute control of other parties. The right to do this was asserted under the following language in the charter of the company:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts."

But the court said it was impossible under any sound rule of construction to find in this language a permission to sell, lease, or transfer to others the entire railroad and the rights and franchises of the corporation.

The cases of *The Asbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653, decided in the House of Lords in 1875, and *The East Anglian Railways Co.* v. *The Eastern Counties Railway Co.*, 11 C. B. 775, were also reviewed, with several others of a similar character from the reports of the highest courts of England, in which, as this court said:

"The broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action."

Reference was also made in the same opinion to the case of *The York & Maryland Line Railroad Co.* v. *Winans*, 17 How. 30, which held that a corporation which has undertaken to construct and operate a railroad cannot, by alienating its right to use and its powers of control and supervision, avoid the responsibility that it assumed in accepting the charter. The court said: "The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." To this effect were cited *Beman* v. *Rufford*, 1 Sim. (N. S.) 550, and *Winch* v. *Birkenhead & Lancaster Railway Co.*, 6 Jurist, 1035; *S. C.* 13 Eng. L. & Eq. 506.

Afterwards, in *Green Bay & Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98, the case of *Thomas* v. *Railroad Co.*, *supra*, was referred to with approbation.

Still later, in the case of *Pennsylvania Railroad Co.* v. *St. Louis &c. Railroad Co.*, 118 U. S. 290, 309, where the whole question was reconsidered after a full argument, the conclusion was stated in the following language:

"We think it may be stated, as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

It may be considered that this is the law of the State of Oregon, except as it has been altered or modified by its constitution and statutes.

We are here met with an embarrassment arising out of the circumstance that neither the plaintiff nor the defendant in the present case professes to exercise its powers under any special charter conferred on it by the legislature of Oregon. That State, in accordance with the principle laid down in its con-

stitution, to which we have already referred, passed general laws for the formation of private corporations. See Laws of Oregon, (Deady's Comp.) c. 8. Under title 1, § 1 reads as follows:

"Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act."

Provision is then made for the manner in which these persons shall constitute themselves a corporation, by filing articles of association, acknowledged before a proper officer, in the office of the Secretary of State and in that of the clerk of the county where the business is to be carried on. What these articles shall contain is specified with some particularity. But title 2 of this same chapter is more important in regard to the matter at issue, because it relates, among other things, to corporations which are organized for the construction of railroads. The mode of their formation is the same as that of those coming under title 1, but the declaration of the powers which may be exercised by railroad corporations may become important in the consideration of the present case.

By the act of the legislature of October 21, 1878, Session Laws, 95, it is provided "that any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of, or with the power of, acquiring and operating any railway, . . . shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges" as a domestic corporation formed for such purpose, and no more.

When we have found, therefore, what powers were conferred by the laws of Oregon on the defendant corporation in this case we shall also have determined that the powers of the plaintiff corporation were no greater with regard to the same subject matter, so far as the statutes are concerned, except as it may be shown that other powers are given by some express statute.

It may also be conceded, at the outset of the argument, that the memorandum made under the Companies' Act of 1862 by

the plaintiff, and the articles of association made under the laws of Oregon by the defendant, both contain declarations of the powers of these companies and of each of them to buy or sell or lease railroads. The only question, therefore, to be considered is whether this declaration of power is authorized by the laws of Oregon.

It is argued that the articles of association, under the Oregon law, and the memorandum of association, under the Companies' Acts of Great Britain, are themselves the equivalent of an act of incorporation by the legislature, and that whatever is found as a grant of power, or description of the purpose of the company, set forth in such articles or memorandum, is tantamount to a legislative act. A phrase in the opinion of the court in *Thomas* v. *Railroad Co.*, *supra*, is cited as supporting this proposition, namely, "The memorandum of association, as Lord Cairns said, stands in place of a legislative charter." But what was meant, both by Lord Cairns and by this court, was that anything not claimed, granted, or described in such instrument in relation to the powers and business of the corporation could not be held to be a part of them by construction; in other words that its powers could not exceed those enumerated therein. It was necessarily implied in such a remark that anything in such articles or memorandum not warranted by the statutes in question, authorizing the formation of corporate bodies, was void for want of authority.

Of course any authority for the exercise of corporate powers, derived from the laws of Oregon, must be in accord with the constitution of that State and its statutes upon that subject. The constitutional provision, above quoted, that corporations shall not be created by special laws, but may be formed under general laws, implies that no private corporation could be created thereafter until such general law had been enacted, and that it thereupon became the fundamental law of the State in regard to all corporations formed under it. It is idle to say, therefore, that any corporation could assume to itself powers of action by the mere declaration in its articles or memorandum that it possessed them.

We have examined with much care the two statutes already

referred to concerning incorporation, enacted in accordance with that constitutional provision, and do not find any express authority for a railroad company to lease its road for an indefinite period, or for it to take such a lease; nor are we able to find any general language in those statutes, or either of them, in relation to the powers that may be conferred upon corporations which justifies a departure from the principles laid down in *Thomas* v. *Railroad Co.*

It is to be remembered that where a statute making a grant of property, or of powers, or of franchises, to a private individual, or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, "in this court the principle is recognized that in grants by the public nothing passes by implication." See also *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 23 How. 66; *Turnpike Co.* v. *Illinois*, 96 U. S. 63.

Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation.

We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte;* their formation and execution — what shall be put into them as well as what shall be left out — do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal

for the personal advantage of the parties concerned rather than the general good.

These articles, when signed by the corporators, acknowledged before any justice of the peace or notary public, and filed in the office of the Secretary of State and the clerk of the proper county, become complete and operative. They are, so far as framed in accordance with law, a substitute for legislation, put in the place of the will of the people of the State, formerly expressed by acts of the legislature. Neither the officer who takes such acknowledgment, nor those who file the articles, have any power of criticism or rejection. The duty of the first is to certify to the fact, and of the second to simply mark them filed as public documents, in their respective offices.

These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the State upon that subject, and the rule stated above.

It is not urged with much apparent confidence that there is anything in the general provisions of the laws of Oregon, in relation to the formation of private corporations, which are to be found in c. 8, titles 1 and 2, Deady's Comp., which by express terms authorizes a corporation to include within the powers enumerated in its articles of association that of making such a lease as the one which is the subject of this action. Arguments based upon these laws are founded upon the implication that building railroads is, within the meaning of § 1 of title 1, a "lawful enterprise, business, pursuit or occupation;" and the further inference that the power of leasing a railroad, either as a lessor or a lessee, is one which is incident and proper to the pursuit of the lawful business of

constructing and operating a railroad. The same argument is drawn from the general fact that title 2 recognizes the authority of corporations organized for the construction of railroads, macadamized roads, plank roads, clay roads, canals or bridges, to appropriate lands for their necessary uses by the exercise of the right of eminent domain, in the manner pointed out.

The language of the statute of New Jersey, (quoted in *Thomas* v. *Railroad Co.*, *supra*,) under which it was urged that the railroad company had authority to make the lease in controversy, was quite as general and as liberal in its description of the powers which that corporation was authorized to exercise as anything to be found in the Oregon statutes. In fact, in the authority which was given to that company in regard to making contracts for the transportation of passengers and freight, and the doing of a general railroad business with other corporations and private persons, it approaches nearer the power to make leases than anything which is to be found in the laws of Oregon; yet this court held that although it was a direct authority from the legislature itself, and not subject to the restrictive criticisms above suggested, the lease made in that case was *ultra vires*, and without authority on the part of the company.

Another important consideration to be observed, peculiarly applicable to the acts of corporations formed by the corporators themselves, declaring what business they are about to pursue, and the powers which they purpose to exercise in carrying it on, is, that while the thing to be done may be lawful in a general way, there are and must be limitations upon the means by which it is to be done or the purpose carried out, which the articles of incorporation cannot remove or violate. A company might be authorized by its articles to establish a large manufactory in a particular locality, and might be held to be a valid incorporation with sufficient powers to prosecute the business described; but such articles, although mentioning the particular place, would not empower the company, in the exercise of the power thus conferred, to carry on a business injurious to the health or comfort of those living in that vicinity.

Instances might be multiplied in which powers described in general terms as belonging to the objects of the parties who thus become incorporated would be valid; but the corporation, in carrying out this general purpose, would not be authorized to exercise the powers necessary for so doing in any mode which the law of the State would not justify in any private person or any unincorporated body. The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws of the State and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom.

In the absence of anything in the general incorporation act, we are referred to several statutes of the State of Oregon, which, while not specifically granting to railroad companies the right to lease their property or to take other railroads under lease from their owners, are supposed by implication to recognize such right in all railroad companies. We are furnished with a list of statutes of that State in which the word "assigns" is used in regard to corporations, generally in the phrase "successors or assigns," from which it is sought to imply the general proposition that a corporation may assign all its property. A special reference is made to the act of October 22, 1880, by which the legislature granted to the "Oregonian Railway Company, Limited, the right of way and station grounds over the state lands, and terminal facilities upon the public grounds at the city of Portland."

The preamble to this statute is quite lengthy, and, taken in connection with the enacting clause, shows very plainly that the principal object aimed at was to give to that company, so far as the legislature could do so, certain rights, privileges and easements upon the public grounds, streets and levee in that city, on and near the banks of the Willamette River, for its depots and wharves and the operation of its railroad. After these are fully specified, a proviso is added, "That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey, or assign the premises or rights *hereby granted*, or any part or parcel thereof, to any person,

persons, firm or corporation, save only with and as part and parcel of and as appurtenant to the railway now built and owned by said company and now in process of construction by it."

It is strenuously argued, and with some degree of plausibility, that the language of this proviso, and the use of the words "successors" and "assigns" in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, it is not precisely the form in which we would expect to find a grant of the power to sell, to lease, or to transfer the title, ownership, or use of railroad lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word "assigns," a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified.

The legislators who enacted these statutes may have had an idea that there were certain things which corporations could assign; they may have used the expressions to which we have referred in a very loose instead of a technical sense; or they may have supposed that cases might arise where railroad property going by some operation of law, as bankruptcy or fore-

closure, from the hands of its original owners into the possession of other persons, would justify the description of the latter by the words "successors or assigns." In using these terms they may have thought that authority might be given by future statutes, either generally to all corporations or to some special organization, to sell or transfer the corporate property or some part of it. But whatever may have been their purpose, we think the argument is a forced one, which would vest in railroad companies the general power to sell or lease their property or franchises, or to make contracts to buy or take leases of the same from other railroad corporations, from the use which is made of these indefinite terms "successors or assigns."

This question came up in *Thomas* v. *Railroad Company*, *supra*, in which, as already stated, a lease by the railroad company of its road and corporate franchises was held to be void. While the lease was in full operation, an act was passed by the legislature of New Jersey declaring it unlawful for the directors, lessees, or agents of that railroad company to charge more than three and a half cents per mile for the carrying of passengers. It was insisted that this use of the word "lessees" applied to the then existing lessees of that road, and operated as a ratification by the state legislature of the lease under which they held it. In discussing this subject the court said:

"It may be fairly inferred that the legislature knew at the time the statute was passed that the plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

"The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees and agents of the railroad.

"The mention of the lessees no more implies a ratification of the contract of lease than the word 'directors' would imply a disapproval of the contract. It is not by such an incidental use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." p. 85.

This language applies with great force to the attempt which is made in this case to deduce from the use of the word "assign" in the act of October 22, 1880, a recognition of the power of the railroad company to sell or assign its entire property and rights. The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of terminal facilities as they are called, with the right to wharves, depots, and access to the river for the use of the road, should never be separated by sale, assignment, or otherwise from the road itself, and that into whosesoever hands the road went should also go the rights, powers and privileges conveyed by the grant. Without these prohibitory words it is possible the company might have had power to sell or assign the depot or wharves granted, while without the authority to do either in regard to the rights or franchises of which they were already possessed. Hence, they used a term which they supposed in a general way might cover any transfer of the ownership by the railroad company of the grants made to it by the statute, whether by operation of law or otherwise. If the property should be sold out under a mortgage or deed of trust, or any other instrument which the company might possibly have had the power to make to purchasers who might be called "assigns" under such proceedings, there should also go with it the grant made by the statute.

The language used in the statute in question in this case is stronger than that in other cases cited to us by counsel, and we are of opinion that they do not, any of them, nor do they collectively, establish the proposition, that by the laws of Oregon a railroad company could sell or lease its entire property, franchises and powers to another company, or take a

grant or lease of similar property or franchises from any other person or company.

The attempt is made to sustain the proposition here contended for in regard to the power to lease, by another inferential process of reasoning which we think equally untenable.

The following provision is found in c. 8, title 1:

"SEC. 20. Any corporation formed for the purpose of navigating any stream or other water may, by virtue of such incorporation, construct any railroad, macadamized road, plank road, or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water, in like manner and with like effect as if such corporation had been specially formed for such purpose; but no corporation formed under this act or heretofore or hereafter incorporated by any special act of incorporation, passed by the legislative assembly of this State or otherwise, for the purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease, or in any way control such road or the corporate rights of such last-named corporation."

It is argued that this prohibition against leasing the railroad is a recognition of the fact that such a power would have existed if it had not been forbidden by this statute; but as the language of the whole section relates to the competition which may exist or arise between corporations organized for the purpose of navigating streams or other waters, when they may find it convenient to construct a road across such portages on the line of their navigation as may be required to carry over goods and property from one navigable water to another, we do not see that it has any effect in establishing such a general principle.

From the simple fact that in the revision of this law all reference to leases was omitted, it is argued that the general power of leasing one road by another wherever situated, without reference to its competition with roads owned by navigation companies, amounts to a restoration of the power to lease or accept leases on the part of any railroad company in the State, of all its road, of all its franchises, of all its property, for an indefinite length of time.

As to this we can only say that the original section, relating solely to a peculiar class of objects, namely, the construction of roads across portages by corporations navigating the waters of the State, and forbidding by its last clause the purchase, lease, or control of such portage road or the corporate rights acquired by them, was necessarily limited to that class of roads, and the repeal or modification of so much of the section as related to the power to lease could have no effect to declare that all railroads in the State of Oregon had the power to make contracts of lease, either as lessors or lessees.

One other provision of the laws of Oregon, immediately preceding the section just discussed, is also relied upon as establishing the right of a corporation to sell all of its property, and therefore its right to the smaller or subsidiary power of leasing it. It is found under c. 8, title 1, as follows:

"SEC. 19. Any corporation organized under the provisions of this act may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property and dividing its capital stock: *Provided, however*, That the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights."

It is argued that because a corporation has authority to put an end to its existence by a vote of the majority of its stock-

holders, in which event it may proceed to settle up its affairs, *dispose of its property*, and divide its capital stock, therefore, a corporation in full operation, with no such purpose of terminating its existence, may, in the ordinary course of its business, sell all of its property, real and personal, and if it be a railroad company dispose of its road, its franchises, and the powers necessary to properly carry on the business of a carrier. It is insisted that if it can do this, it may, therefore, make a lease of such property and franchises, transferring all those powers, rights and privileges.

But it does not need argument to show that such provision, made for the dissolution of a corporation by the voluntary act of its incorporators, providing for the disposition of its property when the resolution to that effect has been adopted, whether by distribution of dividends on its profits or the sale of shares of stock, or for any other disposition of its effects compatible with law, is not applicable to and cannot be intended to confer upon corporations continuing in existence, or which, like these companies, contemplate in the very contract entered into a continuance of more than ninety-six years, the power to dispose of their corporate powers and franchises, much less the authority to lease them for an indefinite period to others.

In the case before us both corporations continued to exist; they both entered into contracts covering a period of ninety-six years; and if the contract of lease be valid, one of them obtained thereby the right to the control and use of the property and franchises of the other, which on its part became bound for the payment of rent therefor, a supposed profit on the capital for the entire period of the term. We can see no reason why the powers conferred upon a corporation going out of existence, and dissolved by its own act, including the right to wind up its affairs and dispose of its property, can be held to confer any such power on a company which contemplates an existence of a hundred years to come.

Nor does there appear to be any force in the objection that if an Oregon corporation cannot acquire the right to take a lease of a railroad under the existing general laws, it cannot acquire

it at all, the legislature being prohibited by the constitution from granting special charters of incorporation, and therefore, it is said, it has no authority to grant special privileges to a particular corporation — a proposition we are not prepared to concede to its fullest extent. But assuming, without deciding, that it is true that the legislature cannot grant the right to a particular railroad company to make or to take a lease of the railroad of another company, it would be clearly within its power to confer by general laws on all railroad corporations within the State the powers to make and to take leases, which powers are claimed by the plaintiff to exist under the general law of Oregon as it now stands.

The reasons for holding that the Oregonian Company had no power to make the lease of its railroad are even stronger than those for holding that the Oregon Railway and Navigation Company had no power to take the lease.

In the first place, even if a domestic railroad corporation established under the general laws of Oregon could be construed as entitled to assume by its articles the power of taking leases of other railroads as incident to and in connection with operating its own road, it would by no means follow that such a corporation could assume the power of leasing its whole railroad for a term of years to another corporation, and thereby substantially abandon and transfer its whole corporate rights and franchises.

The Oregonian Company is a foreign corporation, and the general laws of Oregon do not give a foreign corporation the right to lease, but only to construct or acquire and operate a railroad within the State. The only statute relied on as giving the power to lease (except those already considered) is the general law of Oregon of 1878, Laws of Oregon, p. 95, which clearly does not include or touch that power. The first section, while it includes, among the classes of foreign corporations therein particularly enumerated, "any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating, any railway," significantly omits corporations established for the purpose of selling or leasing their

roads, instead of operating them themselves; and this section gives to those classes of foreign corporations therein enumerated only "the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway," or for one of the other purposes already specified, of which the making of leases is not one. And the second section, merely providing that nothing in the act contained shall be so construed as to give to foreign corporations anv other or further rights than may be acquired or exercised by domestic corporations, but only to give them the same as domestic corporations may acquire or exercise, is evidently limited to the classes, both of foreign and domestic corporations, specified in the first section.

Under this statute, in short, foreign corporations created for the purpose of leasing get no power at all, and no foreign corporation gets any power to sell or lease its road.

Another argument relied upon by counsel for the defendant in error is that, within the principles laid down in certain cases on the subject, the contract here is so far an executed one that the plaintiff in error is estopped to deny its validity and to refuse to continue its performance. As already stated, the contract was one by which the plaintiff demised its road, privileges and franchises, for a period of ninety-six years, from the 1st of August, 1881, to the defendant, who took possession of it, and used and occupied it, under the lease, until the 15th day of May, 1884, a period of less than three years. It then did what was equivalent to returning the property to the plaintiff, and refused to be further bound by the contract.

To say that a contract which runs for ninety-six years, and which requires of both parties to it continual and actual operations and performance under it, becomes an executed contract by such performance for less than three years of the term, is carrying the doctrine much farther than it has ever been carried, and is decidedly a misnomer. This class of cases is not governed by the doctrine of part performance in a suit in equity for specific performance, nor is this a suit for specific perform-

ance. This is an action at law to recover money under a contract which is void, where for nearly three years the parties acted under it, but in which one of them refuses longer to be bound by its provisions; and the argument now set up is that because the defendant has paid for all the actual use it made of the road while engaged in the actual performance of the contract between the dates just given, it is thereby bound for more than ninety-three years longer by the contract which was made without lawful authority by its president and board of directors. We consider this proposition as needing no further consideration, except a reference to the discussion of the same subject in *Thomas* v. *Railroad Company* and *Pennsylvania Railroad Co.* v. *St. Louis &c. Railroad Co.*, already cited.

The judgment of the Circuit Court of Oregon is reversed, and the case is remanded to that court, with a direction to overrule the demurrer, and to take such further proceedings as shall be according to law, and not inconsistent with this opinion.

Mr. Justice Field dissenting.

I am not able to agree with the majority of the court in the decision of this case. It seems to me clear that a railway corporation of Oregon has the right under her laws to lease its road to another corporation of like character. A foreign corporation, as is the plaintiff below, is by the act of October 21st, 1878, placed on the same footing with a domestic corporation, upon complying with the laws passed for the regulation of such corporations transacting business in the State. That act declares that, upon such compliance, the foreign corporation shall have "the same rights, powers and privileges" as a domestic corporation.

Besides, the act of October 22, 1880, entitled "An act to grant the Oregonian Railway Company, Limited, the right of way and station grounds over the state lands, and terminal facilities upon the public grounds at the city of Portland," recognizes the plaintiff as an existing corporation, lawfully engaged in the construction and operation of a railway in

Oregon, "from Portland to the head of the Willamette Valley," and grants to it "and to its assigns" valuable "rights, privileges, easements and property," accompanied with a proviso that it shall have no power to sell, convey, or assign the premises or rights granted, or any part or parcel thereof, to any person or corporation, "save only with, and as a part and parcel of and as appurtenant to, the railway now built and owned by said company, and now in process of construction by it." As the court below observed, and it seems to me very justly, this implies that the plaintiff had the power to assign its road, and also the premises and rights thus granted to it in connection therewith, but not otherwise.

I cannot perceive what public policy of the State is sustained by denying to a foreign corporation, which has by her permission constructed a railway therein, the right to lease its road to a domestic corporation. It would rather seem, if any considerations of public policy are to control, that such policy would favor a transfer of the road from foreigners to her own citizens. When the transfer is made the State can exercise over the road, its management, and the charges for its use, the same authority which she could have previously exercised. And there is nothing in the articles of association which forbids the directors of the plaintiff from making such a transfer if the laws of Oregon permit it.

MR. CHIEF JUSTICE FULLER was not a member of the court when this case was argued, and took no part in this decision.

BADGER *v.* CUSIMANO.

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

No. 179. Argued January 31, 1889. — Decided March 5, 1889.

When there is a general finding in favor of the plaintiff on the issues of fact raised by the pleadings in an action for the recovery of duties ille-

gally exacted, the facts must be taken to be as alleged by him in the pleadings.

Since the enactment of § 7 of the act of March 3, 1883, c. 121, 22 Stat. 488, 523, the value of an importation of goods is to be ascertained for the purposes of customs duties by their actual market value, without reference to the "charges" specified in §§ 2907, 2908, Rev. Stat.; and it appearing in this case that under an appraisement of imported oranges, the invoiced value of such "charges" was reduced, and the amount of such reduction added to the invoiced value of the fruit, although such invoice value represented its true market value; *Held*, that such addition to the true invoice value was illegal, and that the power of the collector to make it was apart from any question of fraud in the appraisement, and could be raised in an action at law when the importer had taken such steps as entitled him to bring suit for the recovery of the duties so illegally exacted.

THE case is stated by the court in its opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Richard H. Browne for defendants in error. *Mr. Charles B. Singleton* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action for the recovery of the sum of $1400.07, with interest, being the amount of certain duties which, it is alleged, were illegally exacted from the defendants in error. The case was tried by the court pursuant to a stipulation between the parties waiving the intervention of a jury.

The court found "the issues of fact raised by the pleadings in favor of the plaintiffs." We must assume, therefore, that the facts were as alleged by the plaintiffs in their pleadings.

It is alleged in the petition and amended petition that the plaintiffs were importers of and dealers in foreign fruits at New Orleans; that, in December, 1883, and January, 1884, they imported several cargoes of Valencia oranges on the steamships Pontiac, Norfolk, North Anglia, Vindolano, and Ehrenfels, aggregating 21,165 cases, each case being over two and one half cubic feet; that the invoice value of the oranges was 177,310 pesetas, while the invoice value of the charges (composed of value of cases, nails, packing, bands, cost of

transportation, etc.) was 120,990 pesetas, making the total invoice value of fruit and charges, 298,300 pesetas; that the fruit as it arrived was duly entered in the customs department at New Orleans, the fruit at its true invoice value, which was its true market value at the date of the respective importations, and the charges at their true invoice value; that, nevertheless, the collector, without pretending that there was any mistake or fraud in the invoice value of the fruit, caused an appraisement of each importation to be made, despite the protest and remonstrance of petitioners, and thereby increased the invoice value of the fruit, and reduced the invoice value of the charges in each, increasing the value of the fruit by just so many pesetas as the invoice value of the charges was reduced, and making a total increase of 36,271.15 pesetas in the value of the fruit, equal to $7000.33 in American coin, upon which petitioners were obliged to pay 20 per cent duty, or $1400.07; that as soon as the liquidations of each and all of the entries were made by the customs department, and within thirty days thereafter, the petitioners appealed from the decision of the collector to the Secretary of the Treasury; that the Secretary, on the 18th of February, 1885, decided that it appeared that the "fruit in question was invoiced at a value which properly represented its market value, but that the value of the boxes, packing, etc., was excessive, and was reduced by the appraiser, and the value of the fruit advanced to the same extent," and affirmed the decision of the collector; that one of the merchant appraisers appointed by the collector knew nothing of the value of Valencia oranges or of the charges thereon, and so admitted; that none of the oranges, nor any samples thereof, were submitted to or examined by the merchant appraisers, which facts were specifically set forth in plaintiff's protest, filed with the collector, against the appraisement; and that all the subsequent appraisements of shipments, other than the shipment by the Pontiac, were based upon the above merchant appraisement, and an appeal to the Secretary of the Treasury was refused, on the ground that such appraisement was binding.

The effect of § 7 of the act of March 3, 1883, c. 121, 22 Stat. 488, 523, was to exclude from the estimate of the

amount of duties collectible upon goods imported from other countries, the value of the "charges" specified in §§ 2907 and 2908 of the Revised Statutes, including the value of the usual and necessary sacks, crates, boxes, or covering of any kind, not composed of materials or made in any form designed to evade duties thereon, but used in the *bona fide* transportation of such goods to the United States. The duties, therefore, for which the plaintiffs were liable in respect to the oranges they imported, were to be ascertained with reference only to their true and actual market value. *Oberteuffer* v. *Robertson*, 116 U. S. 499, 509, 510. That the collector made a reduction of the invoice value of the charges is of no consequence, because such charges were not dutiable items. He did what the law did not authorize him to do, namely, increased the dutiable value of the oranges although they were invoiced and entered at their true market value. The additional duties exacted from the plaintiffs on this increased value amounted to the sum for which the judgment was rendered.

It is insisted, however, that this question cannot arise upon the present writ of error. The only bill of exceptions taken in the case states, "that on the trial of the cause the plaintiffs offered evidence tending to show that the value fixed on goods imported by them was excessive, and that the appraisement of said goods was erroneous; to the reception of which evidence defendant objected, on the ground that said goods were duly appraised, and that the appraisement is final and conclusive in the absence of fraud, which is not alleged, and on the further ground that such evidence is not admissible under the allegations of plaintiffs' petition, which objections were overruled by the court, and said evidence received, to wit, on ground, because, in the opinion of the court, it is not necessary to allege fraud."

The contention of the government is that as fraud was not specifically alleged in respect to the appraisement, the court erred in admitting and considering evidence to impeach it. This position is supposed to be sustained by the case of *Hilton* v. *Merritt*, 110 U. S. 97, 106. In that case it was said: "Considering the acts of Congress as establishing a system, and

giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duties, may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted." Again: "The valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute." In the case before us there is no impeachment of the appraisement, so far as it states the value of the charges or the value of the goods as increased by the amount of the reduction made from the value of the charges. The only inquiry is, whether the collector acted within the power conferred upon him by statute when he required the importers to pay duties not only upon the actual market value of the goods, but upon such additional value as was equal to the reduction made from the value of the cases covering the goods. These are questions of law simply, involving the power of the collector under the statute. They are entirely apart from any inquiry as to fraud in the appraisement, or as to the values set forth in it, and may be raised by the importer in an action at law, when he has taken such steps as entitle him to bring suit for the recovery of duties illegally exacted from him. This ruling is entirely consistent with the decision in *Hilton* v. *Merritt*.

Judgment affirmed.

PARKER *v.* DACRES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 157. Argued January 31, February 1, 1889. — Decided March 5, 1889.

No right exists at common law, or in the system of equity as administered in the courts of England prior to the organization of the government of the United States, to redeem from a sale under a decree of foreclosure.

Clark v. *Reyburn*, 8 Wall. 318, does not recognize a right of redemption

after a sale under a decree of foreclosure, independently of a right given by statute.

The courts of the United States, sitting in equity, recognize a statutory right of redemption from a sale under a decree of foreclosure, and that the statute conferring it is a rule of property in the State.

The Civil Practice Act of Washington Territory of 1873 provides that all sales of real estate under execution, except sales of an estate of less than a leasehold of two years unexpired term, shall be subject to a right of redemption by the judgment debtor, or his successor in interest, within six months after confirmation of sale upon tender to the sheriff of the amount due with interest, and that the sheriff "may be required by order of the court or a judge thereof to allow such redemption, if he unlawfully refuses to allow it." The freehold estate of the plaintiff below having been sold under a decree of foreclosure, he tendered to the sheriff the amount necessary to redeem it within six months from the date of the confirmation of the sale. The sheriff refused to receive the money. No application was made to the court or a judge thereof, under the statute, for an order upon the sheriff requiring him to allow the redemption; but about nine years after the sale, the plaintiff below brought this suit to redeem; *Held*, that, without deciding whether the statute of the Territory is applicable to a sale under a decree of foreclosure, a court of equity should refuse aid to a party asserting under it a right of redemption, who has neglected, at least without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with law.

In equity. Defendants demurred to the bill. The demurrer was sustained in the District Court, and that judgment was affirmed by the Supreme Court of the Territory. Plaintiff appealed. The case is stated in the opinion of the court.

Mr. John H. Mitchell for appellant.

Mr. W. W. Upton for appellees. *Mr. C. B. Upton*, *Mr. B. L. Sharpstein* and *Mr. J. L. Sharpstein* were with him on the brief.

Mr. Justice Harlan delivered the opinion of the court.

The object of this suit in equity is to obtain a decree for the redemption of certain parcels of real estate in the county of Walla Walla, Washington Territory, which were sold by the

sheriff on the second day of January, 1875, at public auction, under a decree rendered in the District Court of the First Judicial District of that Territory, in the case of Joseph Petrain against Edward Sheil, W. B. Thomas, John F. Abbott and D. Brouker. The appellees, who were the defendants below, were purchasers of the several parcels. Before the expiration of six months from the confirmation of the sale, namely, on the 10th of November, 1875, the appellant, who was the plaintiff below, tendered to the sheriff, in lawful money, the amount necessary to redeem the entire property, presenting to him at the time papers showing that he had given to the defendants, at least two days prior to November 10, 1875, notice that he would make such tender; a certified copy of the above decree, with papers showing the amount due thereon; and a duly certified copy of the deed from Sheil, transferring to the plaintiff, on December 28, 1874, all the property in controversy. The sheriff refused to receive the money, and the amount was brought into court at the commencement of this action.

The plaintiff bases his right to redeem upon certain sections of the Civil Practice Act of Washington Territory, approved November 13, 1873, (Laws of Washington, 1873, p. 94,) relating to "sales of property under execution," by one of which, § 364, it is declared that a sale of real property, when the estate is less than a leasehold of two years' unexpired term, shall be absolute, but "in all other cases such property shall be subject to redemption as hereinafter provided in this chapter." That chapter directs the sheriff to deliver to the purchaser a certificate of the sale, and gives the right of redemption to a judgment debtor or his successor in interest, in the whole or in part of the property separately sold, and to a creditor having a lien on any portion of the property, separately sold, by judgment, decree, or mortgage, subsequent in time to that for which the property was sold. § 365. The persons last described are designated by the statute redemptioners. By another section the judgment debtor or redemptioner is permitted to redeem the property within six months from the date of the order confirming the sale, by paying the amount

of the purchase, with interest at the rate of two per cent per month from the time of sale, together with any taxes paid by the purchaser; and, if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien with interest. § 366. A succeeding section prescribes the mode of redeeming, namely: "1. The person seeking to redeem shall give the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose; at the time specified in such notice such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate as in case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows: 2. Proof that the notice required by this section has been given to the purchaser or redemptioner, or waived. 3. If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified to the clerk of the court where such judgment or decree is docketed, or, if he seeks to redeem upon mortgage, the certificate of the record thereof. 4. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent showing the amount then actually due on the judgment, decree, or mortgage. 5. If the redemptioner or purchaser have a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded."

In the same act is a separate chapter regulating foreclosures of mortgages. None of the provisions of that chapter, however, give the right of redemption after a sale under a decree of foreclosure. But it is provided that "the payment of the mortgage debt with interest and costs at any time before sale shall satisfy the judgment." § 563.

The contention of the plaintiff is that the provisions of the chapter relating to "sales under execution," so far as they refer to the right of redemption, apply to sales under decrees

of foreclosure. In support of this view decisions of the Supreme Court of California are cited, construing similar statutory provisions from which, it is claimed, the statute of Washington Territory was copied. *Kent* v. *Laffan*, 2 Cal. 595 (1852); *Harlan* v. *Smith*, 6 Cal. 173 (1856); *McMillan* v. *Richards*, 9 Cal. 365 (1858); *Gross* v. *Fowler*, 21 Cal. 392 (1863). On the other hand it is insisted that the Civil Practice Act of 1873, so far as it related to sales under execution and to sales under decrees for the foreclosure of mortgages, was copied substantially from Iowa statutes, which, it is contended, did not give the right to redeem after sale under a foreclosure decree. *Stoddard* v. *Forbes*, 13 Iowa, 296 (1862); *Kramer* v. *Rebman*, 9 Iowa, 114 (1859).

In the view we take of this case it is unnecessary to express an opinion whether the provision relating to sales under execution, properly interpreted, gave a right of redemption after sale under a decree of foreclosure. If it did not, the decree below must be affirmed, for a right to redeem, after sale, does not exist unless given by statute. Counsel for the plaintiff speaks of a common-law right of redemption after sale that attaches in the absence of any statutory provision on the subject. We are not aware of any such right existing at common law, or in the system of equity as administered in the courts of England previous to the organization of our government. It is a mistake to suppose that the case of *Clark* v. *Reyburn*, 8 Wall. 318, recognizes a right of redemption after a sale under a foreclosure decree, independently of statute. It is there stated that "by the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible," and that "equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount due before sale;" also, that, according to the settled practice in equity, when proceedings to foreclose were not regulated by statute, this right to redeem before sale is fixed by the primary decree, and that only in the event of final default in paying the amount ascertained to be due is an absolute sale ordered. The decree in that case was one of strict foreclosure, cutting off the right of redemption before or

after sale. It did not find the amount due, and allowed no time previous to the sale to redeem by paying the debt. It was final in the first instance. In many of the States the right to redeem within a prescribed time after sale under a decree of foreclosure is given, in certain cases, by statute. This right, when thus given, is a substantial one, to be recognized even in the courts of the United States sitting in equity, because the statute constitutes a rule of property in the State that enacts it. *Brine* v. *Insurance Co.*, 96 U. S. 627; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 88; *Mason* v. *Northwestern Ins. Co.*, 106 U. S. 163; *Conn. Mutual Life Ins. Co.* v. *Cushman*, 108 U. S. 51, 63. "What is indispensable in such a decree," the court said in *Chicago and Vincennes Railroad Co.* v. *Fosdick*, 106 U. S. 47, 70, "is, that there should be declared the fact, nature and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed." In conformity with these principles the Civil Practice Act of Washington Territory of 1873, in the chapter regulating the foreclosure of mortgages, expressly authorizes the mortgagor before the sale occurs to satisfy the judgment by paying the debt with interest and costs. It is clear that the right to redeem after sale, wherever it exists, is statutory.

If it be assumed that the provisions of the chapter relating to "sales under execution," and which, in terms, gave six months after the confirmation of sale to redeem, apply to sales under decrees of foreclosure, it does not follow that the plaintiff is entitled to relief. The territorial statute, like similar statutes in the several States, evidently contemplated that a redemption, if desired, should be made within a fixed, and comparatively short, period after sale. In few, if in any, of the States is more than one year given. The party seeking to redeem under the act of 1873 was required to assert his right

to do so within six months from the confirmation of the sale. If he failed to do so within that time, the right of the purchaser became complete; for it is expressly declared that "if no redemption be made within six months from the confirmation of the sale, the purchaser shall be entitled to a conveyance from the sheriff." § 368. And the mortgagor was not remediless if, without his fault, there was a failure to redeem within the time prescribed; for, by another section, it is expressly provided that "where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required, by order of the court or judge thereof to allow such redemption." Of this mode of enforcing his right to redeem, the plaintiff chose not to avail himself. No reason is assigned why he did not do so. The complaint, upon its face, shows that before the tender to the sheriff he had notice that the purchasers would contest his right to redeem. With knowledge of that fact, and notwithstanding the refusal of the sheriff to accept his tender, he made no application to the court or judge thereof for an order requiring that officer to allow the redemption. After resting in silence from November 10, 1875, until the institution of this suit on the 15th of May, 1884 — a period of nearly nine years — he prayed the assistance of a court of equity for the cancellation of the deeds executed to the several purchasers at the sheriff's sale.

We are of opinion that, construing the statute so as to give effect to the object for which it was enacted, a court of equity should refuse aid to a party, asserting under it a right of redemption, who has neglected, at least without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with law. If, as suggested, this remedy is cumulative only, that fact only diminishes the right of the plaintiff to relief; for he not only neglected to avail himself of this specific remedy, but failed to invoke, in due time, the general author-

ity, of a court of equity. The interpretation we give to the statute is supported by the principle upon which courts of equity uniformly proceed, independently of any statute of limitations, of refusing relief to those who unreasonably delay to invoke their aid. *Richards* v. *Mackall*, 124 U. S. 183, 187.

To avoid misapprehension, it is proper to observe that what we have said has reference only to cases arising under the Civil Practice Act of 1873. The present case is unaffected by the act of the territorial legislature, approved February 3, 1886, permitting the judgment debtor, or his successor in interest, to redeem any real estate sold under execution of judgment or foreclosure of mortgage, at any time within one year from the date of sale, by paying the amount of the purchase-money, with interest at the rate of one per centum per month thereon from the date of sale, together with the amount of any taxes the purchaser may have paid.

The decree is affirmed.

BALLARD *v.* SEARLS.

ORIGINAL MOTION IN A CAUSE BROUGHT HERE ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 144. November 26, 1888, Submitted. — December 3, 1888, Postponed until hearing on the merits. — December 20, 1888, Resubmitted. — Decided March 5, 1889.

Searls, the appellee, filed a bill in the Circuit Court of the United States for the Eastern District of Michigan against Worden for infringement of letters patent. After hearing, a decree was entered in that case in his favor for the recovery of $24,960.31 damages and costs. Worden appealed to this court, but gave no supersedeas bond. Thereupon execution issued on the decree, which was levied on certain lots, the property of Ballard the appellant. Searls then filed his bill in the Circuit Court in aid of the execution, praying to have a conveyance by Worden to Ballard of the lots levied upon set aside, as made to defraud Worden's creditors. On the final hearing of that case the conveyance was set aside as fraudulent, from which Ballard took this appeal. Meanwhile Worden's appeal in the patent suit was reached on the docket in this court, and, after hearing, the judgment below was reversed, and the cause was remanded to the

Opinion of the Court.

Circuit Court, with directions to dismiss the bill. See 121 U. S. 14. Thereupon Ballard moved in this case, on the records in the two cases, and on affidavits, to reverse the decree of the court below, and to remand this cause to the Circuit Court, with direction to dismiss the bill. *Held*, that if such a course could properly be taken in any case, it would be improper to take it in this case; but that, as the appellant might be subjected to great injustice if the cause should go to hearing on the appeal in the present condition of the record, the cause should be remanded with instructions to the Circuit Court to allow the defendant below to file such supplemental bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree, upon the new matter arising from the reversal of the former decree in *Worden* v. *Searls*.

This was a motion to remand the cause with directions to the Circuit Court to dismiss the bill. The case is stated in the opinion.

Mr. Charles J. Hunt, for the motion, cited: *Messmore* v. *Haggard*, 46 Michigan, 558; *Dakota County* v. *Glidden*, 113 U. S. 222; *Smith* v. *United States*, 94 U. S. 97; *Cheong Ah Moy* v. *United States*, 113 U. S. 216; *San Mateo County* v. *Southern Pacific Railroad*, 116 U. S. 138; *Lord* v. *Veazey*, 8 How. 251; *Harrison* v. *Nixon*, 9 Pet. 483; *Waples* v. *United States*, 110 U. S. 630; *Smith* v. *McCann*, 24 How. 398.

Mr. A. G. N. Vermilya, opposing, cited: *Wood* v. *Jackson*, 8 Wend. 1; *S. C.* 22 Am. Dec. 603; *Manning's Case*, 8 Rep. 187, 192; *Eyre* v. *Woodfine*, Cro. Eliz. 278; *Jackson* v. *Cadwell*, 1 Cowen, 622; *Woodcock* v. *Bennet*, 1 Cowen, 711; *S. C.* 13 Am. Dec. 568.

Mr. Justice Bradley delivered the opinion of the court.

The appellant has made a motion that the decree appealed from in this case, so far as it affects the said appellant, be reversed, and that the cause may be remanded to the Circuit Court with direction to dismiss the bill. This motion proposes that the decree be reversed without argument of the cause in view of extrinsic facts, which are made to appear by the records of this court and of the Circuit Court, and by affidavits. If such a course can be properly taken in any case, we think

it would be improper in the present, since the decree may be perfectly correct and free from objection on the facts of the case as they appear upon the record, and it is possible to be correct, notwithstanding the facts alleged by the appellant. These facts, however, are of such a character that the appellant may be subjected to great injustice if the cause should go to hearing on the appeal in the present condition of the record; and, as they have occurred since the appeal was taken, there seems to be no mode of affording relief to the appellant except by sending the cause back to the Circuit Court for the purpose of allowing supplementary proceedings to be had in that court.

The facts as stated by the appellant, and not denied by the appellee, are as follows:

"On the 12th day of July, 1880, Anson Searls, the appellee in this cause, filed in the Circuit Court of the United States for the Eastern District of Michigan his bill of complaint against Alva Worden and John S. Worden, for the infringement of a patent, and such proceedings were had in the cause that on the 5th day of September, 1883, a decree was entered in said cause in said Circuit Court, whereby it was decreed that the said Alva Worden and John S. Worden infringed the patent, and should pay over to the said Anson Searls $24,960.31.

"That upon the entry of said decree the defendants appealed the case to this court. But the defendants, Alva Worden and John S. Worden, were unable to give the necessary bond to operate as a supersedeas bond upon said appeal.

"On the 17th of September, 1883, the complainant issued an execution on his decree, and placed it in the hands of the marshal of said district.

"On the 18th of September, 1883, the marshal, under the execution, levied upon certain lots in the city of Ypsilanti, county of Washtenaw, and upon certain lands in the town of Sumpter, county of Wayne, all in the State of Michigan, in the Eastern District thereof, the property of the said appellant, Harrison H. Ballard; and on other lands in the said city of Ypsilanti, belonging to the said Alva Worden and John S.

Worden but which were mortgaged to Mary Ann Andrews, Henry M. Curtis, Henry Van Tuyl and Charles King.

"That, on the 10th day of October, 1883, the said Anson Searls, in aid of his execution against the Wordens, filed in the said Circuit Court of the United States for the Eastern District of Michigan, his bill of complaint against Harrison H. Ballard, Mary A. Andrews, Henry M. Curtis, Henry Van Tuyl, Charles King, Alva Worden and John S. Worden, to set aside as fraudulent and void, as to the creditors of the said Alva Worden and John S. Worden, the conveyances under which the said Harrison H. Ballard held the lands so levied upon; and also the mortgages given by the said Alva Worden and John S. Worden on the said lands belonging to them to the said Mary Ann Andrews, Henry M. Curtis, Henry Van Tuyl and Charles King. That such proceedings were had in said last-mentioned cause, that the cause was brought to a final hearing, and a decree entered on the 24th day of November, A.D. 1884, in which it was decreed that the mortgages given by the said defendants Alva Worden and John S. Worden to the said defendants Mary A. Andrews, Henry M. Curtis, Henry Van Tuyl, and Charles King, were good and valid liens upon the lands mentioned therein, and that the several conveyances to Harrison H. Ballard were fraudulent and void as against the creditors of the said Alva Worden and John S. Worden.

"Thereupon the said defendant Harrison H. Ballard prayed an appeal to the Supreme Court of the United States to reverse the said decree, as far as it related to him.

"That the said appeal was allowed and the amount of the appeal bond was fixed at the sum of $8500. That the said bond was duly executed and approved by one of the judges of the said Circuit Court, and filed in the office of the clerk of said Circuit Court. That on the 8th day of October, 1885, the clerk of the said Circuit Court of the United States for the Eastern District of Michigan transmitted the transcript of the record in the case of *Anson Searls* v. *Harrison H. Ballard et al.* to the clerk of the Supreme Court of the United States, and that the said transcript was filed in the office of the clerk of

this court on the 13th day of October, 1885, and now stands on the docket for the October Term, 1888, as No. 144.

"That since the appeal in this case, the appeal in the original case of *Alva Worden and John S. Worden, Appellants* v. *Anson Searls*, has been heard in this court, and a decree entered thereon on the 27th of March, 1887, wherein and whereby it was, among other things, ordered, adjudged, and decreed that the final decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, and that the same be remanded to the said Circuit Court with a direction to dismiss the bill with costs.

"That on the 8th day of August, 1887, this court issued its mandate in the said case of *Alva Worden et al., Appellants* v. *Anson Searls* to the said Circuit Court, in which, among other things, the said Circuit Court of the United States for the Eastern District of Michigan was directed to dismiss the bill with costs.

"That said mandate was filed in the said Circuit Court on the 3d day of October, 1887.

"That on the 3d day of September, 1888, a decree was entered in pursuance of said mandate in the case of *Anson Searls* v. *Alva Worden and John S. Worden* (the original case), dismissing the bill of complaint with costs."

It is apparent from this statement that the whole basis and foundation of the present suit has disappeared by the decree rendered in the former case of *Worden and others* v. *Searls*, reported in 121 U. S. 14. Surely there ought to be some mode of relieving a party in such a case. The appellee is endeavoring to collect the amount recovered by a decree which has been reversed, and in a case in which his bill has been dismissed on the merits. The object of the present suit is to aid the execution of that former decree by having declared void certain conveyances of property by the defendants, which the appellee has caused to be levied on for the satisfaction of the decree. If the former decree had been reversed before the taking of the present appeal, the appellant could have instituted supplementary proceedings in the Circuit Court for obtaining the benefit of that reversal. The conveyances sought

to be set aside were good as between the parties, and only void as to creditors; and as the appellee, by the reversal of his decree ceased to be a creditor, his bill to have the conveyances set aside had no longer any ground to stand on. A supplemental proceeding of some kind, therefore, would have been the right of the defendant, the present appellant. But as the case had been removed to this court by appeal before that decree of reversal was rendered, such a proceeding was out of his power. Nor could it be taken in this court, where the case was pending on appeal, for this court cannot entertain proceedings that require the exercise of original jurisdiction, except in the few cases pointed out in the Constitution.

The only course which can be properly pursued is to remand the cause to the Circuit Court, with instructions to allow the appellant to file a supplemental bill, in the nature of a bill of review, or a bill to suspend or avoid the operation of the decree, according to the mode pointed out by Lord Redesdale in his work on Equity Pleading. He says, on page 86: "But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained." And on page 95 he says: "5. The operation of a decree signed and enrolled has been suspended in special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose;" and he gives an instance occurring in the time of Charles II. These views are adopted by Mr. Justice Story in his work on Equity Pleading. See § 415 and note; and § 428. We do not decide what precise form such a proceeding should take: the appellant will be advised by his counsel in this regard.

The appellee, in opposition to the appellant's motion, has produced the certificates of the marshal of the United States for the Eastern District of Michigan, showing that, on the 10th day of December, 1884, he sold the property in dispute, or some part thereof, to certain persons, under the execution issued upon the decree in the case of *Anson Searls* v. *Alva Worden and John S. Worden*, (which was reversed by this court,

as before stated,) and that the purchasers would be entitled to a deed of said lands, and the sales would become absolute at the expiration of fifteen months, unless previously redeemed as prescribed by the statute of Michigan.

It is possible that these sales may complicate the inquiry to be made by the court upon the supplemental proceedings of the appellant; but we do not see that they can preclude such proceedings. It is not shown that the purchasers have advanced any money on the faith of the purchases; and it is possible that the appellant can show that they were made for the benefit of the appellee; in either case, the sales would be liable to be set aside on the reversal of the decree. Should the Circuit Court deem it proper to require that the purchasers be made parties to the supplemental proceedings, the facts of the case could be fully elicited, and right could be done without prejudice to any of the parties.

Our decision is that the cause be remanded to the Circuit Court, with instructions to allow the appellant, defendant below, to file such supplemental bill as he may be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree, upon the new matter arising from the reversal of the decree in the former case of Anson Searls v. *Alva Worden and John S. Worden, and that such proceedings be had thereon as justice and equity may require: And it is so ordered.*

COLLINS COMPANY *v.* COES.

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

No. 164. Argued January 10, 11, 1889. — Decided March 5, 1889.

The first claim in reissued letters patent No. 5294, granted February 25, 1873, to the Collins Company, as assignee of Lucius Jordan and Leander E. Smith, for an improvement in wrenches, was only the application to the bar of the Coes wrench, (which was an existing patented invention

Statement of the Case.

at the date of the alleged invention of Jordan and Smith,) for the purpose of securing and supporting the step, and resisting the strain of a nut already in use on the Hewitt or Dixie wrench; and as such it lacks the novelty of invention requisite to support a patent within the recent decisions of this court; and this conclusion is not affected by the fact that in complainant's wrench the screw-rod of the Coes wrench is availed of instead of the screw-sleeve of the Dixie wrench.

The second claim in said reissue is for "the nut F, combined with the wrench-bar, and interiorly recessed at *d*, for the purpose set forth." Some years later the patentee filed in the Patent Office a disclaimer thereto "except when said recessed nut and wrench-bar are in combination with the handle G, the step or step-plate E, the screw-rod C, and the movable jaw B of the wrench, substantially as is shown and described in said last mentioned reissued letters patent," being the reissue in question; *Held*, that whether this qualified disclaimer was or was not effectual, it was, in view of the fact that the screw-rod and movable jaw of the patent had no different effect from the screw-sleeve and movable jaw of the prior Dixie wrench upon the other parts of the combination, an admission that the second claim of the patent is void for want of novelty.

The third claim of the patent is also void for want of novelty.

In equity. The court in its opinion stated the case as follows:

The Collins Company of Connecticut, a corporation located at Collinsville, in the county of Hartford and State of Connecticut, brought this suit in equity in the Circuit Court of the United States for the District of Massachusetts, against Loring Coes and Melvin O. Whittier, partners in business at Worcester, in Worcester County, Massachusetts, in the name and style of Loring Coes & Company, for the alleged infringement of reissued letters patent No. 5294, dated February 25, 1873, for an improvement in wrenches, issued to the Collins Company as assignee of Lucius Jordan and Leander E. Smith, said reissued letters patent being based upon original letters patent dated October 10, 1865, No. 50,364. There had also been a reissue February 22, 1870.

The specification and accompanying drawings of the reissue No. 5294 are as follows:

"The object of this invention is the prevention of end thrust or back pressure on the wooden handles of wrenches, which has heretofore availed to quickly destroy such wooden handles,

and, in destroying the handles, has left the working parts of the wrench which depended upon the handles for support without such support, so as to injure and effectually impair their working qualities and efficiency, and is accomplished by so connecting the step which forms a bearing for the lower end of the screw-rod with the bar which forms the main part of the wrench that the back pressure upon the step by the screw-rod will be directly transmitted to the wrench-bar at the place of connection therewith, and will not be transmitted to and mainly put upon the wooden handle.

"Figure 1 is a side view of the whole wrench, the part below the dotted line *xx* being in section. Fig. 2 is a top or plan view of the step which forms a bearing for the lower end of the screw-rod.

Fig. 1.

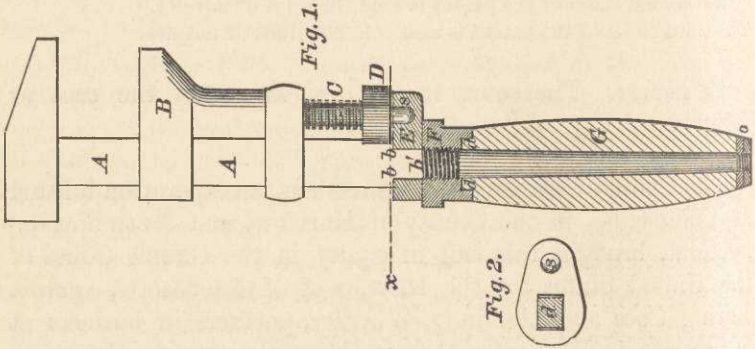


Fig. 2.

"The letter A indicates the wrench-bar, flat-sided down to the under side of the step E, and from thence downward cylindrical or of other convenient shape, so as to take upon it the wooden handle G. B is the movable jaw. The letter C indicates the screw-rod, and D the rosette by which it is turned. The letter E indicates the step, in which is the bearing *s* for the lower end of the screw-rod, and also the hole *a* to admit the bar A, and fitting up against the shoulder *b*. On the bar A, just below the step E, is cut the screw-thread *i*, on which screws the nut F, forming a projection from the wrench-bar, on which rests the step E, and thus transmits the back pressure put upon the step directly to the wrench bar at the place

of connection therewith, and thus relieves the wooden handle therefrom, the connection of the step with the bar being made in such manner that the step may be removed or taken off the bar without any cutting or abrasion of parts.

"The nut not only supports the step, but can be made to rigidly fasten the step to the bar by screwing it firmly up against the step, so as to gripe it between itself and the shoulder *b*, thus giving the nut, so to speak, a double office, viz., that of supporting the step, and, also, that of fastening it rigidly to the bar. The nut is interiorly recessed at *d*, for the purpose of forming a ferrule for the top of the wooden handle.

"Heretofore the part designed to perform the office of the step E has rested directly on the wooden handle, which was secured upon the bar by a light nut *o*, at the lower extremity of the bar, which is the present method of fastening on the handle.

"It is known that, previous to this invention, steps have been forged or otherwise produced solid with the bar, and this became as much a part of it as the solid head at extremity of bar, and also by riveting to reach similar result; but such method, by making a permanent fastening, renders it impossible, or a work of great difficulty, to displace the step in order to remove the sliding jaw for repairs. It will be observed that, while Jordan and Smith's method of fastening is as firm as the permanent fastenings last above referred to, their step can readily be removed and again put in place at pleasure.

"It is believed that Smith and Jordan were the first to secure easy divisibility of step and bar, together with a fixed or stationary step when in position, and at the same time supporting the step when in position immediately by the bar, and not immediately through the handle, as the manner had been.

"As a matter of definition, the Jordan and Smith method of fastening and supporting the step when in position is denominated 'removable' hereinafter in contradistinction from a connection and support made by forging or otherwise producing the step in one solid piece with the bar, and, therefore, a part of it, or by riveting it thereto, or the like.

"*Claims.*

"1. The step, combined with the wrench-bar and supported by the nut F, or its equivalent, at the place where the step is connected with the bar, in such manner that the step can be removed from the bar without cutting or abrasion of parts.

"2. The nut F, combined with the wrench-bar, and interiorly recessed at *d*, for the purpose set forth.

"3. The nut F, combined with the threaded bar, and performing the office of supporting the step, and also of rigidly fastening it to the bar, for the purpose set forth."

April 16, 1841, a patent issued to Loring Coes for what has since always been known as the Coes wrench, and this was reissued June 26, 1849. The specification and drawings of the reissue are as follows:

"Figure 1 is an elevation of my improved wrench, and figure 2 an elevation of a wrench previously known but not of my invention.

"In my improved wrench the inner jaw slides on the bar of the permanent jaw and handle, and is moved by a screw at the side of the bar, operated by a head or rosette, which always remains in the same position relatively to the handle, whereby the movable jaw can be adjusted with the thumb of the hand, which grasps and holds the handle. The principle or character of my invention, and that which distinguishes it from all other things before known, consists in moving the adjustable jaw by means of a screw placed at the side of and parallel with the bar of the permanent jaw and handle, when the required rotation for sliding the jaw is given by a rosette or head, or the equivalent thereof, which retains the same position relatively to the handle; and my invention also consists in retaining the required position of the rosette or its equivalent, by which the required motion is given to the sliding jaw, by having its periphery to work in a notch or recess in the bar of the permanent jaw and handle, or *vice versa*.

"In the accompanying drawings A represents a quadrangular bar of metal with a permanent or hammer jaw C at one end, the other end being reduced in size to pass through a handle

L, secured to it by a nut M. Between the ferule of the handle and the shoulder of the bar an iron plate I is griped by the securing of the handle on to the bar, and this plate extends out sufficiently beyond the bar to receive the journal K (see dotted lines) of a screw F, which is placed parallel

Fig. 1.

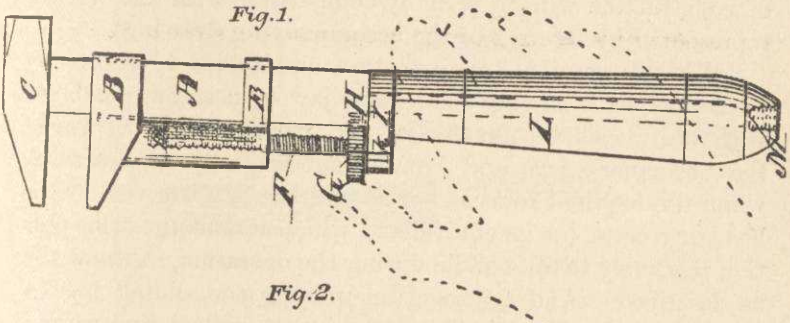
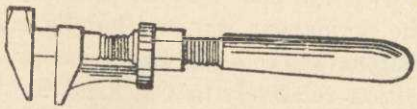


Fig. 2.



with and by the side of the bar. This screw is tapped into a tubular piece D that projects from the back face of the adjustable jaw B, which is fitted to slide on the bar from or towards the permanent jaw C, the rear end of the tubular projection D being provided with and sustained by a bridle E, which embraces and slides on the bar. At the rear end the screw is provided with a head or rosette G, the periphery of which turns in a notch or recess H made in the edge of the bar, as shown by dotted lines, by which the position of the said rosette is retained relatively to the handle. The hand, represented by dotted lines, indicates the manner in which my improved wrench is operated. The handle is grasped by the fingers, and the rosette is operated by the thumb of the same hand, so that, without any change in the position of the hand, the movable jaw can be moved towards or from the permanent jaw, to set the wrench to any size required, with one hand.

"By means of my improvement the bar can be made of any desired form best adapted to the sliding jaw and to strength.

The rosette or its equivalent employed for operating the jaw is always retained in the same position relatively to the hand that gripes the handle. At the same time, the use of two bearings for the screw is avoided.

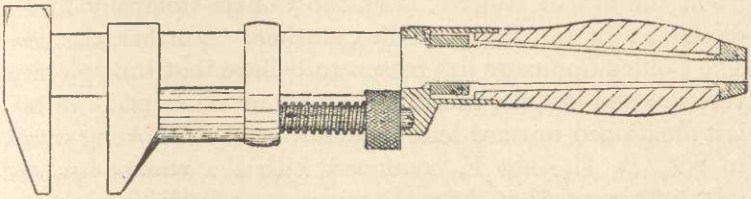
"The advantages of my improved wrench over other methods of construction will be seen by comparison with the wrench represented by figure 2 of the accompanying drawings.

"What I claim as my invention and desire to secure by letters patent is moving the sliding jaw by a screw, combined with and placed by the side of and parallel with the bar of the permanent jaw and handle, substantially as described, when the required rotation for sliding the jaw is given by the head or rosette, (or its equivalent,) which retains the same position relatively to the handle during the operation, substantially as described. And I also claim moving the sliding jaw by a screw, combined with and placed by the side of and parallel with the bar of the permanent jaw and handle, substantially as described, in combination with the rosette or its equivalent, retained in its position relatively to the hand in the manner described."

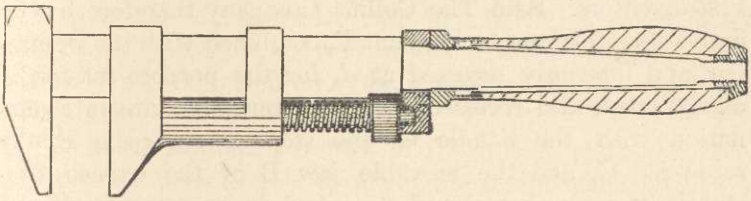
It appears from the evidence that during the years 1851 to 1854, E. F. Dixie was manufacturing, to the extent of from two hundred to four hundred wrenches per week of various sizes, a wrench known as the Hewitt wrench, which wrench contained a recessed nut screwed upon the wrench-bar just above the wooden handle, for the purpose of relieving the handle from back pressure put upon the step, and of serving as a ferrule for the upper end of the wooden handle. It had an adjusting screw-sleeve instead of the adjusting screw-rod of the Coes wrench, but was otherwise substantially the same.

The following diagrams give the various wrenches referred to on the argument:

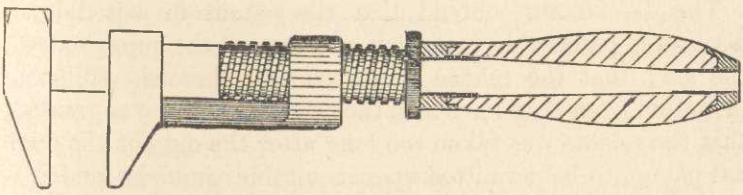
Statement of the Case.



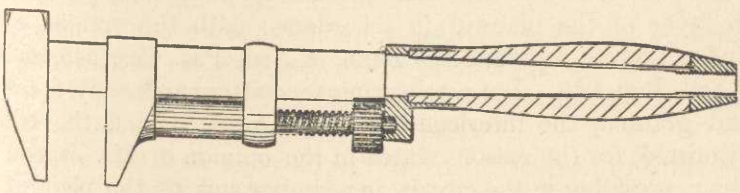
Defendants' Manufacture Complained of.



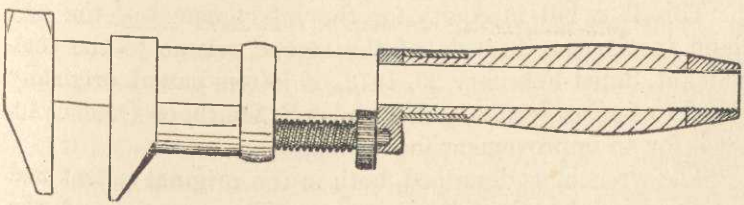
Complainant's Patented Wrench.



Dixie Wrench, Manufactured 1851–1854.



Coes' Wrench, Original Manufacture, before and since 1850.



Coes' Wrench, Patented April 16, 1841.

Statement of the Case.

On the 9th of August, 1880, the Collins Company filed a disclaimer in the Patent Office, stating: "Further, that said The Collins Company has reason to believe that through inadvertence and mistake the second clause of claim made in said last-mentioned reissued letters patent, in the following words, to wit, '2, The nut F, combined with the wrench-bar, and interiorly recessed at *d*, for the purpose set forth,' is too broad, including that of which said Jordan and Smith were not the first inventors. Said The Collins Company therefore hereby enters its disclaimer to 'the nut F, combined with the wrench-bar, and interiorly recessed at *d*, for the purpose set forth,' except when said recessed nut and wrench-bar are in combination with the handle G, the step or step-plate E, the screw-rod C, and the movable jaw B of the wrench, substantially as is shown and described in said last-mentioned reissued letters patent," being the reissue in question.

The defendants contend that the patent in suit did not disclose a patentable invention in view of the prior state of the art; that the reissue described and claimed a different invention from that for which the original patent was granted; that the reissue was taken too long after the date of the original patent to be permitted upon equitable grounds; and that there was no infringement.

The Circuit Court originally granted an interlocutory decree in favor of the plaintiff, in accordance with the opinion of Judge Lowell, reported in 5 Bann. & Ard. Pat. Cas. 548, and 3 Fed. Rep. 225. But a rehearing was afterwards moved for and granted, the interlocutory decree vacated, and the bill dismissed, for the reasons stated in the opinion of Mr. Justice Gray, presiding in the circuit, in a similar suit by the plaintiff against other defendants, which opinion was as follows:

"This is a bill in equity for the infringement of the first claim in the specification of the second reissue to the complainant, dated February 25, 1873, of letters patent originally issued to Lucius Jordan and Leander E. Smith, on October 10, 1865, for an improvement in wrenches.

"The wrench, as described, both in the original patent and in the reissue, has the following parts: The wrench-bar A, the

upper part of which is of the usual shape, and has attached to it the movable jaw B, and the lower part of which is of convenient form to receive upon it the wooden handle; a screw-rod C, parallel to the main bar; a rosette D, at the lower end of the screw-rod, by means of which the movable jaw is worked; a ferrule or step E, having a hole through it for the admission of the bar, and a recess in its upper face as a bearing for the lower end of the screw-rod; a nut F, screwed on a thread in the bar, under the step, and having a recess in its under face to receive the top of the wooden handle G; and the wooden handle secured at its lower end to the main bar by a nut in the usual way.

"Both the original patent and the reissue state that the object of the invention is to make the strain come upon the nut F instead of coming upon the wooden handle. The original patent states that the nut F is, and the reissue states that it may be, screwed up firmly against the step E. The reissue affirms and repeats that the distinguishing characteristic of the invention is that the step can be readily removed and replaced at pleasure. There is no hint of such a distinction in the original patent.

"The first claim of the original patent is for 'the step E, made substantially as described, and for the purpose set forth.' The corresponding claim in the reissue is for 'the step, combined with the wrench-bar, and supported by the nut F, or its equivalent, at the place where the step is connected with the bar, in such manner that the step can be removed from the bar without cutting or abrasion of parts.'

"The parallel screw-rod, with a rosette thereon to work the movable jaw, and resting upon a ferrule or step, had been introduced in the original Coes wrench, patented in 1841; and, long before the issue of the patent to Jordan and Smith in 1865, large numbers of the Hewitt or Dixie wrench had been made and sold, in which there was no separate screw-rod, and the screw that worked the movable jaw revolved on the main bar, but that screw rested on a ferrule or step, which was secured sometimes by driving it on under heavy pressure, and sometimes by a nut screwed under it on the bar.

"The application to the bar of the Coes wrench, for the purpose of securing and supporting the step, and resisting the strain, of a nut already in use for the same purpose, on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent, within the decisions of the Supreme Court at the last term, which have, in effect, overruled the earlier decision of this court in the suit of this complainant against Loring Coes and others, reported in 5 Bann. & Ard. Pat. Cas. 548. *Pennsylvania Railroad* v. *Locomotive Engine Safety Truck Co.*, 110 U. S. 490; *Bussey* v. *Excelsior Manuf. Co.*, 110 U. S. 131; *Double-Pointed Tack Co.* v. *Two Rivers Manuf. Co.*, 109 U. S. 117; *Phillips* v. *Detroit*, 111 U. S. 604.

"The complainant's patent being void for want of novelty, it becomes unnecessary to consider the other defences.

"Bill dismissed, with costs."

Mr. William Edgar Simonds for appellant.

Mr. George L. Roberts for appellees.

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

We concur with the Circuit Court in its disposition of this case and the grounds upon which it rested its decision.

The wrench-bar, the fixed jaw upon its upper end, the movable jaw sliding upon the wrench-bar, the screw-rod parallel with the wrench-bar, the rosette upon the lower end of the screw-rod, the step-plate surrounding the wrench-bar, the wooden handle secured by the nut at its extreme lower end, are all described in the patent to Coes; and the nut screwed upon the wrench-bar just below the step-plate, and provided with a recess for the purpose of forming a ferrule for the top of the wooden handle, which is not in the Coes patent, but is in complainant's reissue, had already been in use in the Hewitt or Dixie wrench for the same purposes. The disclaimer conceded that "the nut F, combined with the wrench-bar, and

interiorly recessed at *d*, for the purpose set forth" was an old device; but it is claimed that the device is new when the recessed nut and wrench-bar are in combination with the handle, the step, the screw-rod and the movable jaw. The handle, the step, the screw-rod and the jaw are all to be found in the Coes and Dixie wrenches, and the recessed nut of the Dixie wrench constituted, by the shoulder which it made at its upper end, a step upon which the screw rested, and served every purpose designated in the reissued patent in suit as intended to be secured by such recessed nut. This in itself justified the finding that "the application to the bar of the Coes wrench, for the purpose of securing and supporting the step and resisting the strain, of a nut already in use, for the same purpose, on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent." This conclusion is not affected by the fact that in complainant's wrench the screw-rod of the Coes wrench is availed of instead of the screw-sleeve of the Dixie wrench.

Complainant's first claim is as follows: "1. The step, combined with the wrench-bar and supported by the nut F, or its equivalent, at the place where the step is connected with the bar, in such manner that the step can be removed from the bar without cutting or abrasion of parts." The specification says: "On the bar A, just below the step E, is cut the screw thread *i*, on which screws the nut F, forming a projection from the wrench-bar, on which rests the step E, and thus transmits the back pressure put upon the step directly to the wrench-bar at the place of connection therewith, and thus relieves the wooden handle therefrom, the connection of the step with the bar being made in such manner that the step may be removed or taken off the bar without any cutting or abrasion of parts."

The elements of this combination are the support of the step by the nut F, the transmission of back pressure directly to the wrench-bar through that nut, and the removability of the step without cutting or abrasion of parts. Now the Dixie wrench contained the nut F, screwed on the wrench-bar, and transmitting the back pressure directly to it, and removable without cutting or abrasion, by being simply unscrewed.

The second claim is: "The nut F, combined with the wrench-bar, and interiorly recessed at *d*, for the purpose set forth." This, as so stated, was disclaimed, except when said recessed nut and wrench-bar are in combination with the handle, the step, the screw-rod and the movable jaw.

It was said in *Hailes* v. *Albany Stove Company*, 123 U. S. 582, 587, the court speaking through Mr. Justice Bradley: "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."

The complainant's qualified disclaimer is an admission that the second claim of the patent is void for want of novelty, which is true, even if the qualification were effectual, since, as we have seen, the screw-rod and movable jaw of the patent have no different effect from the screw-sleeve and movable jaw of the prior Dixie wrench, upon the other parts of the combination.

The other claim is: "3. The nut F, combined with the threaded bar, and performing the office of supporting the step, and also of rigidly fastening it to the bar, for the purpose set forth." The specification says: "The nut not only supports the step, but can be made to rigidly fasten the step to the bar by screwing it firmly up against the step, so as to gripe it between itself and the shoulder *b*, thus giving the nut, so to speak, a double office, viz., that of supporting the step, and, also, that of fastening it rigidly to the bar. The nut is interiorly recessed at *d*, for the purpose of forming a ferrule for the top of the wooden handle." The purpose of supporting the step by the nut F, and fastening the step rigidly to the wrench-bar by means of that nut, is the relief of the wooden

handle from the strain of back pressure. In the Dixie wrench the step and nut were made of one and the same piece of metal, thereby fully attaining the object of holding the step-plate rigidly fastened in position. In the Coes wrench the step was rigidly fastened to the bar by being griped between a shoulder above it and upon the bar and the handle below it, which was backed up by the nut screwed upon the lower extremity of the bar. Dispensing with a washer between a nut and that upon which it acts, makes no change in the office of the nut. The action of the nut M of the Coes wrench in griping the step-plate is the same as that of the nut F of the patent. This third claim is also void for want of novelty.

The decree of the Circuit Court is affirmed.

ARKANSAS VALLEY LAND AND CATTLE COMPANY *v.* MANN.

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

No. 147. Argued January 4, 7, 1889. — Decided March 5, 1889.

If the trial court makes the decision of a motion for a new trial depend upon a remission of the larger part of the verdict, this is not a re-examination by the court of facts tried by the jury in a mode not known at the common law; and is no violation of the Seventh Article of Amendment to the Constitution.

An order overruling a motion for a new trial after the plaintiff, by leave of court, has remitted a part of the verdict, is not subject to review by this court upon a writ of error sued out by the party against whom the verdict is rendered.

A recital in an instrument between two parties that one party, the owner of a great number of cattle, had, on the day of its execution, "sold" the cattle to the other party, followed by clauses guaranteeing the title, and providing the mode in which the buyer was to make payment, contains all the elements of an actual sale, as distinguished from an executory contract.

A provision in a bill of sale of cattle, that the seller shall retain possession

until, and as security for, the payment of the price, is not inconsistent with an actual sale, by which title passes to the buyer.

In trover for the conversion of cattle the plaintiff, proving his case, is entitled to recover for the value of such calves, the increase of the cows, as were in existence at the time of the demand and conversion.

In trover for the conversion of cattle intended for consumption, the plaintiff, if he recover, is entitled to interest on the value of the cattle at the legal rate of the place of the conversion.

Trover. Verdict for the plaintiff and judgment on the verdict. Defendant moved for a new trial. The court decided that the motion should be denied if the plaintiff would remit a part of the verdict specified by the court, which was done. The defendant then sued out this writ of error. The case is stated in the opinion.

Mr. Hugh Butler and *Mr. Assistant Attorney General Maury* for plaintiff in error.

Mr. R. T. McNeal (with whom was *Mr. E. T. Wells* on the brief) for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action for the recovery of damages for the alleged unlawful conversion by the defendant, the Arkansas Valley Land and Cattle Company (Limited), to its own use, of certain cattle. The complaint, which is framed in conformity with the local law, contains three distinct causes of action.

The first count claims seventy-one thousand dollars in damages for the unlawful conversion, at the county of Weld, Colorado, of fourteen hundred and fifty-two head of Oregon cattle, all branded on the right side or loin with what is commonly known as the bar brand, and of which seven hundred and forty-two were steers, alleged to be of the value of forty-four thousand five hundred and twenty dollars, and seven hundred cows, alleged to be of the value of twenty-one thousand dollars.

The second count claims eighty thousand dollars in damages for the conversion by the defendant of one thousand and thirty-six Oregon steers, alleged to be of the value of sixty-two thousand dollars, and marked, among other brands, with the letter

"T" on the left side, which cattle R. T. Kelly, A. J. Gillespie, T. E. Gillespie, Louis J. Gillespie, J. F. Gillespie, and G. O. Keck once owned, but their claim for damages, on account of said conversion, had been assigned, transferred and set over to the plaintiff.

The third count claims seventy-one thousand dollars in damages for the conversion of seven hundred head of Oregon cows and twelve bulls, of the alleged value of twenty-one thousand dollars, and fifteen hundred head of young cattle, the increase of the cows last mentioned, and of the actual value of fifty thousand dollars.

Judgment is asked upon all the counts for the sum of two hundred and twenty-one thousand dollars.

There was evidence relating to a herd of about two thousand steers and cows of various ages, all branded, which the plaintiff claimed to have bought from Slagle and Jordan in October, 1880. His contention is that at the time of the purchase that herd was at or near Rock Creek Station on the Union Pacific Railroad, in the Territory of Wyoming; that under an arrangement, part of his contract of purchase, he caused to be shipped, out of this herd, to Omaha or Council Bluffs for sale at prices fixed by that contract, about six hundred head; that the remainder, about fourteen hundred in number, were driven, in the same month, to Sheep Creek Basin, about twenty miles distant from Rock Creek; that in December they fled or drifted before a severe wind and snow-storm from the west and northwest, until they came to the head of Sheep Creek Basin, thence passed over the Black Hills Range, and moved in an easterly and southerly direction until they reached the ranch of one Bloomfield, in Colorado, and were by him taken possession of, without right, and sold to the defendant, a corporation of which he was general manager.

There was evidence as to another herd of about 1200 steers, marked with a T brand on the left side, and belonging to Gillespie & Co., which disappeared about the same time from the same region in Wyoming Territory. This herd, it was claimed, also found its way to Bloomfield's ranch, and were by him sold without right to the defendant.

Early in the year 1884, the complainant made demand upon the defendant, through Bloomfield, as its manager, for the above cattle, including those formerly owned by Gillespie & Co., to whose rights the plaintiff had succeeded. The demand was refused upon the ground that the defendant had not received any cattle belonging to the plaintiff.

The answer put in issue the plaintiff's ownership of the cattle described in the complaint, and relied also upon certain facts in bar of any recovery against the defendant. The plaintiff filed a replication controverting all the new matters set out in the answer.

After a protracted trial, the jury returned a verdict in favor of the plaintiff for the sum of $39,958.33. There was a motion by the defendant for a new trial, as well as one in arrest of judgment.

The court decided that if the plaintiff would remit the sum of twenty-two thousand eight hundred and thirty-three dollars and thirty-three cents from the amount of the verdict, the motion for a new trial should be denied; but if he declined to do so, a new trial should be granted. In accordance with this decision, the plaintiff remitted the above sum, and stipulated in writing that judgment might be entered for the sum of $17,125. The motion for a new trial, and the motion in arrest of judgment, were overruled, and judgment was entered for the latter sum. To the action of the court in respect to this remission, and to the order denying the motions for new trial and in arrest of judgment, the defendant excepted.

1. The point was much pressed at the bar that the remission by the plaintiff of a part of the verdict, followed by a judgment for the sum remaining, deprived the defendant of his constitutional right to have the question of damages tried by a jury, without interference upon the part of the court, except as it became necessary to instruct them in reference to the principles of law governing the determination of that question. The precise contention is, that to make the decision of the motion for a new trial depend upon a remission of part of the verdict, is in effect a re-examination by the court, in a mode not known at the common law, of facts tried by the jury, and

therefore was a violation of the Seventh Amendment of the Constitution.

The counsel for the defendant admits that the views expressed by him are in conflict with the decision in *Northern Pacific Railroad Company* v. *Herbert*, 116 U. S. 642, 646; but he asks that the question be re-examined in the light of the authorities. That was an action against a railroad company for the recovery of damages resulting from the negligence of its representative, whereby the plaintiff sustained serious personal injury. The verdict was for $25,000, and a new trial was ordered, unless the plaintiff remitted $15,000 of the verdict. He did remit that sum, and judgment was entered for $10,000. This court said: "The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand," citing *Blunt* v. *Little*, 3 Mason, 102, 107; *Hayden* v. *Florence Sewing Machine Co.*, 54 N. Y. 221, 225; and *Doyle* v. *Dixon*, 97 Mass. 208, 213. In *Blunt* v. *Little*, which was an action for malicious civil prosecution, in which the verdict was for two thousand dollars, Mr. Justice Story, while admitting that the exercise of the discretion of the court to disturb the verdict of the jury was full of delicacy and difficulty, recognized it to be a duty to interfere, when it clearly appeared that the jury had committed a gross error, or acted from improper motives, or had given damages that were excessive in relation either to the person or the injury; and held that the cause then before him should be submitted to another jury unless the plaintiff remitted $500 of the damages. The remission was made and the new trial refused. In *Doyle* v. *Dixon*, which was an action for breach of contract, the language of the court was: "When the damages awarded by the jury appear to the judge to be excessive, he may either grant a

new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue." To the same effect are many other cases. *Guerry* v. *Kerton*, 2 Rich. (Law) 507, 512; *Young* v. *Englehard*, 1 How. (Miss.) 19; *Deblin* v. *Murphy*, 3 Sandf. (N. Y.) 20. See also numerous authorities collected in Sedgwick on Damages, 6th ed. 765, note 3; 1 Sutherland on Damages, 812, note 2; 3 Graham & Waterman on New Trials, 1162.

The practice which this court approved in *Northern Pacific Railroad* v. *Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker* v. *Wood*, 1 T. R. 277; *Hewlett* v. *Crutchley*, 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages, 6th ed. 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.

But it is contended that the plaintiff could not have been required to remit so large a sum as $22,833.33, except upon the theory that the jury, in finding their verdict, were either governed by passion, or had deliberately disregarded the facts that made for the defendant; in either of which cases, the

duty of the court was to set aside the verdict as one not fit to be the basis of a judgment. Undoubtedly, if such had been the view which the court entertained of the motives or conduct of the jury, it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury. That was the course pursued in *Stafford* v. *Pawtucket Haircloth Co.*, 2 Cliff. 82. In that case, Mr. Justice Clifford, after observing that the damages were greatly excessive and without support in evidence, said: "Such errors may in many cases and under most circumstances be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding."

This court is not, however, authorized to assume, from the mere fact that $22,833.33 was remitted, that the court below believed that the jury were governed by prejudice, or wilfully disregarded the evidence. On the contrary, it may be inferred that the amount for which the plaintiff was entitled to a verdict was ascertained by the court, after a calculation based upon the prices of cattle as given by numerous witnesses; or that the court became satisfied that the preponderance of evidence as to the ownership of some of the cattle was against the plaintiff; or, as to other cattle, that they were not traced to the possession of the defendant. But, independently of this view, and however it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court. *Parsons* v. *Bedford*, 3 Pet. 433, 447; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 248; *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31. Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether the ver-

dict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made. Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this court, we need not decide in the present case.

If the Circuit Court had entered judgment for the whole amount of the verdict below, the defendant could have made no question in this court as to its being excessive. We could only, in that case, have considered matters of law arising upon the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of its discretion, compelled the opposite side, as a condition of its overruling a motion for a new trial, to remit a part of the verdict.

2. In support of the plaintiff's claim to have purchased the Slagle-Jordan herd of cattle, and his right to bring suit for their conversion, the following agreement was proven and read in evidence:

"SHEEP CREEK, WYO. TER., *Oct.* 11, 1880.

"Memorandum of agreement made and entered into this date by and between C. Slagle and John Jordan of Hepner, Umatilla County, Oregon, and J. J. Mann of Albany County, Wyo. Ter.

"Party of the first part has this day sold the following neat cattle to the said party of the second part in consideration of one dollar, the receipt of which is hereby acknowledged, two thousand head (2000) more or less, classed as follows, to wit — [here follows classification of steers, cows and heifers, according to ages and price per head, and also description of the brands on the different lots constituting the herd] — title guaranteed.

"Party of the second part agrees to pay for them as follows, to wit: To ship the three and four year old feeders to Council Bluffs or to Omaha, and in the name of Jordan and Slagle, to the number of six hundred (600) head. If there is not that number of threes and fours, then to ship twos to make up the number six hundred (600), and to guarantee the cattle to net them $26.00, $24 for all, respectively, up to the full number of threes and fours, and the excess to be reckoned at $18 per head if the threes and fours should not reach six hundred (600). Also to pay $2000 before cattle are shipped cash, and the loss on the steers so shipped so soon if any as the steers are sold and money paid to them, Slagle and Jordan, within two days after reaching market. If the steers should net more than the above prices, then the net profit to be credited to party of second part. The balance of said payment to be in ten (10) months from the fifteenth of October (Oct. 15th), A.D. 1880, with interest at the rate of twelve per cent per annum, seller to retain possession of the balance of the herd until the last payment is made.

"(Signed) "C. SLAGLE.
"JOHN JORDAN. [SEAL.]
"J. J. MANN. [SEAL.]

"Witness: Chas. G. Mantz."

The instructions asked by the defendant proceeded upon the ground that this agreement was executory only, and that the right of property remained in the seller, Mann acquiring only the right to buy according to the terms of the agreement. The charge of the court was based upon the theory that the title passed by the agreement to Mann; the seller retaining possession of that part of the herd not shipped to Omaha or Council Bluffs, simply as security for the amount the buyer agreed to pay. We concur in the view taken by the Circuit Court. Any other interpretation would, in effect, declare that title could, in no case, pass to a buyer while possession remains with the seller for any purpose whatever. Slagle and Jordan certainly intended to vest Mann with the title, at the date of the bill of sale in question; for that instrument recites that

the owners had, on the day of its execution, "sold" the cattle to him, and that recital is followed by clauses guaranteeing the title, and providing the mode in which the buyer was to make payment. Here are all the elements of an actual sale, as distinguished from an executory agreement. The retention of possession by the sellers until, and as security for, the payment of the price, was not inconsistent with an actual sale by which title passed to the buyer. The agreement in question is unlike that in *Harkness* v. *Russell*, 118 U. S. 663, which expressly declared that neither the title, ownership, nor possession should pass from the seller until the note given by the buyer for the stipulated price was paid.

3. The plaintiff asked the following instruction: "If you find that defendant converted any of the cattle belonging to plaintiff, and that among those converted were cows which either had calves with them at the time of the conversion or afterwards and before the commencement of this suit had calves, then you are instructed that the plaintiff is entitled to recover the value of such calves or increase, and you may consider as evidence of the number of such increase the average increase of cattle for the years between the time you may find the company took possession and the institution of this suit." The court below observed: "That is true, substituting for 'the institution of this suit' the time when the demand was made for the cattle. The plaintiff, if entitled to anything, is entitled to the value of the animals with their increase up to the time of the demand made, not the commencement of the suit, but the making of the demand." The defendant insists that this instruction was erroneous. But, in our judgment, it is correct. The calves of such of the cows as belonged to the plaintiff, and were converted by the defendant, certainly belonged to the former; for, according to the maxim *partus sequitur ventrem*, the brood of all tame and domestic animals belongs to the owner of the dam or mother. 2 Bl. Com. 390. The defendant's liability as for conversion extended, at least, to such of the calves, the increase of plaintiff's cows, as were in existence at the time of demand and conversion. As it was not informed of the plaintiff's claim of

ownership until his demand in January, 1884, the conversion must be taken to have occurred when it refused to comply with such demand. The plaintiff, if entitled to recover, was entitled to damages proportioned to the value of the cows and their calves at the time of conversion. The damages could not properly exceed the value of the property at that date, and less than that would not be sufficient compensation.

4. Error is assigned by the defendant in relation to that part of the charge stating that the plaintiff, if entitled to recover, was entitled to interest from the time of demand, at the rate of ten per cent. That is the rate of interest allowed by the statutes of Colorado on the forbearance or loan of money, where there is no agreement between the parties. Gen. Stat. Colorado, 1883, § 1706, p. 559. In *Machette* v. *Wanless*, 2 Colorado, 180, which was an action of replevin, in which damages were claimed for the detention of personal property, the court said, that "where the property is domestic animals, valuable for service only, the value of the use of the animal is, of course, the measure of compensation; but where, as in this case, the article is intended for consumption, interest upon the value of it would seem to be the true compensation. If the owner of the grain should ask to obtain the like quantity, he must purchase in the market, at current rates, and he would be deprived of the use of the money thus invested. The best estimate of a loss that can be made is interest upon the amount of money which he would for that purpose be compelled to pay out." See, also, *Hanauer* v. *Bartels*, 2 Colorado, 514, 525. The same rule ought to control the ascertainment of damages in actions for simple conversion of domestic animals intended for sale and consumption. The plaintiff receives adequate compensation when he is allowed damages equal to the value of the property at the time of conversion, with interest, at the established legal rate, from that date. He is entitled, as matter of law, to be compensated by the wrong-doer to that extent.

Many other questions have been discussed by counsel, but we do not deem it important to refer to them. No substantial error of law appears to have been committed to the prejudice of the defendant, and

The judgment is affirmed.

UNITED STATES *v.* WATSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 369. Submitted January 4, 1889. — Decided March 11, 1889.

The time of the service of a cadet in the Military Academy at West Point is to be regarded as a part of the time he served in the army within the meaning of the act of July 5, 1838, 5 Stat. 256, and should be counted in computing his longevity pay; and in an action to recover that pay he is entitled to judgment for so much of the amount thereon thus computed as is not barred by the Statute of Limitations.

THE case is stated in the opinion.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for appellants.

Mr. R. B. Warden and *Mr. W. W. Warden* for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

On the 24th of February, 1886, the appellee, Malbone F Watson, filed his petition in the Court of Claims, in substance as follows:

Claimant entered the United States Military Academy as a cadet, July 1, 1856; was appointed a second lieutenant of cavalry, May 6, 1861; first lieutenant of artillery, May 14, 1861; captain, March 9, 1866; retired from active service for loss of his right leg from wound received in line of duty, September 18, 1868. In computing his service for longevity pay he claims to be entitled to count his time as a cadet under the acts of July 5, 1838, 5 Stat. 256, c. 162, § 15; March 2, 1867, c. 145, § 9, 14 Stat. 423; July 15, 1870, Rev. Stat. § 1262. By so crediting his service, claimant alleges there is due him up to the time of filing his petition the sum of $2611.10.

To this petition the United States filed a general demurrer, which was sustained as to that part of the claim accruing six years before the filing of the petition, and overruled as to the rest of it, without prejudice. The court thereupon rendered

judgment in favor of claimant for $126.22. The United States appealed.

The ground upon which this judgment rests is, that the time of the service of claimant as a cadet in the Military Academy at West Point is to be regarded as a part of the time he served in the army within the meaning of the act of July 5, 1838, and should be counted in computing his longevity pay under that act; and that he is entitled to receive so much of the amount thereon thus computed as is not barred by the Statute of Limitations.

The provisions of the acts of Congress, relied upon as the foundation of the claim of the appellee, are as follows:

Section 15, act of July 5, 1838: "Every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the army of the United States: *Provided*, That in certain cases where officers are entitled to and receive double rations, the additional one allowed in this section shall not be included in the number to be doubled."

Section 9, act of March 2, 1867: "That § 15 of the 'Act to increase the present military establishment of the United States, and for other purposes,' approved July 5, 1838, be amended so that general officers shall not hereafter be excluded from receiving the additional ration for every five years' service; and it is hereby further provided that officers on the retired list of the army shall have the same allowance of additional rations for every five years' service as officers in active service."

Act of July 15, 1870, now § 1262, Rev. Stat.: "There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

That cadets at West Point were always part of the army, and that service as a cadet was always actual service in the army, has been settled by the decision of this court in the case of *United States* v. *Morton*, 112 U. S. 1, in which a question

almost identical with the one now before us was presented for consideration. In that case, Morton, the claimant, had entered the United States Military Academy at West Point as a cadet, July 1, 1865, had graduated therefrom June 15, 1869, and had served in the army as a commissioned officer from that date until March 31, 1883. In computing his service pay the accounting officers did not allow him credit for the time he had been a cadet at West Point as part of his time of service in the army; and he accordingly brought suit in the Court of Claims under the acts of February 24, 1881, and June 30, 1882, 21 Stat. 346, and 22 Stat. 118, respectively. These acts, among other things, provided that: "Additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the army or navy, or both, shall be allowed all officers in computing their pay." The Court of Claims rendered judgment in favor of the claimant, which, on an appeal prosecuted on behalf of the United States, was affirmed by this court. In the opinion of the court it was stated that "the only question for decision is, whether the time of service as a cadet is to be regarded as 'actual time of service in the army.'" The court, after an elaborate examination and discussion of the laws bearing thereon and having relation thereto, answered that question in the affirmative, and said:

"From this review of the statutes, it cannot be doubted that, before the passage of the act of July 28, 1866, (now § 1094, Rev. Stat., which in so many words classes the cadets at West Point as a part of the army of the United States,) as well as afterwards, the corps of cadets of the Military Academy was a part of the army of the United States, and a person serving as a cadet was serving in the army. . . . The practical construction of the requirement of the act of 1838, that the cadet should engage to serve for eight years, shown by the fact that the form of the engagement in this case was to 'serve in the army of the United States for eight years,' is a circumstance of weight to show that the government, from the beginning, treated the plaintiff as serving in the army. The service for which he engaged began on the 1st of July, 1865, and the eight years ran from that time. That being his status, the acts of

1881 and 1882, in speaking of 'actual time of service in the army,' cover the time of his service as a cadet. . . . Under the statutes involved in the present case, a cadet at West Point is serving in the army as fully as an officer retired from active service is serving in the army, under the statutes which apply to him, so far as the question of longevity pay is concerned."

More direct and emphatic language could not be used to support the contention of the claimant in this case. The words "actual time of service in the army," as used in the act of February 24, 1881, are not more expressive of cadet service at West Point, than are the words "for every five years he may have served or shall serve in the army of the United States," as used in the act of July 5, 1838. They both mean the same kind of service; and we are of the opinion that such service should be reckoned in computing longevity pay prior, as well as subsequent, to the act of February 24, 1881.

We also concur with the Court of Claims, that in this case there can be no recovery for any part of the claim that accrued prior to February 24, 1880, the day when the bar of the Statute of Limitations took effect. Rev. Stat. § 1069. The claim sued on is valid as to that part of it which accrued after that date.

For these reasons the judgment of the Court of Claims is

Affirmed.

CALTON *v.* UTAH.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 1408. Argued January 2, 1889. — Decided March 11, 1889.

A statute of Utah provided that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; *Held*,

(1) That the authority given to substitute imprisonment at hard labor in the penitentiary for life for the punishment by death, when the accused is found guilty of murder in the first degree, depends upon a previous recommendation to that effect by the jury;

(2) That when a person is on trial charged with the commission of mur-

der in the first degree, it is the duty of the court to inform the jury of their right, under the statute, to recommend imprisonment for life at hard labor in the place of the punishment of death; and that failure to do so is error.

THE case is stated in the opinion.

Mr. John H. Mitchell for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, Calton, was indicted in the District Court of the Second Judicial District of the Territory of Utah for the crime of murder in the first degree, in that he "feloniously, unlawfully, wilfully, purposely, premeditatedly, deliberately, and of his malice aforethought," killed and murdered one Michael Cullen. Under the plea of not guilty evidence was introduced by him for the purpose of showing: first, that at the time of the killing he was incapable, by reason of unsoundness of mind, of committing any criminal offence; second, that at most the killing was "upon a sudden quarrel or heat of passion," and, therefore, he could not be found guilty of any higher offence than voluntary manslaughter; third, that at the time of the killing he had reasonable ground to apprehend, and did apprehend, that the deceased was about to do him great bodily harm.

He was found guilty of murder in the first degree. A motion for a new trial having been denied, and the defendant having elected, as under the territorial statutes he might do, to suffer death by shooting, rather than by hanging, it was adjudged that on a named day, between certain hours, he be publicly shot. Upon appeal to the Supreme Court of the Territory that judgment was affirmed, "save as to the time and the publicity of the execution thereof." This saving was because the local statute provides that "a judgment of death must be executed within the walls or yard of a jail or some convenient private place in the district." Laws of Utah,

1878, p. 136. The present writ of error brings up for review that judgment of affirmance.

It appeared in proof that Calton, Tiberty and Cullen were residents of the Star Mining District in the Territory, and well acquainted with each other. On the morning the shooting occurred, Calton and Tiberty went to Milford, a small town near by, and there happened to meet Cullen. During the day they all indulged in strong drink, and became somewhat intoxicated. They were together during most of the time, and apparently upon friendly terms. About six o'clock in the afternoon the three started for home. They left Milford together in a wagon, Calton and Cullen sitting on the driver's seat, Calton driving, and Tiberty on a pile of ore sacks in the body of the wagon. They did not get far in the direction of their homes when Tiberty, leaving his bottle of liquor on the sacks, alighted from the wagon to get a whiplash that Calton had dropped. While he was on the ground a dispute, in some way not fully explained, arose between Cullen and Calton about the possession of Tiberty's bottle of liquor. Subsequently, and while the latter was off the wagon, a struggle ensued between Cullen and Calton, during which they clinched, each one having hold of the other's throat in such manner as to satisfy Tiberty, who was a short distance away, that they were angry. At one time Cullen seemed to be pressing Calton against or over the dash-board. The latter finally released himself from the grasp of his antagonist, who was much the stouter man, and, jumping to the ground, took a loaded pistol from a bundle he had in the wagon, and fired at Cullen five shots in rapid succession. According to the statements of Tiberty the deceased did not move after the first shot, the defendant saying, immediately after that shot was fired, that he had killed him, and that he "might as well give him the rest." Calton and Tiberty returned to Milford with the dead body in the wagon, and the former surrendered himself to an officer of the law.

The penal code of Utah established by the act of February 18, 1876, provides that "every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious

and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Compiled Laws Utah, 1876, p. 585.

The same code further provides that: "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court, and every person guilty of murder in the second degree, shall be imprisoned at hard labor in the penitentiary for not less than five, nor more than fifteen years." Compiled Laws Utah, 1876, p. 586.

It is clear that the authority given in the section last quoted, to substitute imprisonment at hard labor in the penitentiary for life for the penalty of death, when the accused is found guilty of murder in the first degree, depends upon a previous recommendation to that effect by the jury. Without such recommendation the court, in the absence of sufficient grounds for a new trial, has no alternative but to sentence the accused to suffer death. While in this case the jury were instructed as to what constituted murder in the first and second degrees, they were not informed as to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death. If their attention had been called to that statute, it may be that they would have made such a recommendation, and thereby enabled the court to reduce the punishment to imprisonment for life. We are of opinion that the court erred in not directing the attention of the jury to this matter. The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for

which by imprisonment for life at hard labor will suffice to meet the ends of public justice. Its object could only have been met through a recommendation by the jury that the lesser punishment be inflicted, and it is not to be presumed that they were aware of their right to make such recommendation. The failure of the court to instruct them upon this point prevented it from imposing the punishment of imprisonment for life, even if, in its judgment, the circumstances of the case rendered such a course proper. It was well said in the dissenting opinion of Mr. Justice Henderson, in the Supreme Court of the Territory, that by the action of the District Court "the prisoner was deprived of a substantial right. The determination of the question as to whether he should suffer death or imprisonment was one of vital consequence to him. The jury to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility in the matter so as to require them to exercise their judgment and discretion in relation to it, and by the verdict they rendered the court had none." These views are in accordance with the fundamental rules obtaining in the trial of criminal cases involving life.

Other questions were discussed at the bar, but as the instructions relating to them are somewhat obscure, and as they may not arise upon another trial in the form in which they are now presented, we forbear a determination of them.

For the error indicated the judgment is reversed, with directions for a new trial, and for such further proceedings as may not be inconsistent with this opinion.

BROWN v. DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 137. Argued January 8, 9, 1889. — Decided March 11, 1889.

In view of the state of the art at the time of their issue, letters patent No. 101,590, granted to Turner Cowing, April 5, 1870, for "a wood pavement

composed of blocks, each side having a single plain surface and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling, substantially as set forth," are void for want of novelty.

The substitution of blocks of wood of a given shape for blocks of stone of the same shape in the construction of a pavement neither involves a new mode of construction, nor develops anything substantially new in the resulting pavement, and is therefore not patentable as an invention.

Letters patent No. 94,062 to William W. Ballard and Buren B. Waddell, dated April 24, 1869, for improvements in street pavements, were granted for novelty in the method of making the blocks, and not for novelty in the blocks themselves, or in a wooden pavement constructed of them; and it required no invention, but only mechanical skill to produce this method, so far as it varies from other methods for a like purpose previously known.

Letters patent No. 94,063 to William W. Ballard and Buren B. Waddell for "an improved mode of cutting blocks for street pavements" are void because the thing patented required only mechanical skill, and involved no invention, and was not patentable.

THE case, as stated by the court in its opinion, was as follows:

Tallmadge E. Brown filed his bill in the Supreme Court of the District of Columbia on the 14th day of April, 1880, counting upon three patents alleged to have been infringed by the respondent, namely: Patent No. 101,590, issued to Turner Cowing, April 5, 1870, for "a new mode of constructing wood pavements for streets." The specification and claim are as follows:

"The nature of my invention consists in providing and arranging blocks of a peculiar shape in manner to form wedge-shaped crevices for the reception of earth or gravel, and wherein such earth or gravel will be retained to act as a key to bind and confine the blocks in their place.

"Figure 1 represents a section of road paved with the blocks, complete. Figure 2 represents the straight side of a block, with the inclined side at E. Fig. 3 represents the top of a block, and also the section of the base D. Fig. 4 represents the straight side of a block, which is set next to the inclined side of the adjoining block.

Statement of the Case.

"In Fig. 1 letter A represents the top of the block, B the side, and E the crevice and gravel. The blocks should, of course, be placed so that the gravel spaces may extend lengthwise across the direction of the street or road, so that, besides wedging and holding the blocks securely, they may furnish a better foothold for animals drawing heavy loads.

"In the drawing the front edge of the pavement, as shown, represents the side next the curb or a section parallel to the curb.

"It is obvious that the wedge-shaped crevices may also be formed by setting the above-described blocks so that two vertical sides and two inclined sides come together alternately, as shown in Fig. 5; and it is equally obvious that two blocks having their vertical sides together may be replaced by a single block having two inclined faces, as shown in Fig. 6, without any material change of plan, and with a considerable saving of labor and expense in the construction.

"To construct my pavement, prepare the roadway by grading it to the proper form and ramming solid; then set the blocks as shown in Fig. 1, confining them permanently between the curbs of walks; then fill and ram the crevices with earth and gravel.

"I do not claim a wood pavement composed of wedge-shaped blocks, when the blocks are laid alternately on larger and smaller ends, so as to form a continuous surface of wood, but what I do claim, and desire to secure by letters patent of the United States, is:

"A wood pavement composed of blocks, each side having a single plain surface and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling, substantially as set forth."

Patent No. 94,062, issued to William W. Ballard and Buren B. Waddell, August 24, 1869, for "improvements in street pavements," of which the following are the specification and claims:

"Figure 1 is a perspective view of a section of pavement embracing our improvement. Fig. 2 is a perspective view of

a piece of timber from which the block is cut and showing the cuts made by the saw; and Fig. 3 is a perspective view of two of the blocks laid alongside of each other.

"To more clearly illustrate our invention we will proceed to describe the construction, etc., referring by letters to the drawings.

"A represents the bed of the street, which is made slightly arched, the ends of the arch resting against the curbs B B. Strips C are laid upon said arch at right angles to the curb and at convenient distances apart. Upon said strips is laid a flooring, composed of boards of any desired dimensions, and the blocks are then laid on this flooring in rows, and so as to break joints. These blocks are of a wedge shape, and are so laid as that their bases shall touch, forming a continuous arch across the street, and leaving V-shaped spaces between the rows. These spaces are filled with concrete or its equivalent, and the whole surface tarred over, if thought necessary. The gutters are formed by inclining the bed slightly upward at the curb and splitting the ends of the blocks off to fit against the curb and the last one of the street blocks.

"The peculiarity of the blocks used in this pavement is that they are wedge shaped and having both sides at acute angles with the base and the grain running parallel with one and oblique to the other of these sides.

"A more perfect description of these blocks and the manner of producing them is given in another pending application, now on file in the United States Patent Office, entitled 'A method of cutting blocks for street pavements,' prepared and executed by us on the 29th day of September, 1868.

"The advantages of blocks having both sides bevelled, with the grain running, as described, over the ordinary wedge-shaped block, are first and most important — that only one corner of the base is at all likely to become broken off by transportation and rough handling, whereas in the ordinary block both corners are liable to such accidents. Another advantage of the relation of grain to the sides of the block is that the V-shaped spaces have one perfectly smooth side, and consequently less opportunity is afforded to the gravel in the

filling to jam and leave the lower portion of the space loosely or entirely unfilled. This is believed to be a difficulty in pavements constructed of wedge-shaped blocks having the grain running vertically, and thereby exposing the fibre on both the bevelled sides of the blocks.

"A pavement constructed of our improved blocks can be laid at a less cost than any other wedge-shaped pavement, owing to the cheapness of the blocks.

"It has always been desirable to build pavements of wedge-shaped blocks, as they make a stronger and more durable pavement and are more easily laid, but so far it has been impracticable owing to the expense of producing the blocks caused by the waste in material and extra sawing.

"Having described the construction and advantage of our improved pavement, what we claim as new and desire to secure by letters patent is —

"1. As an article of manufacture, wedge-shaped blocks having the grain running parallel to one and oblique to the other of their bevelled sides, and produced substantially in the manner referred to.

"2. A wooden street pavement constructed, substantially as hereinbefore described, of wedge-shaped blocks with the grain running and produced in the manner and for the purpose set forth."

Patent No. 94,063, issued to said Ballard and Waddell, August 24, 1869, for "an improved mode of cutting blocks for street pavement," of which the specification and claim are as follows:

"Figure 1 represents the lumber as the blocks are being cut off in order to give the ends of the blocks the proper angle or bevel.

"Fig. 2 represents the blocks after being cut off as above described before splitting. Fig. 3 represents the blocks in the act of being split on a saw-table, showing the rest or guide necessary to cut them in the proper direction. Fig. 4 represents the blocks finished and placed in the pavement.

"Our invention consists in a novel method of cutting and splitting blocks for wood pavement in such a manner that two

cuts, or rather one cut and one splitting, will produce two finished blocks with level top and bottom and two sides bevelled, one being with the grain and the other slightly oblique to the grain, without more waste of timber than is occasioned by the saws.

"We take a piece of lumber four and a half feet long, twelve inches wide and seven inches thick. This is placed under the saws, as shown in Fig. 1, in an inclined position, so that the first cut will produce blocks with two sides inclined, the top and bottom level or in parallel planes. The first cut produces nine blocks, such as shown in Fig. 2, out of a piece of lumber, as described above. Each such block will then be twelve inches long, six inches high with the fibre and seven inches wide across the fibre. These blocks are then split, as indicated in dotted lines, Fig. 2, slightly oblique to the fibre, as seen also in Fig. 3, being brought toward the splitting saw in an inclined position, inclined in contradistinction to a position level at top and bottom, in such a manner that the line of the cut will form the other two bevelled sides of two blocks, each of which has the top and bottom level, or in parallel planes, and the sides bevelled as shown in Fig. 4, and, moreover, has the grain running in the direction of one of the bevelled sides, as clearly shown in Figs. 2 and 3. These blocks will then be twelve inches long, six inches high, three inches wide at top and four inches wide at the base.

"The figures of feet and inches we have, of course, used only as an illustration, as different dimensions of lumber may be used, but those given will do for an ordinary street block.

"The two great advantages of this method are economy of lumber and of labor and time, the only loss of lumber being the small pieces cut off at each end to start the bevel. Each two cuts, or rather one cut and one splitting, produces two complete blocks ready for use.

"Having thus described our invention, what we desire to secure by letters patent is —

"The herein-described method of cutting blocks for wooden pavement, so as to form by two cuts, or one cut and one splitting, two finished blocks with top and bottom level, or in

parallel planes, and the sides bevelled, one side being inclined with the fibre, and without waste of material, substantially as set forth."

The defendant pleaded the Statute of Limitations, whereupon the complainant amended, and the defendant subsequently demurred, and the demurrer being overruled, the defendant, after interposing another plea of want of notice, answered, denying that it had, in any way, violated the rights of the complainant, and, among other things, averring that all the substantial claims of complainant's alleged patents were covered by previous patents granted to Nicholson, De Golyer, Miller and Mason, Stone, Cranford and others; and that wooden pavements, in all substantial particulars identical with those claimed by complainant, had been laid and used for more than two years before the patents were applied for, in Chicago, New York, Boston, etc., and that the alleged patents are null and void because the alleged invention is neither new nor useful.

Replication was filed and proofs taken. It appeared that patent No. 101,590 was originally granted to Cowing, whose first application was made in November, 1865, and rejected December 27 of that year, whereupon it was amended and renewed in 1869, but the decision was that the application had been abandoned. It was afterwards entertained, and was twice amended in 1870, and the patent was finally issued April 5, 1870. In the original application Cowing said as in the patent as issued:

"The nature of my invention consists in providing and arranging blocks of a peculiar shape in manner to form wedge-shaped crevices for the reception of earth or gravel, and wherein such earth or gravel will be retained to act as a key to bind and confine the blocks in their place."

The amended claim of May, 1869, was:

"The above-described wood pavement, constructed of rectangular blocks, having each a wedge-shaped piece cut from one of its four vertical sides to form a corresponding space for filling, and placed and filled in, substantially as set forth."

The amended claims of February 22, 1870, were:

"1st. A wood pavement consisting of blocks having one or more inclined sides, forming between them wedge-shaped spaces or crevices, which are filled with earth, gravel, or other suitable material, substantially as herein described. 2d. In wood pavement, wedge-shaped spaces or crevices for the reception of earth, gravel or other filling to act as a key to bind and confine the blocks in their places, substantially as described. 3d. A wood-pavement block having one or more oblique or inclined sides, so as to form, when set, wedge-shaped spaces or crevices to receive earth, gravel or other filling, substantially as set forth. 4th. In wood pavement, in combination with wedge-shaped crevices above, formed by the peculiar shape of the blocks, for receiving gravel or other filling, a continuous base beneath, formed by the complete fitting together of the same blocks at the bottom, substantially as specified."

On the 31st of March, 1868, a patent was issued to Miller and Mason, of Chicago, Illinois, for "certain new and useful improvements in wood pavements," in which the claim is:

"A pavement constructed of wedge-shaped blocks A, when laid so as to break joints with those of the opposite rows, in combination with a concrete filling, and in further combination with a continuous wood foundation, and so laid as to form continuous rows across the street."

It is said in the specification of that patent:

"The blocks A are to be cut from plank, and are of the usual size, having the fibre vertical. The blocks of our pavement, however, differ from all other blocks in use for pavements, in having both sides bevelled from top to bottom, as shown by the end view of the blocks in the drawings. The blocks thus prepared are placed in the board or plank foundation B in transverse rows. Each block may be secured to the foundation by a nail or spike, as shown at *a*. It will be observed that in consequence of the peculiar shape of the blocks those in the several rows touch each other at the bottom, but are some distance apart at the top, forming between the rows wedge-shaped channels. These channels are to be filled with concrete, or gravel and coal-tar, or other suitable substance, furnishing the necessary foot-hold for horses.

Statement of the Case.

* * * * *

"The blocks can be cut with less waste of material by cutting them from timber and splitting the timber blocks with the proper bevel. This makes a strong pavement, and as the blocks have a broad base they will not cut or break the foundation when very heavily loaded teams are driven over it."

August 20, 1867, letters patent were reissued to Samuel Nicholson, of Boston, for "a new and useful improved wooden pavement," the original letters having been issued August 8, 1854, and new letters issued dated December 1, 1863. The claims of the second reissue are:

"1. Placing a continuous foundation or support, as above described, directly upon the roadway, then arranging thereon a series of blocks having parallel sides endwise in rows, so as to leave a continuous narrow groove or channel-way between each row, and then filling said grooves or channel-ways with broken stone, gravel and tar, or other like materials. 2. The formation of a pavement by laying a foundation directly upon the roadway, substantially as described, and then employing two sets of blocks; one, a principal set of blocks that shall form the wooden surface of the pavement when completed, and an auxiliary set of blocks or strips of board which shall form no part of the surface of the pavement, but determine the width of the groove between the principal blocks, and also the filling of said groove, when so formed, between the principal blocks, with broken stone, gravel and tar, or other like material. 3. Placing a continuous foundation or support, as above described, directly upon the roadway, and then arranging thereon a series of blocks having parallel sides endwise in a checkered manner, so as to leave a series of checkered spaces or cavities between said blocks, and then filling said checkered cavities with broken stone, gravel and tar, or other like material. 4. The formation of a pavement by laying a foundation directly upon the roadway, substantially as above described, and then employing two sets of blocks, viz., one a principal set of blocks that shall form the wooden surface of the pavement, and an auxiliary set of blocks that shall form no part of the wooden surface of the pavement, but determine the dimen-

sions of the tessellated cavities between the principal blocks, and then filling said tessellated cavities with broken stone, gravel and tar, or other light material."

February 28, 1824, English letters patent were granted to A. H. Chambers for "improvements in preparing and paving horse and carriage-ways," in which the nature of the invention is said to

"Consist in an arrangement of conical-formed stones, or other hard mineral or silicious substances of the said form, placed on their natural bases, cemented together at their lower extremities, and having their remaining interstices filled with loose materials insoluble in water."

He describes pyramidal stones, "cut in the form represented in the drawing, and placed with their large end or natural base downward," to be grouted at their bases by a good strong cement; the upper part of the interstices that will then be left vacant to be filled "with finely broken flints, patent English pozzolana powdered, or any other similar substance, not soluble in water."

"Fig. 3 represents the stones in that form which I consider the best calculated to effect the required resistance to downward pressure, the size of which should be eight inches square at the apex, twelve inches square at the base, and ten inches high."

He explains that while stones of the shape described are the best adapted for the purpose of the pavement or carriage-way, yet to save expense use may be made for all ordinary pavements of stones as usually prepared for paviors, but taking care "always to lay their natural bases or largest end downwards which is the exact reverse of the mode adopted by paviors;" "the upper part of the intermediate spaces or interstices aforesaid filled with powdered or finely broken matter not soluble in water, as aforesaid."

June 14, 1825, English letters patent were granted to John Lindsay for "certain improvements in the construction or formation of the horse and carriage-ways of streets, turnpike and other roads, and an improvement or addition to wheels to be used thereon."

Statement of the Case.

He says, referring to a pavement "with the common or usual sized paving stones," that

"The method of arranging or laying them is as follows: Instead of laying them with their broadest ends upwards, I lay them with the broadest ends downwards, and, as each stone is made of a wedge form, this leaves a considerable space open between the stones. These I close with smaller stones of a wedge form, which, being carefully placed and well rammed down, after a sufficient quantity of fine gravel or grout has been worked between them, will make a pavement nearly as substantial as a solid sheet of granite."

In 1839, English letters patent were issued to Richard Hodgson for "improvements in the forms or shapes of materials and substances used for building and paving and in their combinations for such purposes," in which he describes an invention consisting in forming and shaping materials and substances according to a new section of the cube obtained by dividing the cube into eight equal prisms or parts, etc., the shapes and forms described, with their combinations, being "applicable generally to materials and substances employed in building and paving, whether of stone, iron, bricks, or wood." The shapes in the case of stone, marble, etc., are "to be formed by sawing or cutting the same out of the full size of the cube and leaving them entire in their relative dimensions, so as to be ready to be placed together either horizontally, vertically, or obliquely, as the case may require," while for "wood paving a peculiar disposition of the materials or blocks thus shaped, and, if necessary, pegged or dowelled, will be required," etc. The blocks may be packed up together in the workshop in masses, so as to be laid down more speedily on the ground, where they must be fastened together with pegs or with any bituminous compound usually employed for similar purposes. They must be placed nearly vertically, as the tree grows, and according to the traffic, the depth or substance of the wood pavement must be increased or diminished. They may in most cases be laid across the street from side to side, but, when necessary, in a diagonal line.

Defendant introduced various letters patent, to wit: For im-

provement in "the machine for re-sawing boards and other timber," (issued to Crosby, 1841;) for "improvements in sawmills, for curved and bevel sawing, but which may also be used for rectilinear sawing," (issued to Normand, 1854;) for "a new and improved mode of sawing stone or marble into tapering and other forms," (issued to McBird, 1856;) for "an adjustable table for reciprocating saws," "whereby the proper bevel may be imparted to the ribs of vessels and other objects with accuracy and facility," (issued to Hinchman, 1863;) for "improvement in the manufacture of siding," (issued to Millengar, 1864;) for "an improved sawmill," "so as to cut ship-timbers and other irregular forms," (issued to Wright & Molyneux, 1865;) and also extracts from a volume entitled "Turning and Mechanical Manipulation," by Charles Holtzapffel, London, 1847.

These extracts treat of cutting, by means of guides, rectangular pieces from the end of a long bar, and rhomboidal pieces of any angle and magnitude; the sawing of small pieces into regular and irregular polygons of any particular angles and numbers of sides; the cutting of mitres, etc.; the sawing bevelled edges and oblique prisms or those in which the angular variations are in the vertical plane, rhomboids, or squares.

"When the pieces are parallel in one direction and bevelled in the other, they may be cut out without any waste beyond that arising from the passage of the saw."

Figure 743 shows a method of cutting blocks at one cut for each piece, into rhombuses, which are shown separately at *a*, which blocks can be afterwards divided into two, so as to make triangular-shaped blocks such as are shown at *c*.

At the hearing in special term the bill was dismissed, and the decree being affirmed in general term, the complainant has prosecuted his appeal to this court.

The opinion of Judge Cox at special term was adopted by the court in general term, (Cartter, C.J., Hagner and James, JJ.,) and from it it appears that it was held that no case of actionable infringement was made out as to No. 94,063, and that Nos. 94,062 and 101,590 were void for want of patentable novelty. *Brown* v. *District of Columbia*, 3 Mackey, 502.

Opinion of the Court.

Mr. C. C. Cole and *Mr. A. S. Worthington* for appellant.

Mr. Henry E. Davis for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

Was a wood pavement "composed of blocks, each side having a single plain surface and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling," patentable April 5, 1870, in view of the state of the art?

Chambers had, in 1824, described a pavement of pyramidal stones, twelve inches square at the base, eight inches square at the apex, and ten inches high, placed with their larger end downward, and the interstices filled with loose materials insoluble in water.

Lindsay's invention, in 1825, comprised stones made of a wedge-shaped form, laid with their broadest ends downwards, leaving a considerable space between them to be closed with smaller wedge-formed stones, with fine gravel or grout worked between them.

Nicholson's pavement was composed of blocks of wood laid in rows across the street, with spaces obtained by interposing narrow wooden strips between the blocks, to be filled with concrete or other suitable filling.

Cowing disclaimed "a wood pavement composed of wedge-shaped blocks when the blocks are laid alternately on larger and smaller ends, so as to form a continuous surface of wood," but claimed the arrangement of the blocks so as to leave wedge-shaped spaces to receive filling to act as a key to bind the blocks together. But reference to these prior patents clearly shows that the formation of wedge-shaped spaces to receive concrete or other filling by laying blocks with one or more inclined sides with their larger ends downwards, the filling acting as a key, and the use of wooden blocks in that way, were well known at the time of the alleged invention under consideration.

The blocks of the Lindsay patent are of the same shape as those of Cowing, but are of stone, while the latter are of

wood, but this was nothing more than the substitution of one material for another without involving a new mode of construction, or developing anything substantially new in the resulting pavement. *Hotchkiss* v. *Greenwood*, 11 How. 248; *Hicks* v. *Kelsey*, 18 Wall. 670; *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Phillips* v. *Detroit*, 111 U. S. 604.

The filling under Lindsay's patent was with small stones, fine gravel, or grout, while Cowing names a filling of earth, gravel, or some other similar substance, but Nicholson used broken stones, gravel and tar, or other like material, being the same filling for the same purpose and with substantially the same result, while the material of the Nicholson block was the same as that of Cowing.

It is argued that gravel and similar substances cannot be forced into the stone blocks of the Chambers and Lindsay patents, and that in ramming gravel between wooden blocks it of necessity indents the blocks, and the filling must adhere much more firmly than would be the case if they were stone. There is nothing said about this by Cowing in his specification, but he is entitled, if this is an advantage directly following from the alleged invention as described, to the benefit of it, whether he perceived it or not. *Stow* v. *Chicago*, 104 U. S. 547, 550. The same effect, however, would be obtained in ramming filling between the blocks of any wooden pavement, and the same liability of the filling "to extend laterally into the fibre of the wood and seat itself therein" is found in the Nicholson pavement.

In the Chambers patent the blocks had four inclined sides, which would make the filled space run lengthwise as well as crosswise. In the Cowing patent the crevices run lengthwise "across the direction of the street or road."

As Cowing's combination simply embraces blocks of the same shape and material, and similar filling, applied in substantially the same way and producing substantially the same results as in the prior patents referred to, it cannot be regarded as possessing patentable novelty.

The first claim of patent No. 94,062 covers, as an article of manufacture, "wedge-shaped blocks having the grain running

parallel to one and oblique to the other of their bevelled sides, and produced substantially in the manner referred to."

The second is "a wooden street pavement constructed substantially as hereinbefore described, of wedged-shaped blocks with the grain running and produced in the manner and for the purposes set forth."

The original application of Ballard was filed June 15, 1869, and rejected by Examiner Spear upon the ground that the claim was essentially the same as that in No. 94,063, which was for a mode of cutting blocks. It was then amended and again rejected, the examiner saying: "It is admitted that there is no difference between the blocks of applicant and those of Miller and Mason in configuration, nor is any difference claimed of functions. These blocks and those of the patent referred to, once laid, would be indistinguishable, serving, under the same conditions, precisely the same purposes and wearing equally as long. The difference lies in the mode of cutting, by which not a different block is produced, but the same block is cut with a minimum of waste of material." From this decision an appeal was taken to the examiners in chief, who affirmed the ruling, holding that "the trouble with the present application appears to be that the specification and claim merely set forth and embrace a paving block and the use thereof, having a certain form and being so cut that the grain will run in certain angles with the sides, or parallel thereto, and without any reference to the mode and manner of manufacturing. Blocks having all the peculiarities set forth may be manufactured without resorting to the method by which it seems the ones described in the application were made; and it does not follow, therefore, that the block described and claimed is the new article of manufacture produced by the new invention, nor is it at all material whether the grain runs as set forth or the blocks have the precise form described. Therefore these peculiarities are not the patentable features of the invention; they merely result from the invention."

The application was then renewed by Ballard and Waddell with the result before us, but it is plain that the patent was granted for novelty in the method of making the block and

not in the block itself, nor in a wooden street pavement so constructed. It is not denied that the Ballard block is identical in shape with those set forth in the Cowing, Chambers, Lindsay and Miller and Mason patents, but it is claimed that a difference exists between it and that of Miller and Mason in the arrangement of the grain, namely, running parallel with one and oblique to the other of its bevelled sides.

We can discover nothing materially different in the practical result of having the grain run in this way, and no material difference is disclosed by the evidence.

The specification asserts that the gravel in the filling is not so liable to jam and leave the lower portion of the space loosely or entirely unfilled, where the blocks have one perfectly smooth side, and that "only one corner of the base is at all likely to become broken off by transportation and rough handling, whereas in the ordinary block both corners are liable to such accidents;" but, as appears from the evidence, "if the blocks are cut with the grain in the manner described in said patent, although one side is not so likely to break off as the other, yet the side that has the grain oblique to it is twice as likely to be broken off as the blocks made in the ordinary way, that is, with the grain vertical," and "the effect of the smooth side of one block, if there were such an alleged advantage in said side, would be fully recompensed by the additional roughness of the other side;" and it would seem that the durability of the block is less where the grain is inclined than where it is vertical. It is fully shown in an elaborate report upon wood paving, quoted from in the evidence, and which, it is testified, agrees with general experience, that vertical fibre blocks have far greater power of resistance than blocks with fibres horizontal, and with fibres at various degrees of inclination.

The manner of laying the blocks is substantially the same as in prior pavements.

The process of making the block is given in patent 94,063, the claim of which is "the herein-described method of cutting blocks for wooden pavement, so as to form by two cuts, or one cut and one splitting, two finished blocks with top and bottom level, or in parallel planes, and the sides bevelled, one side being

inclined with the fibre, and without waste of material, substantially as set forth."

From what we have said it will be perceived that this claim and the first claim of patent No. 94,062 must be considered together. The manner of producing these blocks is described as cutting them from lumber by means of guides so as to cut the blocks of certain bevels, by which a block is produced having two of its sides inclined and with the grain running parallel to one and oblique to the other of the bevelled sides; but the essential features of the apparatus described in this patent appear in many of the defendant's exhibits. Instead of having a table parallel with the shaft of the saw or at right angles with the saw itself, the patent in question uses a rest or guide in presenting the material to the saws, but the use of such guides is shown in Holtzapffel's "Turning and Mechanical Manipulation," and Crosby's patent and others.

The prior existence of the method of cutting blocks without waste by severing a large block by a cross-cut from a long stick and then dividing that block into two similar blocks by a splitting cut is satisfactorily established, as also the same result reached in the same way in the treatment of stone. In the case of the Ballard block, the splitting cut is made in a direction parallel with the grain; but that is because the object of having the grain run in a particular way controls the action of the mechanic, who makes the cut as he desires the fibre to run.

Complainant's expert admits that the patentee in the McBird patent, by the first cut he makes, produces a block of rhomboidal form, and, by a second oblique cut, divides his block into two equal wedge-shaped blocks, produced without waste of material; and the difference he points out between that and the Ballard and Waddell patent is, so far as the cutting operation is concerned, that in the former the cut which divides the rhomboid into two wedge-shaped blocks is made across the grain, while in the latter it is made in the general direction of the grain.

To cut the block so as to get the grain in a particular way, and so as to avoid waste, requires simple mechanical skill, without involving invention.

The result is that none of these claims can be sustained, and the decree of the court below is *Affirmed.*

RICHARDSON *v.* GREEN.

NELSON *v.* GREEN.

NELSON *v.* GREEN.

SICKLES *v.* GREEN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Argued February 1, 4, 1889. — Decided March 18, 1889.

It is a well settled rule that this court will not entertain an appeal where the transcript of the record is not filed in this court at the term next succeeding the taking of the appeal, unless a recognized satisfactory excuse for the laches is made.

It is not a sufficient excuse that the clerk of the court below was mistaken in his understanding as to the time when the transcript must be filed, and that it was prepared as soon as possible by him, having due regard to the other duties of his office, and the size of the record.

Where the transcript of the record was placed in the hands of the clerk of this court at the next term after the appeal was allowed and perfected by the filing of a bond, but no appearance was entered for the appellant, nor any deposit for costs made, at that term, but these things were done at the next following term, and the case was then docketed, and a motion to dismiss the appeal was made at the third term thereafter: *Held*, that the motion must be denied.

Where an appeal is allowed in open court at the same term the decree is made yet if the bond to perfect the appeal is not accepted at or during that term, a citation is necessary.

The issuing of a citation may be waived by the appellee, and a general appearance by him is a waiver of a citation.

Where this court has jurisdiction of an appeal, and a citation is necessary, it will issue one.

Reasons stated why the appeal in this case is not open to the objection that it does not involve more than $5000, or to the objection that the appellee is not named in the order allowing the appeal.

Where the appellee died after the argument of the motion to dismiss the appeal, the order on the motion was entered *nunc pro tunc* as of the day of the argument.

IN EQUITY. On the 21st January, 1889, a motion to dismiss these cases was submitted, and a further motion was made to

postpone the hearing when the cases should be reached, until the motion to dismiss should be decided. The motion to postpone was denied on the 22d January, and the motion to dismiss was ordered to be heard at the argument on the merits. The case is stated in the opinion of the court.

Mr. J. Hubley Ashton and *Mr. Henry T. Dechert* appearing specially for John Bower & Co. and John F. Betz, appellees, in support of the motions to dismiss, cited: *Castro* v. *United States*, 3 Wall. 46; *Edmonson* v. *Bloomshire*, 7 Wall. 306; *Grigsby* v. *Purcell*, 99 U. S. 505; *The Tornado*, 109 U. S. 110; *Killian* v. *Clark*, 111 U. S. 784; *Caillot* v. *Deetken*, 113 U. S. 215; *Fayolle* v. *Texas &c. Railroad Co.*, 124 U. S. 519; *United States* v. *Burchard*, 125 U. S. 176; *Hewitt* v. *Filbert*, 116 U. S. 142; *Radford* v. *Folsom*, 123 U. S. 726; *Sage* v. *Railroad Co.*, 96 U. S. 712; *Vansant* v. *Gas-Light Co.*, 99 U. S. 213; *Railroad Co.* v. *Blair*, 100 U. S. 661.

Mr. D. A. McKnight appeared for Thomas W. Ferry, Hiram Hodgden, John A. Elwell, Frederick A. Nims and Edward P. Ferry, appellees, and, in support of the motions to dismiss, cited: *Hamilton* v. *Moore*, 3 Dall. 371; *Blair* v. *Miller*, 4 Dall. 21; *Veitch* v. *Farmers' Bank*, 6 Pet. 777; *Villabolos* v. *United States*, 6 How. 81; *United States* v. *Curry*, 6 How. 106, 112; *The Virginia* v. *West*, 19 How. 182; *Carroll* v. *Dorsey*, 20 How. 204; *Castro* v. *United States*, 3 Wall. 46; *United States* v. *Gomez*, 3 Wall. 752; *Mussina* v. *Cavazos*, 6 Wall. 355; *Washington* v. *Dennison*, 6 Wall. 495; *Edmonson* v. *Bloomshire*, 7 Wall. 306; *The Lucy*, 8 Wall. 307; *Gillette* v. *Bullard*, 20 Wall. 571, 574; *Caillot* v. *Deetken*, 113 U. S. 215; *Edwards* v. *United States*, 102 U. S. 575; *Grigsby* v. *Purcell*, 99 U. S. 505; *Hilton* v. *Dickinson*, 108 U. S. 165; *The Tornado*, 109 U. S. 110, 117; *State* v. *Demarest*, 110 U. S. 400; *Killian* v. *Clark*, 111 U. S. 784; *Fayolle* v. *Texas &c. Railroad Co.*, 124 U. S. 519; *Deneale* v. *Archer*, 8 Pet. 526; *Miller* v. *McKenzie*, 10 Wall. 582.

Mr. Lyman D. Norris, for appellants in No. 181, opposing, cited: *Wood* v. *Lide*, 4 Cranch, 180; *Bingham* v. *Morris*, 7

Cranch, 99; *Pickett* v. *Legerwood*, 7 Pet. 144; *Owings* v. *Tiernan*, 10 Pet. 24; *Van Rensselaer* v. *Watts*, 7 How. 784; *Sparrow* v. *Strong*, 3 Wall. 97; *Edwards* v. *United States*, 102 U. S. 575; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Butterfield* v. *Usher*, 91 U. S. 246; *Hilton* v. *Dickinson*, 108 U. S. 165; *Wheeler* v. *Harris*, 13 Wall. 51.

Mr. Willard Kingsley, (with whom was *Mr. James Blair* on the brief,) for intervening defendants Nelson and Soule in Nos. 947 and 1027, appellants, opposing, cited: *Fosdick* v. *Schall*, 99 U. S. 235; *Edwards* v. *United States*, 102 U. S. 575; *Hewitt* v. *Filbert*, 116 U. S. 142; *Radford* v. *Folsom*, 123 U. S. 725.

Mr. Daniel E. Sickles in person, for himself and Stevens, appellants in No. 1074, (with whom were *Mr. T. J. O'Brien* and *Mr. Daniel P. Hays* on the brief,) opposing, cited: *Grigsby* v. *Purcell*, 99 U. S. 505; *Fayolle* v. *Texas Railroad*, 124 U. S. 519, 523; *Fosdick* v. *Schall*, 99 U. S. 235; *Barton* v. *Barbour*, 104 U. S. 126, 134.

Mr. Justice Blatchford delivered the opinion of the court.

These are five appeals taken in a suit in equity brought by Ashbel Green and William Bond, trustees, against the Chicago, Saginaw and Canada Railroad Company, in the Circuit Court of the United States for the Western District of Michigan, for the foreclosure of a mortgage executed to the plaintiffs upon the railroad of that company. The mortgage was given to the plaintiffs, as trustees, to secure 5500 bonds, of $1000 each, issued by the company, and payable to the plaintiffs or bearer.

A decree was made, on June 30, 1882, directing a foreclosure and sale, and referring it to a master to determine the priority of those who claimed to be creditors of the company. On the 6th of November, 1882, the master filed his report, in which he divided the debts and bonds proved before him into four classes. In class A he placed the debts which had a priority over the bonds. The creditors in class A were Thomas M.

Nelson and James B. Soule, for a debt of $25,284.17, of which $12,497.48 had a priority, and was to be paid in full; and Thomas M. Nelson for a debt of $7749.42, of which $3845.20 had a priority, and was to be paid in full. In class B he placed the *bona fide* holders of the bonds as purchasers of them, among whom were Daniel E. Sickles for 163 bonds, amounting to $269,541.26; and Benjamin F. Stevens, for 32 bonds, amounting to $51,247.20. In class C he placed persons who held the bonds as collateral security, and the amount of security so held. Among these was Benjamin Richardson, with a debt of $273,282.87, and collateral security in 200 bonds, amounting to $374,904.

After a hearing on the report of the master, and exceptions thereto, the court, on the 3d of May, 1883, made a decree providing for the distribution of the proceeds of the sale of the mortgaged property which had taken place. After directing the payment of certain expenses and of receiver's certificates, it directed the payment *pro rata*, from the fund remaining, of certain specified bonds as a third class, no greater sum to be paid, where the same were held as security, than sufficient to satisfy the indebtedness for which they were held. In this class the decree named Sickles and Stevens, as owners, for the number of bonds and the amounts severally before mentioned; and Richardson and his assignee, Henry Day, for the debt before mentioned, with the lien on 200 bonds, amounting to the sum before mentioned. The decree then put into a fourth class the debts, above mentioned, to Nelson and Soule, and to Nelson, to be paid *pro rata* from any surplus which should then remain.

On the 12th of July, 1883, Sickles and Stevens were permitted, by an order of the court, to prosecute in their own names an appeal to this court from the decree of May 3, 1883; and by a like order, made on the same day, Richardson and Day were allowed to appeal to this court from the same decree. The appeal bond of Sickles and Stevens was filed in the Circuit Court on September 6, 1883, and that of Richardson and Day on August 14, 1883.

On the 6th of August, 1883, Sickles and Stevens filed in the

Circuit Court a petition alleging that the master, in computing the amount due to various claimants of the bonds other than the petitioners, and who held the bonds as collateral security and not as purchasers, had allowed to them interest to which they were not entitled. The petitioners set forth that they desired a rehearing on the point thus stated, and prayed that, where the error had occurred, there might be a recomputation of the interest, and a return of the overpayment, where distribution had already been made; and that, in the meantime, the master be directed to make no further distribution of the fund; and for such other and further relief as should be equitable and proper.

On a hearing of the matter, the court made an order, on the 1st of September, 1883, adjudging that the master had made an erroneous computation of the interest in the case of bonds held by divers claimants as collateral security, in that he had allowed such claimants all coupons appearing with and attached to the bonds, without regard to the date when they were delivered to the holders, instead of computing interest upon them only from the date of their delivery; and referring it to the clerk of the court to make a computation of the interest on the bonds, from the date of their delivery to the several persons who held them as collateral security. The clerk reported such computation, and stated the amount of the 200 bonds held by Benjamin Richardson, as collateral security, to be $330,725, instead of, as before, $374,904. It also appeared that Richardson and Day had been overpaid $2173.91; and that the Wrought Iron Bridge Company had been overpaid $183.60.

On September 11, 1883, Nelson and Soule were allowed an appeal from the decree of May 3, 1883; and on that day Thomas M. Nelson was also allowed an appeal from the same decree. An appeal bond on each of these two appeals was filed in the Circuit Court on October 15, 1883.

On the 8th of October, 1883, the court, on a further hearing, entered a decree which recited that the cause "came on to be reheard;" and also recited the filing of the petition by Sickles and Stevens for a rehearing, and the making of the reference to the clerk and his report, and stated that it appeared "to

this court that a rehearing should be had, and a correction made in the decree" of May 3, 1883, and, after reciting the provisions of that decree in regard to paying the creditors in the third class, then proceeded to give a new list of the third class, putting down Sickles and Stevens as the owners respectively of the same number of bonds, for the same amounts, as in the decree of May 3, 1883, and the debt of Richardson and Day at the same amount as in that decree, with a lien on 200 bonds, amounting to $330,725, instead of $374,904, as in that decree. It also adjudged that the Wrought Iron Bridge Company had been overpaid $183.60, and Henry Day, assignee of Benjamin Richardson, $2173.91, and that they should severally pay into the court those sums, which should be distributed among the remaining several claimants, in proportions and amounts specified in the decree; among others, to Benjamin F. Stevens, $113.25; to Daniel E. Sickles, $595.66; to J. Bower & Co., $373.93; to John F. Betz, $357.41; to Thomas W. Ferry, $205.02; to Hiram Hodgden, $37.49; to John A. Elwell, $16.93; to Frederick A. Nims, $40.53; and to Edward P. Ferry, $64.32. The decree further provided "that all persons having claims against the fund created by the sale of the mortgaged property herein, whether evidenced by bonds, coupons, or otherwise, shall present the same to this court within five days from the date of this decree, and in default thereof the clerk of this court shall distribute to the parties, respectively, all moneys to which they are entitled hereunder." It further provided "that the decree of May 3, 1883, entered herein, shall stand ratified and confirmed, except as the same is changed and modified by this decree."

On the 17th of November, 1883, Richardson and Day were allowed an appeal from the decree of October 8, 1883. The appeal bond on that appeal was filed in the Circuit Court, November 28, 1883.

The appeal of Richardson and Day from the decree of May 3, 1883, and their appeal from the decree of October 8, 1883, are together known as No. 181. There is no other appeal but theirs, from the decree of October 8, 1883. The appeal of Nelson and Soule from the decree of May 3, 1883, is No. 947;

the appeal of Nelson from that decree is No. 1027; and the appeal of Sickles and Stevens from that decree is No. 1074.

Motions are now made, in the four cases, by John Bower & Co., and John F. Betz, to dismiss the two appeals in No. 181, and the other three appeals, on the grounds, that the transcript of the record was not filed, and the cause was not docketed, in this court at the term thereof next after the time when the appeals respectively were prayed and allowed; and that no citations were issued on any of the appeals. A motion is also made by T. W. Ferry, Hodgden, Elwell, Nims, and E. P. Ferry, to dismiss the four appeals from the decree of May 3, 1883, for want of jurisdiction, and also for want of due prosecution, because they were not lodged, or filed, or docketed, in this court during the term next succeeding the date of their allowance; and to dismiss the appeal, in No. 181, from the decree of October 8, 1883, for want of jurisdiction, because the amount involved is less than $5000; and to dismiss the appeals in Nos. 947 and 1027, for want of citations; and to dismiss all five of the appeals, because the appellees are not described in them with certainty.

As to Nos. 947, 1027 and 1074, the appeal in each is from the decree of May 3, 1883. In Nos. 947 and 1027, the appeals were allowed by an order of court, made in open court, on the 11th of September, 1883; and in No. 1074, by an order of court, made in open court, on the 12th of July, 1883. In No. 947, the transcript of the record was filed, and the case docketed, in this court, January 26, 1888; in No. 1027, June 26, 1888; and in No. 1074, August 30, 1888. The term of this court next ensuing the allowance of the several appeals in Nos. 947, 1027 and 1074, from the decree of May 3, 1883, was the October Term, 1883. That term commenced on the 8th of October, 1883, and ended on the 5th of May, 1884. The transcript of the record filed in all five of the appeals is certified by the clerk of the Circuit Court by a certificate bearing date October 4, 1884. The same transcript of the record is filed in all of the appeals. The transcript left the office of the clerk of the Circuit Court on October 6, 1884, and was sent by express, and reached the clerk of this court on October 10, 1884;

but no step was taken by any of the parties appellant, in No. 947, No. 1027, or No. 1074, to furnish security to the clerk for the payment of his fees, under § 1 of Rule 10 of this court, or to have the transcript filed, or the case docketed, or an appearance entered, at the term of this court next after the allowances of the appeals, to wit, the October Term, 1883.

The rule being well settled that this court will not entertain an appeal where the transcript of the record is not filed in this court at the term next succeeding the taking of the appeal, *Credit Co.* v. *Arkansas Central Railway Co.*, 128 U. S. 258, 259, and cases there cited, unless a recognized satisfactory excuse for the laches is made, it is sought in these cases to show such excuse by the following facts: In October, 1883, the appellants Richardson and Day as one party, Sickles and Stevens as one party, and Nelson and Soule and Thomas M. Nelson as one party, gave to the clerk of the Circuit Court a joint verbal order to make a transcript of the record without unnecessary delay, and forward it to the clerk of this court, the three parties to pay to the former clerk the fees therefor *pro rata*, according to the amounts of their respective claims. After such order to the clerk, the appeal of Richardson and Day from the decree of October 8, 1883, was taken. The clerk did not know that each appeal was a separate matter, but believed that all the appeals made but one case, and that, if the record should reach this court in time for any one appeal, it would bring up the case as a whole, with all the appeals; and he understood and believed, while he was copying the record, that if the transcript should arrive at the office of the clerk of this court on or before October 15, 1884, it would be in ample time to make all of the appeals valid, on the filing and docketing of the transcript. The clerk prepared the transcript as soon as he could, having regard to the other duties of his office and to the size of the record, (which makes 1235 printed pages, as printed here). He did not complete the making of the transcript until about June 24, 1884, and forwarded it by express to the clerk of this court on October 6, 1884. These facts are supported by an affidavit of the clerk, and by one of the solicitor for Nelson and Soule, to the same effect.

We cannot admit the validity of this excuse, in regard to the three appeals in question. All suitors in this court are bound by its written rules, and its practice and decisions are established and known. The same ruling must apply to the appeal in No. 181, from the decree of May 3, 1883. That appeal was allowed July 12, 1883. The transcript of the record was not certified until October 4, 1884, and did not reach the hands of the clerk of this court until October 10, 1884, all of which occurred after the expiration of the October Term, 1883, of this court. That appeal therefore fails, with the other three.

But the appeal in No. 181, of Richardson and Day, from the decree of October 8, 1883, was allowed on November 17, 1883, after the commencement of the October Term, 1883, of this court. It was, therefore, returnable to the October Term, 1884, of this court. The transcript, as before stated, was put into the hands of the clerk of this court, in his office, on the 10th of October, 1884. The counsel for Day and Richardson took no further step in the matter until September 25, 1885, when he wrote to the clerk of this court, desiring his appearance to be entered for them. After some further correspondence, the counsel was informed by the clerk that, although the latter had received the record in October, 1884, the appeals had not been docketed, because the rule as to a deposit for costs (Rule 10) and that as to the entry of appearance (Rule 9) had not been complied with. On a compliance with such rules, and on the 26th of October, 1885, the case was docketed, and an appearance for Richardson and Day was entered.

The principle applicable to such a state of facts is that established by the decision in *Edwards* v. *United States*, 102 U. S. 575. In that case, a writ of error was issued, returnable at October Term, 1877. A transcript of the record was lodged in the office of the clerk of this court in September, 1877, but by an oversight of the counsel for the plaintiff in error no fee bond was given, and the cause was not docketed during October Term, 1877. In September, 1878, an acceptable fee bond was given, and the cause was formally docketed. A motion was made, at October Term, 1880, to dismiss the writ of error. This

court denied the motion, and said (p. 576): "We are aware that in some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed and the cause docketed during the term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should therefore be construed in connection with those facts. In *Owings* v. *Tiernan's Lessee*, 10 Pet. 447, and *Van Rensselaer* v. *Watts*, 7 How. 784, leave was given to docket the cause after the term, when the transcript had been filed in time, but through inadvertence a fee bond had not been given and there had not been in the meantime a motion to docket and dismiss. That is this case. . . . If a return is made and the transcript deposited in the clerk's office in time, our jurisdiction is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rest largely in the discretion of the court, when not provided for by rules. Rule 9 is of that class."

In the present case, although the transcript of the record in No. 181 was filed and the case was docketed on October 26, 1885, no motion to dismiss was made until the present term; and, under the foregoing views, we are of opinion that the appeal of Richardson and Day from the decree of October 8, 1883, cannot be dismissed on the ground that the case was not actually docketed during October term, 1884.

One ground urged for dismissing the appeal of Richardson and Day from the decree of October 8, 1883, is that, although that appeal was allowed by an order of court, made in open court on the 17th of November, 1883, at the same term at which the decree of October 8, 1883, was entered, yet the bond given to perfect such appeal was approved by the district judge on November 28, 1883, apparently out of court, although filed in the court on that day; and that, under these circumstances, a citation to the appellees was necessary, and none appears ever to have been issued.

As the appeal in question was allowed in open court, during

the term at which the decree appealed from was rendered, and that appeal was perfected by the filing in due time of a bond duly approved, and the transcript of the record was, as we have held, duly lodged in this court at the next ensuing term thereof, namely, October Term, 1884, in such manner as to give this court jurisdiction of the case, no citation was necessary, unless the bond was accepted after the term at which the appeal was allowed. In the present case, it does not appear that the appeal bond was accepted in open court, or at or during the term at which the appeal was allowed; and a citation would seem to have been necessary. *Sage* v. *Railroad Co.*, 96 U. S. 712, 715; *Hewitt* v. *Filbert*, 116 U. S. 142, 144; *Brown* v. *McConnell*, 124 U. S. 489, 491.

But, as to a citation, this case falls within the ruling in *Dodge* v. *Knowles*, 114 U. S. 430, 438, where it is said: "The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court, or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished; and this, whether the motion was made after the expiration of two years from the rendition of the decree or before."

In *Hewitt* v. *Filbert*, (*supra*,) it is said (p. 144): "The allowance by the court in session before the end of the term at which the decree was rendered, and when both parties are either actually or constructively present, is in the nature of an adjudication of appeal, which, if docketed here in time, gives this court jurisdiction of the subject matter of the appeal, with power to make all such orders, consistent with the practice of courts of equity, as may be appropriate and necessary for the furtherance of justice."

But the issuing of a citation may be waived by the appel-

lees; and a general appearance by them is a waiver of a citation. *Alviso* v. *United States*, 5 Wall. 824; *Sage* v. *Railroad Co.*, 96 U. S. 712, 715. In No. 181 a general appearance for the appellees, T. W. Ferry, Hodgden, Elwell, Nims and E. P. Ferry, was entered in this court on January 11, 1889. As to John Bower & Co. and John F. Betz no general appearance for them has been entered in No. 181, but only, on January 14, 1889, an appearance specially for the making of the motion by them. This is not a waiver of a citation.

Under these circumstances, a citation will be issued by this court, on the appeal in No. 181 by Richardson and Day from the decree of October 8, 1883, to the appellees in that appeal who have not entered here a general appearance in No. 181, returnable at the next term of this court, unless the issuing of such citation shall be duly waived on the part of such appellees.

It is also urged, in the motion made by Thomas W. Ferry and others to dismiss the appeal in No. 181 from the decree of October 8, 1883, that this court has no jurisdiction of it, because the amount involved is not more than $5000. The ground urged is, that the amount involved, so far as that appeal by Richardson and Day is concerned, is only $2173.91, which is the amount that Day, as assignee of Richardson, was directed to pay into court as having been overpaid on his claim.

It appears by the master's report that he disallowed the claim of Richardson as pledgee or purchaser of 400 bonds other than the 200 bonds the claim to which was allowed to Richardson. The amount of money involved in the claim of Richardson and Day to these 400 bonds largely exceeds the sum of $5000. This claim is fairly brought up by their appeal from the decree of October 8, 1883, because that decree contains an express provision "that the decree of May 3, 1883, entered herein, shall stand ratified and confirmed, except as the same is changed and modified by this decree."

Moreover, the Circuit Court, by reason of the petition of Sickles and Stevens for a rehearing, and by reason of the rehearing which was had, did not lose its hold upon the fund to be distributed, nor part with its control of the cause, until

the decree of October 8, 1883, was made, so far as claims against the fund created by the sale of the mortgaged property were concerned. That decree contained a provision that persons having claims against such fund, whether evidenced by bonds, coupons, or otherwise, should present the same to the court within five days from the date of that decree, and that, in default thereof, the clerk should distribute to the parties the moneys in his hands.

These provisions save the appeal of Richardson and Day from the decree of October 8, 1883, as to amount, and enable them to have adjudicated by this court, on the hearing of that appeal, at least their claim in respect of the 400 bonds not allowed to them.

It is also objected, on the motion to dismiss made by Thomas W. Ferry and others, that, in the order of November 17, 1883, allowing an appeal to Richardson and Day from the decree of October 8, 1883, the appellees are not named, but it is stated only that "the other parties of said cause, original and intervening, (as appearing in the said final decree,)" are "appellees." But the bond on such appeal, filed November 28, 1883, is given to the clerk of the Circuit Court for the use and benefit of twenty-five appellees, naming them, and among them are by name the five appellees by whom the motion on that ground is made. We think the objection is not a good one.

It results from these views that the appeals in No. 947, *No.* 1027 *and No.* 1074 *must be dismissed; that the appeal in No.* 181 *from the decree of May* 3, 1883, *must be dismissed; and that the motion to dismiss the appeal of Richardson and Day, in No.* 181, *from the decree of October* 8, 1883, *must be granted, unless the appellants therein shall procure to be issued and served on the appellees therein a citation from this court, in the terms before set forth, returnable at the next term thereof, provided the issuing and service of such citation shall not be duly waived; and it is ordered that such citation shall issue, if a request therefor shall be filed with the clerk.*

As Richardson has died since the day these motions were argued, the order to be made will be entered nunc pro tunc, *as of that day, February* 4, 1889.

THOMPSON *v.* HALL.

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

No. 186. Argued March 6, 7, 1889. — Decided March 18, 1889.

Letters patent No. 232,975, granted October 5, 1880, to Henry G. Thompson, as assignee of the inventor, Moses C. Johnson, for an improvement in cutting-pliers, the claim of which is, "The body, composed of the side plates, *a b*, the independent fulcra 2 3 4 5 for the jaw-levers and hand-levers, the jaw-levers provided with cutting edges and with lips *e*, and the hand-levers having short arms *g' h'*, and a prong and notch always in engagement as described, combined with the V-shaped spring, held, as described, by the lips of the jaw-levers, all as and for the purpose set forth," are invalid, because Johnson was not the first inventor of the combination claimed in the patent.

IN EQUITY for infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. Horace Barnard for appellant.

Mr. Amos Broadnax for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of New York, by Henry G. Thompson against Thomas G. Hall, J. F. Oliver, Samuel Leopold and David L. Harris, for the alleged infringement of letters patent No. 232,975, granted October 5, 1880, to the plaintiff, as assignee of the inventor, Moses C. Johnson, for an improvement in cutting-pliers, on an application filed June 2, 1880.

The specification, drawings and claim of the patent are as follows:

"This invention relates to cutting-pliers, and is an improvement on that class of pliers represented in United States patent

No. 209,677, dated November 5, 1878, granted to T. G. Hall, to which reference may be had. In that invention either of the two hand-levers may be turned on its pivot without turning the other, and the tool-body formed by the face or covering plates is permitted to vibrate, or turns more or less, with relation to the handles, and the central space between the cutting-faces of the jaw-levers, when the pliers are taken in the hand to be used, drops more or less out of line with the central line of the handles, making, as it were, a loose joint midway between the ends of the pliers.

Fig. 1.

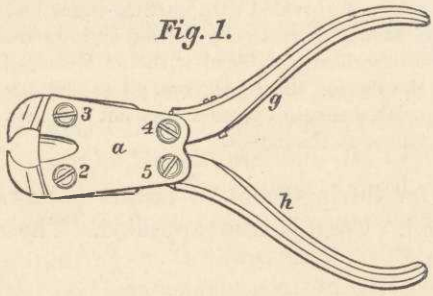
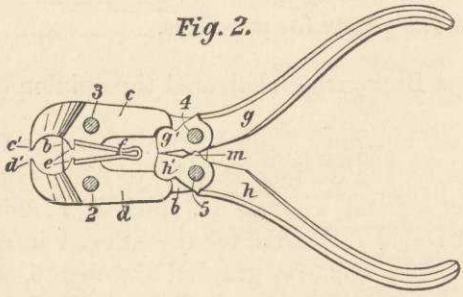


Fig. 2.



"One of the objects of my invention is to construct a stiff pair of pliers, or pliers in which the hand and jaw-levers shall each be compelled to move positively in an opposite direction to the movement of its fellow, or a pair of pliers in which the tool-body shall not of itself swing or vibrate upon the pins or studs holding the hand-levers.

"In the patent above referred to, the end of wire or other thing cut off by the cutters drops into and injures the spring that opens the jaw-levers. This I obviate by providing each jaw-lever with a lip to cover or bridge the space between the jaws, as the jaw-levers are closed.

"My invention consists in the combination and arrangement of parts for effecting these ends, as hereinafter specified and claimed.

"Figure 1 represents, in side elevation, a pair of cutting-pliers containing my improvements; and Fig. 2, a like view with one of the body or side plates removed.

"The body of the pliers is composed of two side plates, *a b*. These side plates are fixed together by the screws 2 3 4 5. Of these screws, those 2 3 are the fulcra of the jaw-levers *c d*, having at their ends the usual cutters or cutting-surfaces *c' d'*. Each of these jaw-levers has a lip *l*, and the end of one meets the end of the other lip just as or just before the two cutting-edges *c' d'* separate the wire or other metal end to be cut off by them, thus closing the space between the said jaw-levers and side plates, in which is placed the spring *f*, and preventing the entrance into said space of hard pieces of wire or other articles that would clog the pliers. These lips also serve another essential purpose — viz., that of holding the ends of the spring from displacement, and obviating the employment of a separate pin or stud to hold the said spring at one end, as heretofore common.

"The screws 4 5 serve as the fulcra for the hand-levers *g h*, having short arms *g' h'*, to act upon the ends of the longer arms of the jaw-levers and turn them on their fulcra to close the jaws and bring the cutting-edges together. The spring *f* opens the jaws the instant the clasping pressure on the hand-levers is relaxed.

"In order to move the jaw-levers equally at all times and prevent the jaw-levers and body of the pliers turning on the handles, I have provided one hand-lever with a prong *m*, having a rounded end that enters a rounded notch in the opposite lever. This one prong and its notch are always in engagement, and so connect the two levers that the body of the pliers

cannot vibrate on the screws 4 5, but, on the contrary, the two levers may turn each on its own pivot, both levers always turning the same distance, but in exactly opposite directions. This connection between the two hand-levers, as described, insures a stiff pair of pliers, that can be handled more readily and accurately than the old form of cutting-pliers referred to, and which are more positive as to the movement of the cutting-jaws.

"I am aware, in bolt-cutters, where the short ends of the hand-levers are jointed with the long ends of the cutting-jaw levers, that a series of teeth or cogs have been interposed to cause the hand-levers to be geared together; but in such bolt-cutters one single tooth and notch would not operate to always keep the two hand-levers locked together as to their movement in unison, as is the case with my one prong, *m*, rounded at its end and inserted within a rounded notch. I claim —

"The body, composed of the side plates, *a b*, the independent fulcra 2 3 4 5 for the jaw-levers and hand-levers, the jaw-levers provided with cutting-edges and with lips *e*, and the hand-levers having short arms *g' h'*, and a prong and notch always in engagement, as described, combined with the V-shaped spring, held, as described, by the lips of the jaw-levers, all as and for the purpose set forth."

One of the defences set up in the answer is, that Johnson and Thompson surreptitiously obtained the patent in fraud of the rights of the defendants; that the defendants are trustees and directors of a New York corporation, known as the Interchangeable Tool Company; that that corporation was organized in August, 1878, for the purpose of manufacturing cutting-pliers or nippers, under letters patent No. 209,677, granted to the defendant Hall, November 5, 1878; that Hall invented certain improvements upon such pliers, and immediately described and explained them to the officers of the company; that the company thereupon caused a model of them to be made, embracing such improvements; that Johnson was employed to make such model pliers for the company, and made them for the company while in its employ, and under the direction of Hall; that Johnson was in the employ of the company, in making such pliers, from April 20, 1879, until May 1, 1880,

during which time the company made and sold upwards of 30,000 of such pliers, with the knowledge and consent of Johnson, and without any objection on his part, and without notice that he claimed to be the inventor of the whole or any part of such pliers, or intended to apply for a patent for the same; that Hall was the first and original inventor of said original cutting-pliers and of said improvements thereon, and assigned to the company the whole of the patent of November 5, 1878, immediately on its issue, and also the whole of the said improvements upon such cutting-pliers; that Johnson, after so being in the employ of the company for one year, was dismissed from its service, and thereupon, as the result of a conspiracy between Thompson, Johnson and one Gustam, Johnson falsely claimed that he was the first and original inventor of said improvements, and applied for a patent therefor, and sold his pretended claim to the invention to Thompson; and that Johnson, without the knowledge of Hall, or of the other defendants, or of the company, applied for a patent for said improvements, falsely alleging that he was their first and original inventor, and surreptitiously obtained said patent, No. 232,975, for said invention of Hall, and for an improvement upon the pliers so patented November 5, 1878.

There was a replication to this answer, proofs were taken, and the Circuit Court entered a decree dismissing the bill, from which the plaintiff has appealed. In its opinion (25 Fed. Rep. 906) the Circuit Court stated, that the question at issue was whether the combination covered by the claim of the plaintiff's patent was invented by Johnson while he was an employé of the corporation; that the plaintiff had sought to prove that a model produced by him, known as Exhibit C, was made by Johnson while he was in the employ of the company; that, on the other hand, the defendants had sought to prove that that model was not made by Johnson while he was employed by the company, but after he had been discharged from its employ, and for the purpose of supporting a fraudulent claim to an invention really made by Hall, and which claim had been put forth by Johnson for the first time after he had been discharged from the service of the company; and that, upon a

full consideration of all the evidence, the conclusion of the court was, that Exhibit C was not made while Johnson was a workman for the company, but was made subsequently to his leaving its employment, and that he was not the first inventor of the combination claimed in the patent issued to the plaintiff.

The testimony is voluminous and contradictory, and, without discussing it, it is sufficient to say that we are of opinion that the evidence establishes the conclusion reached by the Circuit Court, and that the decree must be affirmed; and it is so ordered.

Affirmed.

MOORE *v.* CRAWFORD.

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

No. 700. Submitted January 2, 1889. — Decided March 18, 1889.

In January, 1875, a patent issued from the state land office in Michigan for 160 acres of mineral land to McDonald and McKay, who furnished the money for it. The application was made by Moore in their behalf, and under an agreement which the court finds to be established by the proof as made (but not as made in writing) that he was to have one third interest in it in consideration of his services in prospecting. On the 18th of October, 1875, Moore, being then unmarried, executed and delivered a deed of one sixth interest in the tract to Monroe for a valuable consideration, informing him that he (Moore) was to have a deed of one third part from McDonald and McKay, which was probably at that time made out. McDonald and McKay executed their deed to Moore some time in 1875, and deposited it with a third party to be delivered when a debt due from Moore to McDonald should be settled, which was done in 1877. Moore did not know of the existence of this deed, and it was subsequently lost. On the 16th of December, 1880, at Moore's request, and for the avowed purpose of defeating his deed to Monroe, McDonald and McKay conveyed the promised one third interest to the wife of Moore, he having been in the meantime married, and the wife having knowledge of the deed to Monroe, and of the object of the conveyance to her. Moore then entered into possession, and managed the property as if it were his own. Monroe died intestate in Colorado in 1878, and his widow moved into Canada. In the summer of 1871 she first learned that Moore disputed Monroe's title. She wrote him a letter informing him of the claim of the widow and heirs of Monroe to one

Statement of the Case.

sixth part of it, which he received in the fall of 1881, or in the spring of 1882. February 8, 1882, the widow and heirs commenced this suit to compel a conveyance of the one sixth interest to them; *Held:*

(1) That the transaction must be regarded in equity as if McDonald and McKay had conveyed to Moore, and Moore had conveyed to his wife, she holding one half of the interest conveyed to her, being one sixth of the whole, in trust for Monroe and his heirs;

(2) That Moore was guilty of a fraud in preventing the conveyance to himself which would have inured to the benefit of Monroe, and that his wife, by accepting with knowledge, became a party to it;

(3) That the fact that McDonald and McKay could not have been compelled to convey to Moore because of the want of written evidence of their agreement to do so does not entitle Mrs. Moore to invoke the Statute of Frauds as a defence, they having kept their faith with Moore by conveying under his directions;

(4) That treating Moore's deed as a covenant to convey to Monroe, he would have been precluded from denying the title if the deed of McDonald and McKay had been made directly to him; and that this was not changed by the interposition of a third person, who took without consideration and in order to enable the fraud to be carried into effect;

(5) That the fraud was of such character as to enable a court of equity to decree the relief as against the covenantor, not only under his own name, but under the name of his wife;

(6) That as the contract was binding at the time of Monroe's death, his heirs had the right to compel specific performance;

(7) That there was no sufficient proof that the deed of Moore to Monroe was set aside by consent, and the purchase abandoned by Monroe;

(8) That the defence of laches, if available at all, was not made out;

(9) That the allegations of the bill as amended were sufficient to support the decree.

The case, as stated by the court in its opinion, was as follows: —

Appellees, the widow and heirs of John Monroe, deceased, filed their bill against Nathaniel D. Moore and Helen Moore, to compel a conveyance of the one undivided sixth part of one hundred and sixty acres of mineral land in Ontonagon County, Michigan, which had been located by Nathaniel D. Moore, under an agreement with James H. McDonald and John McKay, that Moore should have a one third interest in consideration of his services in prospecting for land having iron ore, and selecting and locating that in question. It was upon Moore's application that the patent was issued from the state

land office at Lansing, in January, 1875, to McDonald and McKay, the purchase money being furnished by them and paid over by him.

By the testimony of Moore and McKay it was established that Moore was to have a one third interest, while McDonald admitted that he was to have an interest, but was uncertain whether it was to be one third or one fourth.

One McIntyre testified that the agreement between Moore, McDonald and McKay was in writing, and signed in his presence by McDonald and McKay, but he was not sure whether Moore signed it or not. The execution of such an agreement was denied, and the Circuit Court considered McIntyre's testimony too indefinite as to its terms to warrant proceeding upon it.

On the 18th day of October, 1875, Moore, who was then unmarried, executed and delivered to John Monroe a deed in fee simple, with covenants of seizin, against incumbrances, and of general warranty, for an undivided one sixth interest in said lands, which was duly recorded December 20, 1875. The consideration was two hundred and fifty dollars, of which Monroe paid ten dollars in cash, and for the residue gave his promissory note to Moore, payable one year after its date. Moore informed Monroe at the time, that he had arranged with McDonald and McKay for a one third interest, and that the deed was then probably made out.

Pursuant to their agreement McDonald and McKay, some time in 1875, executed a deed to Moore for a one third interest in the land, which was deposited with one Viele to be delivered to Moore when McDonald and McKay should direct. McDonald testified that Moore was indebted to him, and he wished delivery delayed until the debt was arranged and satisfied, which was finally effected in 1877. Moore does not seem to have known about the execution of this deed, and it appears to have been subsequently lost. McDonald and McKay never denied Moore's right to his interest, but always admitted it, and McDonald testifies that it was understood that Moore should have the interest any time he called for it. In December, 1880, McDonald and McKay conveyed an un-

Citations for Appellants.

divided one third interest in the land to Helen Moore, wife of N. D. Moore, who requested the conveyance to be made to his wife for the express purpose, as he admitted, of defeating the deed he had previously given to Monroe for one sixth of the land. Monroe died intestate in Colorado in August, 1878, and Moore, knowing that his deed to Monroe had been recorded, expected Mrs. Monroe would make trouble. No consideration passed when McDonald and McKay executed and delivered this conveyance, and Mrs. Moore was not present when it was executed, but she had been informed by her husband that it was to be made to her, and had full notice of his deed to Monroe. Since the conveyance to Helen Moore, N. D. Moore has substantially managed the property as if it were his own.

Further reference to the pleadings and evidence is made in the opinion.

Hearing having been had upon bill as amended, answer, replication and proofs, the Circuit Court, Judge Sage presiding, delivered its opinion, which is reported in 28 Fed. Rep. 824, and decree was thereupon entered for conveyance to complainants as prayed, and for rents and profits from the date of the filing of the bill, less the amount due on the two hundred and forty dollar note, from which decree this appeal was prosecuted. Mrs. Moore having died pending the appeal, Nathaniel D. Moore, Jr., her sole heir at law, and John McKay, administrator of her estate, were made co-appellants with Nathaniel D. Moore.

Mr. Daniel H. Ball and *Mr. Irving D. Hanscom*, for appellants, cited: *Piatt* v. *Vattier*, 9 Pet. 404; *Bumpus* v. *Bumpus*, 53 Mich. 346; *Whiting* v. *Butler*, 29 Mich. 122; *Trask* v. *Green*, 9 Mich. 358; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Palmer* v. *Sterling*, 41 Mich. 218; *Weare* v. *Linnell*, 29 Mich. 224; *Garfield* v. *Hatmaker*, 15 N. Y. 475; *Everett* v. *Everett*, 48 N. Y. 218; *Stebbins* v. *Morris*, 23 Fed. Rep. 300; *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 429; *Lantry* v. *Lantry*, 51 Illinois, 458; *Walker* v. *Hill*, 21 N. J. Eq. 191; *Hoge* v. *Hoge*, 1 Watts, 163; *S. C.* 26 Am. Dec. 52; *Peckham* v. *Balch.*

Citations for Appellants.

49 Michigan, 179; *Scott* v. *Bush*, 26 Michigan, 418; *Raub* v. *Smith*, 61 Michigan, 543; *Glass* v. *Hurlbert*, 102 Mass. 24; *Dung* v. *Parker*, 52 N. Y. 494; *Hutchins* v. *Hutchins*, 7 Hill, 104; *King* v. *Morford*, Saxton (1 N. J. Eq.) 274; *Maxfield* v. *Terry*, 4 Delaware Ch. 618; *Truesdail* v. *Ward*, 24 Michigan, 465; *Peake* v. *Thomas*, 39 Michigan, 584; *Cox* v. *Cox*, 26 Penn. St. 375; *S. C.* 67 Am. Dec. 432; *Bomier* v. *Caldwell*, 8 Michigan, 463; *Texas* v. *Hardenberg*, 10 Wall. 68.

Mr. John F. Dillon, for appellants, cited: *Aveling* v. *Knipe*, 19 Ves. 441; *Bartlett* v. *Pickersgill*, 1 Eden, 515 (*semble*); *Smith* v. *Garth*, 32 Alabama, 368; *McCue* v. *Gallagher*, 23 California, 51; *Loomis* v. *Loomis*, 28 Illinois, 454; *Hubble* v. *Osborn*, 31 Indiana, 249; *Jackson* v. *Stevens*, 108 Mass. 94; *Gibson* v. *Foote*, 40 Mississippi, 788; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Trask* v. *Green*, 9 Mich. 358, 366; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Newton* v. *Sly*, 15 Mich. 391; *Whiting* v. *Butler*, 29 Mich. 122; *Brown* v. *Bronson*, 35 Mich. 415; *Palmer* v. *Sterling*, 41 Mich. 218; *Shafter* v. *Huntington*, 53 Mich. 310; *Emmet* v. *Dewhurst*, 3 McN. & Gord. 587; *Horn* v. *Ludington*, 32 Wisconsin, 73; *Johnston* v. *Glancy*, 4 Blackford (Ind.) 94; *S. C.* 28 Am. Dec. 45; *Purcell* v. *Miner*, 4 Wall. 513; *Williams* v. *Morris*, 95 U. S. 444; *Webster* v. *Gray*, 37 Michigan, 37; *Edwards* v. *Estell*, 48 California, 194; *Stanton* v. *Miller*, 58 N. Y. 192; *Beller* v. *Robinson*, 50 Michigan, 264; *Dean* v. *Dean*, 6 Conn. 285; *Ratliff* v. *Ellis*, 2 Iowa, 59; *S. C.* 63 Am. Dec. 471; *Irwin* v. *Ivers*, 7 Ind. 308; *S. C.* 63 Am. Dec. 420; *Bumpus* v. *Platner*, 1 Johns. Ch. 213; *Peckham* v. *Balch*, 49 Mich. 179; *Blodgett* v. *Hildreth*, 103 Mass. 484; *Jackson* v. *Cleveland*, 15 Mich. 94; *S. C.* 90 Am. Dec. 266; *Morrall* v. *Waterson*, 7 Kansas, 199; *Philbrook* v. *Delano*, 29 Maine, 410; *Gerry* v. *Stimson*, 60 Maine, 186; *Walker* v. *Locke*, 5 Cush. 90; *Bartlett* v. *Bartlett*, 14 Gray, 277; *Titcomb* v. *Morrill*, 10 Allen, 15; *Gould* v. *Lynde*, 114 Mass. 366; *Graves* v. *Graves*, 29 N. H. 129; *Farrington* v. *Barr*, 36 N. H. 86; *Moore* v. *Moore*, 38 N. H. 382; *Hogan* v. *Jaques*, 4 C. E. Green (19 N. J. Eq.) 123; *S. C.* 97 Am. Dec. 644; *Jackson* v. *Garnsey*, 16 Johns. 189; *Sturtevant* v. *Sturte-*

Citations for Appellees.

vant, 20 N. Y. 39; *S. C.* 75 Am. Dec. 371; *Whiting* v. *Gould*, 2 Wisconsin, 552; *Rasdall* v. *Rasdall*, 9 Wisconsin, 379; *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Kimball* v. *Harman*, 34 Maryland, 407; *Heywood* v. *Tillson*, 75 Maine, 225; *Day* v. *Lown*, 51 Iowa, 364; *Bell* v. *Johnson*, 111 Illinois, 374; *Johnston* v. *LaMotte*, 6 Rich. Eq. 347; *Tuite* v. *Miller*, 10 Ohio, 382; *Tallman* v. *Green*, 3 Sandf. (N. Y.) 437; *Kitchell* v. *Mudgett*, 37 Michigan, 81; *Childs* v. *McChesney*, 20 Iowa, 431; *S. C.* 89 Am. Dec. 545; *Shaffner* v. *Grutzmacher*, 6 Iowa, 137; *Wadleigh* v. *Glines*, 6 N. H. 17; *S. C.* 23 Am. Dec. 705; *Wales* v. *Coffin*, 13 Allen, 213; *Raymond* v. *Holden*, 2 Cush. 264; *Wright* v. *DeGroff*, 14 Michigan, 164; *Jackson* v. *Wright*, 14 Johns. 193; *Clark* v. *Baker*, 14 California, 612; *S. C.* 76 Am. Dec. 449; *Emery* v. *Wase*, 8 Ves. 505; *Weed* v. *Terry*, 2 Doug. (Mich.) 344; *S. C.* 45 Am. Dec. 257; *Duvall* v. *Craig*, 2 Wheat. 45; *Buckmaster* v. *Harrop*, 7 Ves. 341; *Broome* v. *Monck*, 10 Ves. 597.

Mr. T. L. Chadbourne and *Mr. L. H. Boutelle*, for appellees, cited: *Irvine* v. *Irvine*, 9 Wall. 617; *Van Rensselaer* v. *Kearney*, 11 How. 297; *House* v. *McCormick*, 57 N. Y. 310; *Bush* v. *Person*, 18 How. 82; *Smith* v. *Williams*, 44 Mich. 242; *D' Wolf* v. *Haydn*, 24 Illinois, 525; *Tefft* v. *Munson*, 57 N. Y. 97; *Smith* v. *Baker*, 1 Young & Coll. 223; *Chew* v. *Barnet*, 11 S. & R. 389; *Way* v. *Arnold*, 18 Georgia, 181; *Goodson* v. *Beacham*, 24 Georgia, 150; *Huxley* v. *Rice*, 40 Michigan, 73; *Parkist* v. *Alexander*, 1 Johns. Ch. 394; *Byrne* v. *Rood*, 54 Michigan, 67; *Barber* v. *Milner*, 43 Michigan, 248; *Patten* v. *Chamberlain*, 44 Michigan, 5; *Newman* v. *Nellis*, 97 N. Y. 285; *Urann* v. *Coates*, 109 Mass. 581; *Carroll* v. *Hart*, 85 Penn. St. 508; *Parrill* v. *McKinley*, 9 Gratt. 1; *S. C.* 58 Am. Dec. 212; *Bowles* v. *Woodson*, 6 Gratt. 78; *Jenkins* v. *Harrison*, 66 Alabama, 345; *Campbell* v. *Thomas*, 42 Wisconsin, 437; *Thayer* v. *Luce*, 22 Ohio St. 62; *Mundy* v. *Foster*, 31 Mich. 313; *Shakespeare* v. *Markham*, 10 Hun, 311; *Kent* v. *Lasley*, 24 Wisconsin, 654; *McClellan* v. *Sanford*, 26 Wisconsin, 595; *Harter* v. *Christoph*, 32 Wisconsin, 245; *Kercheval* v. *Doty*, 31 Wisconsin, 476; *Pringle* v. *Dunn*, 37 Wisconsin, 449; *Howland* v. *Blake*, 97 U. S. 626.

Opinion of the Court.

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

Had the conveyance of McDonald and McKay, lodged in Viele's hands, been actually delivered to Moore, no question would have arisen; but that deed having been suppressed or lost, when Moore subsequently induced McDonald and McKay to convey to his wife, for the avowed purpose of avoiding the deed he had given Monroe, Moore's wife being fully advised of the purpose and paying no consideration for the conveyance, the transaction must be regarded in equity as if McDonald and McKay had conveyed to Moore and Moore had conveyed to his wife, she holding in trust for Monroe and his heirs one half of the interest conveyed to her namely, one sixth of the whole.

"Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." 1 Story Eq. Jur. § 187.

Whenever the legal title to property is obtained through means or under circumstances "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust." Pomeroy Eq. Jur. § 1053.

In *Huxley* v. *Rice*, 40 Michigan, 73, 82, it is said: "It is the

settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party deriving title under it will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief; and the setting up the Statute of Frauds by a party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects." The fraud of which Moore was guilty was in preventing the conveyance to himself, which would have inured to Monroe, and in obtaining it to his wife, so as to reap the benefit which belonged to his grantee. Mrs. Moore stands in her husband's shoes, and by accepting with knowledge is to be treated as a party to his fraud and profiting by it, or as a mere volunteer, assisting him to perpetrate the fraud and to profit by it, and is hence to be held, as he could have been, a trustee *ex maleficio*. Nor do we see that the Statute of Frauds can be invoked as a defence. The fact that McDonald and McKay could not have been compelled to convey to Moore, because of the want of written evidence of their agreement to do so, does not entitle Mrs. Moore to object that they were not legally bound to do what they were morally, they having kept their faith with Moore by conveying under his directions. If McDonald and McKay had violated their agreement with Moore, and in furtherance of such violation had conveyed to a stranger, such grantee might have defended, even though cognizant of the verbal agreement of McDonald and McKay to convey to Moore; but McDonald and McKay never repudiated their obligation to Moore, and conveyed as he directed, thereby, so far as he was concerned, carrying out the trust upon which they held one third of the land.

There is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally, bound to do a certain act or thing, upon the act or thing being done, to

recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not, by reason of some technical rule of law, have been enforced by action." *Newman* v. *Nellis*, 97 N. Y. 285, 291; *Patten* v. *Chamberlain*, 44 Michigan, 5; *Barber* v. *Milner*, 43 Michigan, 248.

Mrs. Moore did not take as a stranger would have taken, but took in execution of the agreement with her husband. Clearly, then, she cannot be permitted to set up a statutory defence personal to McDonald and McKay, who could not, in fulfilling their agreement, transfer an excuse for non-fulfilment.

It is undoubtedly the rule that the breach of a parol promise or trust as to an interest in land does not constitute such fraud as will take a case out of the statute. *Montacute* v. *Maxwell*, 1 P. Wms. 618, 620; *Rogers* v. *Simons*, 55 Illinois, 76; *Peckham* v. *Balch*, 49 Michigan, 179; but here McDonald and McKay did not fail to perform their promise, and when they performed, their grantee took one half of the one third, charged with a trust to hold it for Monroe by reason of the deed of Moore to Monroe, under the covenants of which Moore was equitably bound, when he acquired the title, to hold it for Monroe's benefit. That deed contained a general covenant of warranty.

In *Irvine* v. *Irvine*, 9 Wall. 617, 625, Mr. Justice Strong, speaking for the court, said: "It is a general rule that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee, on the principle of estoppel;" and in *Van Rensselaer* v. *Kearney*, 11 How. 297, it was pointed out that it is not always necessary that a deed should contain covenants of warranty to operate by way of estoppel upon the grantor from setting up the after-acquired interest against his grantee, the court saying (p. 325): "that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to con-

vey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies."

The rule is thus stated in *Smith* v. *Williams*, 44 Michigan, 242: "It is not disputed that a deed with covenants of seizin and title would be effectual to give the grantee the benefit of an after-acquired title, under the doctrine of estoppel, but these covenants were absent from the deed in question, and the covenant of quiet enjoyment, it is said, would not have a like effect. No reason is given for any such distinction, and it is not recognized by the authorities. When one assumes, by his deed, to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenants for redress; the short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance; this is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given."

Conceding that a covenant of general warranty operates by way of rebutter to preclude the grantor and his heirs from setting up an after-acquired title rather than to actually transfer the new estate itself, the subsequent acquisition creates an equity for a conveyance in order to make the prior deed effectual. *Noel* v. *Bewley*, 3 Sim. 103, 116; *Smith* v. *Baker*, 1 Younge & Col. Ch. 223.

In *Mc Williams* v. *Nisly*, 2 S. & R. 507, 515, Tilghman, C. J., said that equity will enforce a covenant to convey an estate whenever it shall be acquired by the covenantor, and that the case is not the less strong where there is an absolute conveyance; and this is cited by Strong, J., in *Bayler* v. *Common-*

wealth, 40 Penn. St. 37, 43, wherein it is held that "though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration." So Gibson, J., in *Chew* v. *Barnet*, 11 S. & R. 389, 392, says, "In the case of a conveyance before the grantor has acquired the title, the legal estate is not transferred by the statute of uses, but the conveyance operates, as I have said, as an agreement, which the grantee is entitled to have executed in chancery, as was decided in *Whitfield* v. *Fausset*, 1 Ves. Sen. 387, 391."

In *Way* v. *Arnold*, 18 Georgia, 181, 193, Pyncheon, having no title, sold to Way with warranty, and subsequently acquiring title, sold to Arnold. It was held that "if Pyncheon, upon consideration, conveyed this subsequently acquired interest, and such was his intention, equity will decree a title to the after-acquired estate, and the second grantee, Arnold, provided he purchased with notice, would be affected by said notice, and could not conscientiously hold the land in dispute."

In *Goodson* v. *Beacham*, 24 Georgia, 150, Mims by warranty deed conveyed to Beacham, Mims having no title at the time, but subsequently acquiring it; Goodson claimed title under an execution sale; and the court say (p. 153): "Mims, when he made the deed to Beacham, had no title, but his deed was an attempt to convey the fee, and it was a deed with a warranty. This shows, first, that it was the *intention* that the *land*, the *whole* interest in the land, should be conveyed to Beacham; secondly, that Beacham had paid the purchase-money. Such being the intention, the consequence would be, that if Mims should afterwards acquire the title, he would be bound to convey it to Beacham, as much so as if the contract were one standing in the form of a bond for titles. Perhaps this would be the consequence, even without the warranty. *Taylor* v. *Debar*, 2 Cas. in Ch. 212; 1 Id. 270; *Wright* v. *Wright*, 1 Ves. Sen. 409; *Noel* v. *Bewley*, 3 Sim. 103; *Smith* v. *Baker*, 1 Younge & Col. Ch. 223; *Jones* v. *Kearney*, 1 Dr. & Walsh, 159, cited in note, 2 Rawle Cov. 438; Sug. Vend. 33, c. 8, § 2; Rawle Cov. 448."

Treating his deed as a covenant to convey, Moore would

have been precluded from denying the title, if the deed of McDonald and McKay had been made directly to him; and if, this being so, he could not call in question his own grant, he could not, by interposing a third person, taking without consideration and to enable the fraud to be carried into effect, in that way defeat it. It was the duty of Moore to take the conveyance for the benefit of Monroe, and Monroe had the right to the enforcement of that duty in equity, in view of the fraudulent device by which Moore attempted to avoid its discharge. The fraud was of such character as enables a court of equity to decree the relief as against the covenantor, not only under his own name but under the name of his wife; and it will not do, under such circumstances, to say that Monroe is remitted to an action for damages for breach of the covenant of warranty, because Moore not only had no title at the time but never afterwards acquired title; for when the conveyance was made to Mrs. Moore it was, as we have held, as if the title had been acquired by Moore himself. Nor is this a case wherein specific performance of the covenant of warranty is sought upon failure of title in the absence of fraud.

It is insisted that if the deed be regarded as a contract to convey, while in such case the heir would ordinarily be entitled to a conveyance from the vendor, yet if the vendor had no title, or if the vendee was not bound by the contract at the time of his death, the heir is not so entitled; but it appears from this record that Moore could have obtained the title in Monroe's lifetime, and the latter could have been compelled to perform on his part, so that the contract was binding at the time of Monroe's death, and his heirs had the right to compel specific performance. The vendor, therefore, would not be liable in one action to the estate, and in another to the heirs.

Monroe died in August, 1878. Moore and McDonald had settled in 1877 the matters which McDonald had given as reasons for not conveying, or for suspending the delivery of the deed placed in the hands of Viele, and McDonald was then ready to convey to Moore, which McKay had always been. Moore was able to perform before Monroe's death, and the right to compel performance which Moore had, his heirs can enforce.

It is strenuously urged that the deed of Moore to Monroe was set aside by agreement, and the purchase abandoned by the latter.

We agree with the learned judge of the Circuit Court in the conclusion at which he arrived in disposing of this contention. The evidence to make out such rescission practically consists of the testimony of defendant N. D. Moore, given on his own behalf. It is only when an oral agreement is clearly and satisfactorily proven by testimony above suspicion and beyond reasonable doubt, that it will be enforced to establish rights in land at variance with the muniments of title, and it is open to question "whether, in any case, after the decease of the grantee, the unaided testimony of the grantor alone, however intelligible and credible he may be as a witness, should be held sufficient to set aside and invalidate the title claimed under it." *Kent* v. *Lasley*, 24 Wisconsin, 654. "Where a written instrument is sought to be reformed upon the ground that by mistake it does not correctly set forth the intention of the parties; or where the declaration of the mortgagor at the time he executed the mortgage, that the equity of redemption should pass to the mortgagee [is relied on]; or where it is insisted, that a mortgagor, by a subsequent parol agreement, surrendered his rights, . . . in each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence." *Howland* v. *Blake*, 97 U. S. 624, 626.

Tested by this rule, the evidence is manifestly insufficient to defeat the deed from Moore to Monroe. It must be conceded that the party interposing such a defence should be able to set it up with reasonable accuracy in his pleadings, and Moore's statement on the stand varies so much from that given in his answer as to make it impossible to indulge in any presump-

tions in its favor. The Circuit Court justly comments on this conflict between answer and testimony (28 Fed. Rep. 831); but that ground need not be minutely gone over again here.

The consideration for the one sixth interest was two hundred and fifty dollars, ten dollars in cash and a note for two hundred and forty dollars.

Immediately before the purchase of the land in controversy Monroe had let Moore have money to enter a particular forty acres which he represented had such indications of mineral as showed it would be valuable. Moore did not make the entry because, he says, the land had been previously entered, but he did not return the money to Monroe.

The forty acres was school land, and the minimum price of school lands was fixed by statute at four dollars per acre, 1 Comp. Laws Mich. (1872) 1251, or, for forty acres, one hundred and sixty dollars, and the presumption, in the absence of evidence to the contrary, would be that this was the sum Monroe let Moore have, the purpose to make the particular entry being conceded.

Now, Moore's story as to the rescission is that Monroe came to him and "wanted me to pay him the money that he had given me to enter that land," and that in the conversation that ensued reference was made to the fact that Moore had not yet received a deed to the McDonald and McKay land, and it was finally agreed that Moore should give Monroe his note for one hundred and sixty dollars and surrender Monroe's note for two hundred and forty dollars, and that Monroe should give up his deed; and Moore claims that the money which Monroe had given him to enter the forty acres of school land was one hundred and fifty dollars, and that the one hundred and sixty dollar note was made up of that one hundred and fifty dollars, and the ten dollars which had been paid on the purchase. When confronted with the fact that he had sworn that Monroe gave him the money to enter forty acres of school land, the minimum price of which was one hundred and sixty dollars, his explanation is that, as Monroe had to pay a discount to get the money, "I told him that I would throw off the ten dollars on that account," though why

Monroe could not borrow one hundred and sixty as well as one hundred and fifty dollars, if he borrowed at all, or why Moore should "throw off" ten dollars to the party who advanced the whole capital, or whether Moore had ten dollars to make up the deficiency, (and he admits that he was then quite impecunious,) does not appear.

Whether the money Monroe had let Moore have was one hundred and fifty or one hundred and sixty dollars, and whether the note included the ten dollars paid on the one sixth interest, depends on the testimony of Moore. Mrs. Monroe found the note among her husband's papers after his death, and knew nothing about it except that he told her that it was for money he had loaned Moore. The note itself was not produced; payments had been made upon it in Monroe's lifetime, but none afterwards, until 1881, when sixty dollars was paid to Mrs. Monroe, who cannot remember what the amount of the note was; and this payment was after McDonald and McKay had conveyed to Mrs. Moore, at the request of Moore, for the purpose of cutting out the deed to Monroe, and after the land had commenced to increase in value, to Moore's knowledge but not to that of Mrs. Monroe. When it was made not a word was said to Mrs. Monroe about the outstanding deed to Monroe, either as to having it sent back or having a quit-claim given, and it is quite clear that she was wholly unaware of any connection between that note and the land in controversy, if any such connection in fact existed, as it would seem there did not, if the amount Monroe let Moore have to make the entry was one hundred and sixty dollars. Some small payments had been made on this note to a justice of the peace, in whose hands it had been lodged for collection. He was not sworn as a witness, but Moore is "inclined to think that he is dead." Under the circumstances, it is remarkable that the note when taken up by Moore was not preserved by him, and is not put in evidence. The money was not in fact loaned to Moore by Monroe but given to him for a particular purpose, and when that purpose could not be effectuated, should have been returned at once. Monroe is dead. Is it not dangerous to take Moore's testimony, in face of these facts,

as establishing that the one hundred and sixty dollars covered the ten dollars forming part of the consideration of the purchase under consideration? We think it is, and particularly, as in his answer Moore does not set up that the money was given him for the entry of a specified tract of forty acres, nor state any reason why it was one hundred and fifty instead of one hundred and sixty dollars, but says the money was furnished by Monroe to enter land, "if he should know of any that was desirable."

Equally unsatisfactory is the evidence as to Monroe's note for two hundred and forty dollars. Moore alleges in his answer that it was part of the agreement to rescind that he should cause this note to be surrendered to Monroe, and that one John McKay, in whose possession it was, "as he had been previously requested by said Nathaniel D. Moore," delivered the note to Mrs. Monroe, and it was cancelled; but it is not to be questioned, upon the evidence, that the note was handed to Mrs. Monroe, not at the request of Moore at all, who knew nothing about it until a year, or perhaps nearly six years, afterwards, but at her solicitation; and it was not only not cancelled, but carefully preserved and produced upon the trial, a fact inconsistent with a rescission to be accomplished by its destruction, but entirely in accordance with Mrs. Monroe's testimony, that her getting the note was accidental, and that, as came out on her cross-examination, when she showed it to her husband, he told her "to put it by." Such a direction on his part is irreconcilable with the theory that he had sent her to the McKays for the note because the bargain had been declared off, while it sustains the view that he had no intention to throw up the purchase. This note had been given to William McKay, according to Moore, to raise money on; failing in which, William had left it with his brother John, or his wife, who testifies he gave it to her "to keep or to give back to Mrs. Crawford (then Mrs. Monroe), *or to collect.*" Mrs. McKay was Mrs. Monroe's sister and gave her the note, cautioning her that she must take care of it so as to produce it in case it was asked for by William McKay. This was in July, 1876, but Moore fixes the date of the conversation with Monroe as in

August or September, or, as he finally believes, early in October, 1876, which, if true, would show that Mrs. Monroe's possession of the note had nothing whatever to do with an agreement that it should be surrendered. Indeed, Moore does not contend that it had, but testifies that Monroe said he could get the note from the McKays, whom, however, Moore does not pretend he directed to deliver it. There is a direct conflict between Mrs. Crawford and the McKays, as to her statements at the time she took the note; but we are not inclined, therefore, to reject her account of the transaction, so far as bearing upon whether she had authority to act for her husband on that occasion or not. Granting that Mrs. Monroe was desirous of getting the note, because she feared Monroe would never obtain title, and considered Moore's deed worthless, this did not bind Monroe, and her statements could not be used for that purpose. It should further be observed that, while Moore avers in his answer, which he subscribed, that Monroe was to quit-claim to him, he states in his testimony that Monroe said he had not recorded the deed and would send it back, although the evidence discloses it was recorded December 20, 1875; and also that though Moore and Monroe lived at the time within three miles of each other, yet Moore never asked Monroe either to quit-claim or return the deed, now giving as an excuse that he did not wish "to stir it up more than was necessary," and did not wish to urge him while the other note remained unpaid. If he was not entitled to demand a release until he had paid the one hundred and sixty dollar note, it would hardly be just to allow him to cease paying and not resume until years after, when the land had increased in value, and Monroe was in his grave, and then treat such payment to Mrs. Monroe, though he kept her in ignorance of any connection between it and the land, as performance of the alleged agreement of five years before.

Upon a careful examination of the evidence, it amounts to no more than this: Monroe expected and desired to obtain the land; he found that McDonald and McKay had not made a deed to Moore, and doubt was expressed whether they ever would. He wished to collect the money which Moore had

wrongfully kept, and which had no relation to the other transaction. He retained possession of the two hundred and forty dollar note, so that Moore could not make use of it, not intending to cancel it, but to hold it for payment when Moore obtained the title. In accepting payments on the one hundred and sixty dollar note, he was only receiving what Moore originally owed him, assuming that the ten dollars was not included. If there ever was such an arrangement as contended for, it was evidently not to be carried out on the part of one unless or until carried out by the other, and was not carried out by either, and the payment of the sixty dollars to Mrs. Monroe, ignorant as she was of the facts, cannot be regarded as acceptance of performance. In any point of view in which this evidence can be considered, we do not feel justified in denying complainants relief upon the ground of an abandonment of the deed of Moore to Monroe.

In our judgment, the defence of laches is not made out, even if the minority of the heirs did not preclude it. The deed of McDonald and McKay to Helen Moore is dated December 16, 1880, and was recorded March 16, 1881. During all this time Mrs. Monroe and her children were living in Canada. Mrs. Monroe, when on a visit to Houghton County, in the summer of 1881, first learned that Moore disputed their title, and in the fall of that year she was advised by Mr. McKay to "hire a lawyer or attorney." She did so, and he wrote a letter to Moore, informing him of complainants' claim. Moore testifies as to its receipt that "it must have been in the fall of 1881 or in the spring of 1882. I am not sure of it."

February 8, 1882, this suit was commenced in the Circuit Court for Ontonagon County, Michigan. This cannot be held to be unreasonable delay. The answer of defendants averred: "It is only since said [mineral] discoveries, made at the expense of these defendants and said McDonald and McKay, that these complainants have claimed to have any interest therein;" but all that was done in developing the land was by the Cambria Iron and Steel Company, and no actual discoveries of ore had been made before the bill was filed.

Moore is asked by his counsel, and answers as follows:

"Q. When was it first ascertained that the property had value beyond what you knew of at the time you first went over it for iron ore? A. The spring of '82 was the first developments that was made on that property by the Cambria Iron and Steel Company. They worked considerably on it in '81, but hadn't shown up anything until the spring of '82."

McDonald testifies: "We let an option to the Cambria Iron and Steel Company of Johnstown, Pa., to mine ore if they could find it; gave them a privilege of exploring for iron; if they found iron they was to pay us so much for the iron. . . . That must have been in '81. . . . Q. About what time was it that they first developed mineral value there; that is, to show that there was mineral value there? A. Well, in the spring, I couldn't say what time that was, but it must have been in the following spring; . . . the following spring after we gave the option."

While this shows that Mrs. Monroe had no reason to suppose the land had increased in value when she began her suit, Moore, from his knowledge of the property, and his being on the ground, must have been aware, when he paid Mrs. Monroe, and probably as early as when the deed was given to his wife, that the property was likely to improve in value. He says the option of the Cambria Iron and Steel Company was in 1880 or 1881, and if it was after his wife got her deed, it was *shortly after*. The inevitable inference from his conduct is that he did not ask McDonald and McKay to convey, and did not propose to pay up the note until roused into activity by the prospect of gain.

The bill and amendments state the deed from Moore to Monroe of one sixth of the land; that McDonald and McKay held "an undivided one third thereof in trust for the said Nat. D. Moore by an arrangement between the said McDonald and McKay, on the one side, and the said Moore, on the other, entered into before or at the time the said McDonald and McKay acquired said title;" that the conveyances by McDonald and McKay to Helen Moore "were made at the instigation of said Nat. D. Moore, with the intent and purpose of defrauding these complainants out of the estate in fee con-

veyed and assured, and intended to be conveyed and assured, to the said John Monroe by the said Nat. D. Moore as aforesaid, by lodging the apparent legal title in his wife's name, but for his own benefit and use;" "that the said Helen Moore paid no consideration for said conveyance, and that said interest vested in her as trustee for her husband, Nat. D. Moore, and for the said John Monroe, his heirs and assigns;" that the deed to Helen was procured by said Nat. D. and said Helen to be made "for the purpose of cutting out complainants' title to the undivided one sixth of the said land and of depriving them thereof;" that the transaction "is and ought to be held to be of the same effect as if the said McDonald and McKay and their wives had conveyed said interest directly to the said Nat. D. Moore instead of to his wife, and that the said Moores, husband and wife, ought to be and are estopped by the terms of Moore's said conveyance to Monroe, from claiming or asserting that, as to the one sixth interest in said land conveyed by the said Nat. D. Moore to the said John Monroe, the said Helen Moore has any title or interest therein as against said complainants; and they further charge that as to said one sixth interest the title is in them by virtue of the premises; that at the time of said conveyance by Nat. D. Moore to John Monroe said Moore was unmarried, and that said Helen Moore gave nothing for either or any of said conveyances nor for said interest in said land; and that she took the same with full notice and knowledge of complainants' rights, obtained as aforesaid, by deed from said Nat. D. Moore to said John Monroe."

The original bill charged also that a conveyance was made by McDonald and McKay to Moore, and fraudulently suppressed before the conveyance to said Helen.

We think the allegations of the bill as amended are sufficient to support the decree.

McDonald and McKay held in trust for Moore, that is, upon the trust created by their obligation to convey to him on request; they not only did not deny the trust but conveyed on Moore's request to his nominee, and fraud is charged against Moore and his wife in procuring the conveyance to the latter.

Syllabus.

The prayer of the bill was "that the said Helen Moore be compelled by the proper decree of this court to execute and deliver a good and sufficient warranty deed or deeds of the undivided one sixth part of said premises to these complainants, in the proportions to which they are respectively entitled, as sole heirs of said Monroe," and as there is enough in the bill as amended to warrant relief, and as the defendants could not have been taken by surprise, we do not think the decree should be reversed on the ground that the allegata and the probata do not sufficiently agree to justify it. It is true, there is no offer to pay the balance of the purchase money, but the case shows that a tender would have been but an empty show, and as the court had it in its power to require payment of the two hundred and forty dollar note, thus completing performance by Monroe, and as it did this by its decree, the allegation would have been merely formal and became immaterial.

The decree of the Circuit Court is

Affirmed.

BULLITT COUNTY *v.* WASHER.

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

No. 132. Submitted December 18, 1888. — Decided March 11, 1889.

Amendments are discretionary with the court below, and are not reviewable here.

In Kentucky when the record of a County Court, composed of the county judge and a majority of the justices of the peace of the county, shows affirmatively an adjudication of the necessity of a construction contract; an appropriation for preliminary work upon it: the appointment of an agent to make the contract; and the levy of taxes to pay for work done under it, it is not necessary, in order to fix liability on the county, that the record should further show that the contract was reported to the court with the name of the person making it; that it was filed in the court, or that it was accepted by the county judge.

When a body like the county courts of Kentucky has judicial powers, and also large administrative and executive powers, and is by law authorized to employ agents in the execution of the latter branch of powers, the acts of the agents are not in every case required to appear of record.

Opinion of the Court.

When a County Court in Kentucky, constituted as the law requires, enters into a construction contract on behalf of the county in the manner prescribed by law, and charges the county with the amount specified therein, its jurisdiction in that special mode of organization ceases; and it is then the legitimate province of the County Court, held by the county judge alone, to superintend and control the erection of the structure.

As a general rule in Kentucky, when any power is conferred or duty imposed by statute upon a County Court, the term is understood to mean a court held by the presiding judge alone, and not in conjunction with the justices, and should be held so to mean, even when used in connection with fiscal matters, if it relates to mere ministerial duties.

In contract. Verdict and judgment for the plaintiffs. The defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. D. M. Rodman and *Mr. Frank P. Straus* for plaintiff in error.

Mr. Augustus E. Willson for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

On the 31st of December, 1879, W. T. Washer, Jacob Danenhauer and Peter Baecker commenced an action in the Circuit Court of the United States for the District of Kentucky against Bullitt County in that State, to recover damages for breach of a certain contract made between Washer and the county, and afterwards assigned by Washer to Danenhauer and Baecker, for the construction by Washer of a bridge over Pond Creek, between Bullitt and Jefferson counties.

A demurrer to their original petition having been sustained with leave to amend, the defendants in error, on the 24th of March, 1880, filed an amended petition.

The original and amended petitions substantially aver that the county of Bullitt, by its duly authorized commissioner, entered into a written contract with plaintiff Washer for the erection by him of a bridge across Pond Creek according to specifications, at prices stipulated therein; that in this contract the county guaranteed payment for the entire work; that the County Court of Bullitt County appointed commissioners, and

notified Jefferson County thereof, requesting it to appoint commissioners to contract for the bridge; that beyond the appointment of such commissioners Jefferson County took no action looking to any co-operation of the two in the work; that thereupon, before the contract was made, the County Court, the presiding judge and a majority of the justices of the county being present, decided that it was necessary to erect the bridge, and having exhausted all means provided by statute for securing the aid of Jefferson County in building it, decided to erect it upon the responsibility of Bullitt County alone; that thereafter on the 16th of July, 1877, the Bullitt County Court, composed as aforesaid, authorized its commissioner, J. W. Ridgway, to report any bids that might be offered, and the amount of the same, and authorized the county judge, W. Carpenter, to receive bids, and to accept or reject the same; that in pursuance of that order the county judge accepted the bid of Washer; that thereafter Ridgway, being thereunto authorized by an order of the County Court, made and entered into the contract with Washer for the construction of the bridge, which contract was afterwards ratified by the County Court, composed as aforesaid, and said court, by an order duly entered of record, directed the levy of taxes to pay for the work done under the contract, and the application of the money raised to the payment of the contractors; that Washer commenced work under that contract, and proceeded with it until he and his assignees were notified by the county to stop work upon the bridge; and that the defendant had failed to perform its contract, and to pay for work done thereunder, to the damage of plaintiffs in the sum of $5325.14, for which sum they prayed judgment.

A demurrer to this amended petition was sustained by the Circuit Court, but upon writ of error from this court the judgment was reversed and the case remanded. *Washer* v. *Bullitt County*, 110 U. S. 558. The question raised by the pleadings in that case was, whether Bullitt County had, under the statutes of Kentucky, authority to make the contract sued on, by which, according to the averments of the declaration, it undertook, at its own cost, to build across a boundary stream a bridge, one end of which was in another county.

Opinion of the Court.

This court held that the power given by the Kentucky statutes to adjoining counties to construct bridges across boundary streams at joint expense did not take away the common law right of each of the counties to construct such bridges at its sole cost.

It also held, in effect, that the allegations of the petition and amended petition, being admitted to be true by the demurrer, the contract sued on must be held to have been made under that section of the statutes which confers upon the County Court jurisdiction to erect public buildings, bridges and other structures, and not under the section providing for the joint action of contiguous counties, as was contended on behalf of the plaintiff in error; and that therefore the averments of the petition disclosed a right of action in the plaintiffs.

Upon the return of the case to the Circuit Court, Bullitt County filed an answer specifically denying the truth of every material allegation of the petition and amended petition, the chief and controlling defence being that the contract sued on was not the contract of Bullitt County. As a part of its answer the county filed a complete transcript of the orders of its County Court. Plaintiffs replied to the answer, and afterwards, with the leave of the court and against the defendant's objection, filed a second amended petition. Issue was joined, and the case was tried by a jury, resulting in a verdict for the plaintiffs for the full amount claimed by them, upon which judgment was rendered. A motion for a new trial having been overruled, this writ of error was thereupon sued out.

The first assignment of error, namely, that the court erred in allowing the second amended petition to be filed, has been so frequently considered and declared unfounded by this court that it may be dismissed with the remark that amendments are discretionary with the court below, and not reviewable here. See the opinion of the court in the case of *Chapman* v. *Barney*, 129 U. S. 667, decided March 5, 1889, and the authorities there cited. The same remark applies to the assignment that the court erred in overruling a motion for a new trial. *Arkansas Valley Co.* v. *Mann*, *ante*, 69, decided March 5, 1889, and the cases there cited.

The leading assignments of error substantially present but one proposition, to wit: Conceding that the county had the power to build the bridge, (as was determined by this court on the former writ of error,) the averments of the plaintiff's petitions were not sustained by the evidence adduced at the trial, and the contract sued on was not made by the county in the mode provided by law.

The statute law of Kentucky applicable to such contracts made by a county is found in Art. 17, § 1,[1] c. 28, of the General Statutes of that State (Frankfort, 1873):—

§ 5. "The county court is a court of record." (Page 307.)

§ 9. "The records of the county court shall at all times show by whom the court is holden. When the justices of the peace compose a part of the court the records must state the names of those who take their seats, and when a member leaves the bench his absence must be noted."

§ 1, Art. 3, c. 27. "The county court, except for the county of Jefferson, unless composed of a majority of the justices of the peace of said county in commission, shall not have power to make appropriation of the county revenue or levy, or to make any charge thereon greater than fifty dollars for any one object."

It is contended that the contract sued on was not made in conformity with those requirements; that it was neither made nor authorized by the County Court, composed of the county judge and a majority of the justices of the peace of the county; and that there is no record of the County Court so constituted, showing that the contract was, as a matter of fact, authorized to be made.

In order to test the soundness of this position, it is necessary to consider the entire record taken together. In the first place,

[1] § 1. The county judge in each county shall hold the County Court on the days prescribed by law; but at the Court of Claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him and constitute the court; a majority of whom shall constitute a quorum for the transaction of business; which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county.

it cannot be denied, indeed the plaintiff in error concedes, that there are a number of orders which, even *quoad hoc*, come up to the requirements of "orders of record," and "of the court properly constituted," having been made when a majority of the justices were present.

Among these are —

First. The order of June 18, 1877. This order recognized Ridgway as commissioner; it adjudicated the necessity of erecting the bridge; it adopted the Brawner site for that bridge; and it appointed Ridgway a commissioner to confer with a commissioner from Jefferson County concerning plans and specifications and cost.

Second. The order of July 16, 1877. This order appropriated $600 for the building of the bridge at the Brawner site; it directed the commissioner to report plans and specifications, and the bids made; it authorized the county judge (W. Carpenter) to receive bids and to accept or reject the same as he might think proper, looking to the interest of the two counties.

Third. The second order of November 19, 1877, which appropriated $600 for the bridge.

Fourth. The order of November 18, 1878. This order showed a levy of a tax on the taxable property of the county for the purpose of paying for the bridge; a recognition of Washer as contractor for building the bridge, and of Danenhauer and Baecker as his assignees; and an allowance to them, as such assignees, in part payment of the bridge.

Fifth. The order of November 18, 1879. This order appointed a committee to examine the work on the bridge, and to report.

Sixth. The order of January 19, 1880. This order confirmed the committee's report, and discharged the committee.

Such is that portion of the record which is admitted to be the record of the court "properly constituted." It is claimed that the record is defective in the following particulars:

It gave neither the judge nor the commissioner power to contract; although it is conceded that the power was given to the county judge to accept bids. The alleged contract does not appear to have been reported to the court; nor was there

any note of record that it was made by Ridgway; nor was the contract ever filed; nor does it show that the county judge accepted it. And lastly, while the record shows a knowledge of the fact that a contract existed, and was with the defendants in error, yet it does not show a knowledge of the fact that the contract assumed to bind Bullitt County for the whole cost.

Now, inasmuch as the record does show affirmatively an adjudication of the necessity of the contract; an appropriation for the preliminary work; the appointment of an agent (Carpenter) to make the contract; and a recognition of the contract by directing the levy of taxes to pay the contractor and his assignees for the work done; we do not think it necessary, in order to fix a liability upon the county, that the record should also show, affirmatively, the existence of those outside incidents which, as enumerated, it does not set out.

The case of *Mercer County Court* v. *Kentucky River Navigation Co.*, and *Garrard County Court* v. *Same*, 8 Bush, 300, much relied on and quoted from by counsel for plaintiff in error, is, as a brief analysis will show, inapplicable to the controversy in the present case.

An act of the Kentucky legislature, passed in 1865, to incorporate the Kentucky River Navigation Company, provided in one of its sections: "that the county courts of the several counties bordering on the Kentucky River, . . . may on the application of the corporation named, . . . a majority of all the justices of the peace being present, subscribe stock in said company, and levy a tax on all taxable property of said county sufficient to pay the whole amount of said subscription in three years from the time it was made, which tax shall be collected in all respects as taxes for state revenue are now collected." The Mercer County Court, a majority of the justices being present, made an order "that the sum of seventy-five thousand dollars be directed to be subscribed," and appointed one Joseph A. Thompson, a commissioner to subscribe the same in the Kentucky River Navigation Company. The Garrard County Court in like manner made an order that the sum of one hundred thousand dollars should be subscribed on the part of Garrard County, and also appointed an agent

to subscribe the same in said company. In pursuance of said orders the subscriptions were made by the persons appointed, on the books of the company, for and on behalf of each of said counties by its agent. The court held that the above orders and subscriptions were not binding, and did not amount to contracts of subscription, because the County Court had no authority under the statute to appoint a commissioner or agent to make the subscription.

The decision was simply that, where the County Court, assuming to act under a special statute, whereby was delegated to that court the extraordinary power of determining whether a county should subscribe in aid of the Navigation Company, and of making such subscription, undertook to appoint an agent to make the subscription, such appointment was void as being unauthorized by law. The whole question was, as to the power to appoint the agent; and the court held that, as no such power to appoint existed, the court could not bind the county, except by an order which itself amounted to a subscription, and which must be made, as evidenced by the record alone, when a majority of the justices were present. The court, however, clearly recognized the principle that it was legally possible to imply a subscription from the subsequent adoption and ratification by a full court of the act of Thompson.

Now, in the case at bar, the power to appoint an agent or commissioner is undeniable, and is not challenged. On the contrary, it is admitted. So also is it shown that the agent (Carpenter) was appointed. And, as we have seen, one of the orders of the court imports upon its face a knowledge of the contract made by its commissioner, and amounts to a ratification of such contract.

The well-settled maxim that a court of record can act only through its orders made of record, when applied to judicial proceedings, means that where the court must itself act, and act directly, that action must always be evidenced by the record. But in this instance, where a body has large administrative and executive powers, and is by law authorized to appoint agents, the principle cannot be so extended as to mean that all the acts of its agents shall appear of record.

The County Court of Kentucky is, by the statute of that State, constituted the executive body of the county, and invested with the important and usual powers of a county to keep in repair public buildings, bridges, and other structures, and to superintend the same; over highways and ferries, provision for the maintenance of the poor, the laying and collecting of taxes, the appropriation of the county revenue, the appointment of many county officers, and to manage all the fiscal affairs of the county, with many other powers, not less important, appertaining to the administration of county government. The sole fact that its proceedings as a court of law are of record, cannot, in our opinion, deprive it of the power to appoint, by record, agents to make contracts, and to transact business not of record.

With regard to the contention that the commissioner exceeded the authority given by binding Bullitt County to pay for the entire work, an examination of the county record shows that whilst the court sought to secure joint action with Jefferson County in building the bridge, it determined to proceed without that county, if necessary. Especially is this shown by the order of July 16, 1877, authorizing Carpenter alone to accept bids without the coöperation of Jefferson County.

But this point is disposed of by this court in its decision on the demurrer above mentioned: "Nothing further," say the court, "could be done under §§ 36 and 37. Bullitt County, therefore, fell back upon the power conferred by § 1, of article 16, c. 28, *and made a contract by which it became responsible for the entire cost of the bridge.* Its power to do this, we think, was clear." 110 U. S. 566, 567.

It is contended that the court erred in admitting, as evidence of the breach of the contract by Bullitt County, the letter of the presiding judge of the County Court to Washer notifying him to stop all work upon the bridge immediately, or that proper proceedings would be instituted to stop the same.

The ground upon which this objection rests is, that the power to direct the contractor to discontinue the work resided only in the County Court, composed of the county judge and a

majority of the justices, and that the court so composed could authorize such notice only by an order to that effect entered of record.

We do not concur in the proposition that such action of the County Court, evidenced by its record, was necessary to authorize the presiding judge to direct the contractor to stop the work. When that court, constituted as the law requires for such purpose, and in the manner prescribed, entered into the contract sued on, and charged the county with the amount specified therein, its jurisdiction in that special mode of organization extended no farther. It then became the legitimate province of the County Court, held by the county judge alone, to superintend and control the erection of the structure. According to the settled course of decisions in the highest court of Kentucky, the justices of the peace do not form a necessary part of the County Court, except when sitting as a court of claims, or when engaged in appropriating the revenues of the county, levying taxes, laying charges upon the county, submitting questions of taxation to a popular vote, and making subscription to stock in railroads. Upon no other occasion, and with reference to no other matters, is the concurrence of the justices of the peace necessary. Gen. Stat. Ky. 273, c. 27, art. 3, § 1; Id. 306, c. 28, art. 17, §§ 1 and 2. All the powers of the court, which do not come within these enumerated exceptions, are exercised exclusively by the County Court, presided over by the county judge alone. Gen. Stat. Ky. 304 to 307, inclusive. And, as a general rule, when any power is conferred or duty imposed by statute upon the County Court, the term is understood to mean a court held by the presiding judge alone, and not in conjunction with the justices, and should be held so to mean even when used in connection with fiscal matters, if it relates to mere ministerial duties. *Bowling Green & Madisonville Railroad* v. *Warren County*, 10 Bush, 711; *Meriwether* v. *Muhlenburg County Court*, 120 U. S. 354, 357, and cases there cited.

When, therefore, Washer received the formal and official notice to stop work, signed by the judge of the County Court and the county attorney, he was not bound before obeying it,

to examine the records of that court to ascertain whether it was authorized by an order made by the judge in conjunction with the justices and duly entered of record; but he was justified in stopping immediately, as directed, and in resorting to his action upon the contract. We are of opinion that no principle of law or of fair dealing is violated by holding a municipal corporation to a contract thus made within its lawful powers and by its lawfully constituted authority. For these reasons the judgment of the Circuit Court is

Affirmed.

RUDE *v.* WESTCOTT.

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

No. 187. Argued and submitted March 7, 1889.— Decided March 18, 1889.

A general and full assignment by a patentee of the letters patent, and all his interest therein, to the full end of the term, and of all reissues, renewals, or extensions, accompanied by a clause that the net profits from sales, royalties, settlements, or any source, are to be divided between the parties, the patentee to receive one fourth thereof, is a full and absolute transfer of title; and the assignee does not hold the property as trustee for the benefit of the patentee, but is trustee only of one fourth of the profits which may be received.

The payment of a sum in settlement of a claim for an alleged infringement of letters patent, cannot be taken as a standard to measure the value of the improvements patented in determining the damages sustained by the owner of the patent in other cases of infringement.

An agreement concerning compensation for the use of a patented invention, where the charge may be fixed at the pleasure of the owner of the patent, cannot be received as evidence of the value of the improvements patented so as to bind others who have no such agreement.

In order to make the price received by a patentee from sales of licenses a measure of damages against infringers, the sales must be common, that is, of frequent occurrence, so as to establish such a market-price for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated.

Conjectural estimates of injury, founded upon no specific data, but upon opinions formed upon guesses, without any knowledge of the subject, furnish no legal ground for the recovery of specific damages.

Statement of the Case.

THE case, as stated by the court in its opinion, was as follows:—

The original complainants, John M. Westcott and Charles W. West, allege in their bill that they are the owners, by assignment from the patentee, of two patents to Hiram Moore for improvements in seeding machines, one issued November 20, 1860, and extended for seven years from November 20, 1874, and the other issued March 28, 1861, for seventeen years; that since the assignment the defendants have made, used, and sold seeding machines in the District of Indiana, and in various other places in the United States, without the consent or license of the complainants and in infringement of their patents; and that the defendants are still engaged in such unlawful acts. The complainants therefore pray that the defendants may upon their best knowledge and information answer as to the matters alleged, and be compelled to account for and pay to the complainants the profits acquired by them and the damages sustained by the complainants, and be enjoined from making, using, and vending the said machines, or any part thereof, or any seeding machine made in accordance therewith, or similar to those heretofore made, used, and sold by them. The bill was filed in March, 1876. An answer was filed in June following, in which the defendants admit that they have been and are engaged in the manufacture and sale of seeding machines, but deny that they infringe either of the patents or any of the rights of the complainants under them, or that the complainants have been thereby deprived of any profits. They also deny that Hiram Moore was the first and original inventor of the alleged improvements described and claimed in the patents, and designate several patents previously issued which, as they allege, embody the substantial and material parts of the invention claimed.

In March, 1881, an amendment to the answer was allowed, in which the defendants deny that the complainants have such title to the patents as to enable them to maintain the suit against the defendants, setting up that on the 10th of November, 1874, the complainant Westcott, by an instrument in writ-

ing, assigned to Isaac Kinsey and Aaron Morris an undivided part of his interest in the patents, which instrument is recorded in the Patent Office of the United States, and that on the 4th of February, 1879, the said Isaac Kinsey assigned one twelfth interest in the patents to one Lowell L. Lawrence and the Wayne Agricultural Company, which assignment is also on record in the Patent Office.

A replication to the answer having been filed, proofs were taken, and among other things the assignment by Moore, the patentee, to the complainants, and the assignment by Westcott to Kinsey and Morris, mentioned in the bill and answers, were produced. They are as follows, omitting such parts as are not material to the questions presented:

Assignment of Moore to Westcott and West, and contract between them.

"This agreement, made this sixth day of October, anno Domini one thousand eight hundred and seventy-four, by and between Hiram Moore, residing near Ripon, in the county of Fond du Lac, and State of Wisconsin, party hereto of the first part; Charles W. West, of Cincinnati, in the county of Hamilton, and State of Ohio, party hereto of the second part, and John M. Westcott, of Milton, in the county of Wayne, and State of Indiana, party hereto of the third part, witnesseth:

"That whereas sundry letters patent of the United States heretofore have been granted to said Moore, which said letters patent are respectively numbered, entitled and dated as follows, to wit: No. 30,685, dated November 20th, 1860, and entitled, 'Improvement in Seed-Drills,' and No. 31,819, dated March 26th, 1861, and entitled 'Improvement in Seed-Drills;' and whereas the said Moore is justly indebted unto the said Charles W. West in the full sum of ten thousand dollars, for money advanced to aid him, the said Moore, in perfecting his inventions, and is desirous of securing the repayment of the same; and whereas the said Westcott is desirous of acquiring an interest in the inventions and letters patent aforesaid, and in any reissue, renewal, or extension thereof: Now, therefore,

"Know all men by these presents, that, for and in considera-

tion of the premises, and of the sum of five dollars in lawful money, to me in hand, by the said Westcott and West, before the execution hereof, paid, and of other valuable considerations, me thereunto moving, I, the said Hiram Moore, do hereby assign, sell, and set over unto the said Charles W. West and John M. Westcott the entire right, title and interest in and to the letters patent aforesaid, and in and to the inventions and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott, and their legal representatives, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made, to the full end of any term or terms for which the letters patent aforesaid, or either of them, have been, or hereafter may be, granted, reissued, renewed, or extended.

"I hereby further agree to sign such lawful papers, and do such lawful acts as may, by the counsel learned in law, of the said West and Westcott, be deemed necessary or expedient in order to obtain an extension or reissue of the patents aforesaid, or to assert, maintain, or defend the rights secured by said letters patent. It is expressly understood, however, that the costs and charges of the proceedings aforesaid shall be defrayed by said West and Westcott, as hereinafter provided.

"In consideration of the premises, I hereby further make, constitute and appoint the said Charles W. West and John M. Westcott my true and lawful attorneys in law and in fact, with power irrevocable, giving and granting to them full and exclusive and unreserved power and authority, for me and in my name, place and stead, to assume and take upon themselves the entire and exclusive management and control of the aforesaid letters patent, and of each and every one of them, and to dispose of all the rights, title and interest which I have under the same, and under each and every of them, for such price or prices, upon such terms, and to such persons, and for such place or places, as they, my said attorneys, shall deem proper, and in my name, place and stead, and as my own proper act and deed, to sign, seal, deliver and acknowledge all such deeds

and instruments of writing as shall be necessary or proper for the granting or licensing to others the said rights under the said letters patent, and to each and every of them, and to ask, demand, sue for and receive the price of fees, or any part or parts thereof, paid or payable for such grants or licenses, and in my name to execute and deliver receipts and acquittances therefor, and in my name to bring to account and reckoning, and to ask, demand, sue for, and recover and receive of and from all and any person whomsoever, who may have been, or may be, manufacturing or selling said drills containing the improvements aforesaid, or by any or either of them, such reasonable price or fee for such use of said improvements, or either of them, as my said attorneys shall deem proper and reasonable, . . . and generally to do and perform, and execute in my name as aforesaid, all and whatever other acts, matters and things that they may deem expedient and requisite, or may be advised to do in and about the premises, as fully and effectually, to all intents and purposes, as if I myself were present and did the same, I, the said Hiram Moore, hereby ratifying, allowing and confirming, and agreeing from time to time, and all times hereafter, to ratify, allow and confirm as good and valid all and whatsoever the acts, matters and things which my said attorneys, or their substitute, shall lawfully do, or cause to be done, in and about the premises, by virtue of these presents.

* * * * *

"The said John M. Westcott, for his part, agrees, at his own cost and charges, to procure the extension of said letters patent, November 20, 1860, now pending, if practicable, including the expenses already incurred as well as those which hereafter may be incurred in said behalf, which sum is to be paid absolutely whether said extension is granted or not, and in no event is any part of said sum to be reclaimed from, or refunded or repaid by, said Moore, or to be deducted from the sum or sums collected under said patents.

"It is hereby covenanted and agreed, by and between the parties hereto, as follows: That from the sum or sums collected under the letters patent aforesaid, from sales, royalties,

or settlements, or from any other source, shall first be deducted the costs, charges and expenses of collecting the same, including all litigation expenses save those of the extension application, and then the net profits or receipts shall be divided among the parties hereto as follows: To Hiram Moore, or his legal representatives, one fourth part; to C. W. West, or his legal representatives, one fourth part; to John M. Westcott, or his legal representatives, one half part. In case of loss or failure to realize any profit under said patents, all litigation expenses aforesaid are to be paid by said Westcott, it being expressly understood by the parties hereto that under no circumstances are said Moore or West to incur any obligation, or be under any liabilities for said expenses. It is further agreed that John M. Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charges for his services.

"It is also expressly understood that said Moore's interest is to continue during and throughout the extended time of the patent of November 20, 1860. Should such extension be granted, the parties hereto hereby agree in good faith to perform the covenants between them made.

"In testimony whereof, the parties hereto have affixed their hands and seals, the day and year first above written.

"In presence of — HIRAM MOORE.
"Wm. D. Baldwin. C. W. WEST. } Seal. }"
"Mary T. Palmer. J. M. WESTCOTT.

Assignment of Westcott to Morris and Kinsey, and contract between them.

"Whereas, heretofore, to wit, October 6th, 1874, Hiram Moore, of Fond du Lac County, Wisconsin, Charles W. West of Cincinnati, Ohio, and John M. Westcott of Milton, Indiana, entered into a contract and article of agreement in relation to certain improvements in grain-drills, for which letters patent have been issued to said Moore, No. 30,685, dated November 20th, 1860, and No. 31,819, dated March 26th, 1861, in which agreement, amongst other things, the said Moore assigns and conveys to said West one fourth, and to said Westcott one

half, and retains for himself one fourth of said interest, contained in said letters patent, for said improvements in said grain or feed-drills;

"In said assignment, said Wescott, on his part, agrees, at his own cost and charges, to procure the extension of said letters patent of November 20th, 1860, including expenses already incurred, as well as those that may hereafter occur in said behalf, to be paid whether such extension be granted or not, and in no event is said sum, or any part thereof, to be reclaimed from or refunded by said Moore, and that from sums collected under said letters patent, from sales, royalties, or settlements, or from any other source, shall first be deducted the costs, charges and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits, or receipts, shall be divided among said parties; to said Moore one fourth, said West one fourth, and said Westcott one half part. In case of loss or failure to realize any profits under said patent, all litigation expenses aforesaid are to be paid by said Westcott, said Moore or West to be under no liabilities for said expenses. Said Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services; said Moore's interest is to continue during and throughout the extended term of the patent of November 20th, 1860, should such extension be granted;

"And whereas, in consideration of the foregoing, Isaac Kinsey and Aaron Morris of Milton, in Wayne County, Indiana, are desirous of obtaining an interest in said letters patent, they thereby agree to and with said John M. Westcott, of the same place, to severally take an equal interest with him in the same;

"Therefore, this article of agreement witnesseth: That said John M. Westcott hereby agrees to and with said Isaac Kinsey and Aaron Morris, and does hereby set over and assign to each of them one third part of his one half interest, retaining one third part himself in said letters patent; and said Kinsey and Morris, fully understanding the original agreement mentioned, do hereby agree to and with said Westcott, to be at

one third expense each with said Westcott, jointly, as set forth in said agreement, and shall be equally entitled and receive one third profit or proceeds, if any, in said one half interest, and in all things pertaining hereto to be governed by this and the original contract and agreement.

"In witness whereof, we have hereunto set our hands and affixed our seals, this 10th day of November, 1874.

"J. M. Westcott. [Seal.]
"Isaac Kinsey. [Seal.]
"Aaron Morris. [Seal.]"

In May, 1881, the case was brought to a hearing on the pleadings and proofs, and the court held that the patents to Moore were valid; that he was the original and first inventor of the improvements specified in them, and that the title to them was vested in the complainants; that the defendants had infringed the first and second claims of the patent of 1860, and the sixth claim of the patent of 1861, and that complainants were entitled to recover the profits and gains which had accrued to the defendants from the manufacture, use, and sale of the improvements specified in those claims; and ordered a reference to one of the masters of the court to ascertain, state and report an account of the gains and profits which the defendants or either of them had received by infringing the said claims, as well as the damages the complainants had sustained thereby.

The master thereupon proceeded to comply with the order, and on the 6th of December, 1883, made his report to the court. That report is not contained in the record, but from references to it, and quotations from it in the opinion of the court in considering exceptions taken to it, it appears that he reported that the complainants waived all claim for profits, and relied upon the proofs produced as establishing a fixed license fee or royalty as the measure of damages. After stating the testimony of the witnesses who had been examined on the point, he said that it was very difficult to determine from this evidence whether it made proof of such an established royalty or license fee as furnished a criterion upon which to estimate complainants' damages.

The proof on the subject of damages was thus stated in his report:

"It is proved that the Wayne Agricultural Company paid the royalty of $1 for one-horse machines and $2 for two-horse machines for four years — a sum which, in the absence of evidence to the contrary, may be regarded as reasonable. Mast & Co. paid between $2000 and $3000 in cash and conceded privileges, which Westcott estimates to have been worth as much more, for infringement. It is true Westcott threatened suit, and when money is paid under threat of suit merely as the price of peace, it furnishes no evidence of the amount or value of the real claim in dispute; but the settlement made shows that Westcott was paid something substantial for the infringement, and that the fear of litigation was a small element of the settlement itself. Westcott says that he arrived at the amount by his estimate of the number of the machines made by Mast & Co. and other considerations which are explained in Mast's deposition. Mast says no estimate was made of the number of machines."

"Westcott says he gave licenses like the one attached to his deposition to Mast & Co., and to English and Over. Mast was examined but not interrogated on that point. Mr. English, the active man in the firm of English & Over, says he does not recollect whether they took a license or not."

Notwithstanding the difficulty expressed by him, the master reported that the defendants had made and sold 800 infringing one-horse machines, and that complainants' damages on that account were $800; and that defendants had made and sold 800 infringing two-horse machines, and that complainants' damages on that account were $1600, making $2400 damages in full. The court, after a full consideration of the exceptions, came to the conclusion that without further evidence the complainants were entitled to only nominal damages, and entered an order that the case be recommitted to the master, with directions to admit further evidence as to damages, and to report the same, with his conclusions of law.

On the 23d of April, 1885, the master made a second report, in which among other things he stated that the additional

evidence taken by him did not strengthen the proofs previously made in support of the claim that the complainants had established a license fee or royalty, which furnished a criterion by which to estimate the damages. He found that between 1870 and May, 1881, the defendants had made and put on the market about two thousand drills which infringed "the elements of the combination covered by the first claim," one half of which were one-horse and one-half two-horse drills. He then considered the value of the claim or combination to defendants, who had used it in violation of complainants' rights, and stated that the evidence on this subject was conflicting; that some of the manufacturers considered it of so much value that during the life of the patent they had paid a stipulated license for its use, and that afterwards they said it was worth very little if anything, and that it might be true that its value had been impaired and destroyed by new devices and improvements; and that the value of the combination as estimated by the witnesses varied from nothing to six dollars per drill. He therefore reported that complainants were entitled to damages for 1000 one-horse drills at 75 cents each, and 1000 two-horse drills at $1.50 each, making in all $2250; but how he arrived at the conclusion that seventy-five cents on each drill of one class, and one dollar and fifty cents on each drill of the other class, were the actual damages sustained, nowhere appears.

Exceptions were taken to the report on various grounds, and among others: That the findings were based on speculation, and were only guesses, both as to the number of infringing drills and as to the value of the claim infringed; and that it failed to state any definite facts or evidence as a basis or ground for the findings. In July, 1885, the court decreed that the complainants were entitled to recover $1800 for the damages sustained, and that so far as the master's report was inconsistent with that decree, the exceptions to it were sustained, but in other respects the exceptions were overruled. From this decision the appeal is taken.

Pending the suit, Charles W. West, one of the complainants, and George W. Rude and John R. Rude, two of the defendants, died, and the bill was revived by the substitution of the

executors of West in his place, and the administrators of George W. Rude in his place, and the executor of John R. Rude in his place.

Mr. Arthur Stem for appellants. *Mr. L. Hill* was with him on the brief.

Mr. E. E. Wood and *Mr. Edward Boyd*, for appellees, submitted on their briefs.

Mr. Justice Field, having stated the facts of the case, delivered the opinion of the court.

The defendants below, appellants here, seek a reversal of the decree of the Circuit Court upon several grounds, and, among others, these: 1st, that the complainants have not established a title in themselves to the patents; and 2d, that they have not proved any damages for the infringement of the claims of the patentee.

The first of these grounds rests upon the supposed effect of the assignment executed by the patentee to the complainants on the 6th of October, 1874. The instrument in its words of transfer is amply full and expressive to convey to them his entire interest in and title to not only the patents then issued, but also any renewals or extensions thereof. His language is:

"I, the said Hiram Moore, do hereby assign, sell and set over unto the said Charles W. West and John M. Westcott the entire right, title and interest in and to the letters patent aforesaid, and in and to the invention and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott, and their legal representatives, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made, to the full end of any term or terms for which the letters patent aforesaid, or either of them, have been, or hereafter may be, granted, reissued, renewed, or extended."

Nothing could add to the force of this language. The concluding provision, that the net profits arising from sales, royal-

ties, or settlements, or other source, are to be divided between the parties to the assignment so as to give the patentee one fourth thereof, does not, in any respect, modify or limit the absolute transfer of title. It is a provision by which the consideration for the transfer is to be paid to the grantor out of the net profits made; it reserves to him no control over the patents or their use or disposal, or any power to interfere with the management of the business growing out of their ownership. The clause appointing the assignees attorneys of the grantor, with authority to use his name whenever they deem proper in such management, does not restrict in any way the power of the assignees after the transfer of the property. It was inserted, perhaps, from over-caution, but it was unnecessary. The assignees were under no obligation to consult him in the management of the property. Their own interests were a sufficient guarantee of a judicious exercise of their power of disposition.

The assignment of Westcott to Kinsey and Morris does speak of an interest possessed by him in the patents, but it explains what that interest is, viz., one half part of the net profits from the patents, arising from sales, royalties, or settlements, or other source, and it refers to the original assignment of the patentee to West and Westcott.

It follows that the contention of the defendants, that the complainants have not established their title to the patents, is not sustained. The complainants do not hold the property as trustees for the benefit of the patentee; they are only trustees for him of one fourth of the profits which may be received by them. *Tilghman* v. *Proctor*, 125 U. S. 136, 143.

The second ground of the appellants is, we think, well taken. The master reported in his first report that the complainants waived all claim for profits arising from the manufacture, use and sale of the patented machines, and relied upon the proofs as establishing such a fixed royalty or license fee as would furnish a criterion by which to estimate complainants' damages; and proceeding upon that view, he found from two instances, and perhaps a third instance, in which a specified sum had been paid for the use of the machines, or for the privilege

of making and selling them, that the complainants had suffered damages on each one-horse machine used by the defendants of one dollar, and on each two-horse machine used by them of two dollars. One of the instances relied upon was that of the Wayne Agricultural Company, which had paid the sums named for the use of the machines for four years. It is not clear when the payment was made, but it would seem that it was made in part under a threat of suit, and in part as the result of an arbitration after litigation on the subject had been commenced, and to avoid future litigation. It is clear that a payment of any sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patent in other cases of infringement. Many considerations other than the value of the improvements patented may induce the payment in such cases. The avoidance of the risk and expense of litigation will always be a potential motive for a settlement. The second instance relied upon is that of a corporation by the name of P. P. Mast & Co., which had obtained a license to manufacture grain-drills and seeders at Springfield, Ohio, and to sell the same within the United States, upon an agreement to pay one dollar for every one-horse drill or seeder and two dollars for every two-horse drill, provided that if the fee were paid upon the days designated for semi-annual returns, or within ten days thereafter, a reduction of fifty per cent should be made from the fee. The corporation soon afterwards changed its feeding device, and thus did not infringe, and it settled for a portion of the fees; but it does not appear what they were. It is plain, without regard to the settlement had, that an agreement of this kind, where the charge may be fixed at the pleasure of the owner of the patent, cannot be received as evidence of the value of the improvements patented so as to bind others having no such agreement. The third instance is that of an alleged license to English & Over. The complainant Westcott testifies that they continued to pay as long as they were in partnership, but how much, or how long that partnership continued, does not appear. And Mr. Over, a member of that firm, does

not recollect that it ever took a license. Westcott also testifies that no other persons or corporations than those mentioned ever took any licenses from them under the patents sued upon.

It is undoubtedly true that where there has been such a number of sales by a patentee of licenses to make, use and sell his patents, as to establish a regular price for a license, that price may be taken as a measure of damages against infringers. That rule was established in *Seymour* v. *McCormick*, 16 How. 480, and affirmed in *Corporation of New York* v. *Ransom*, 23 How. 487; *Packet Co.* v. *Sickles*, 19 Wall. 611, 617; *Birdsall* v. *Coolidge*, 93 U. S. 64; and *Root* v. *Railway Co.*, 105 U. S. 189, 197. Sales of licenses, made at periods years apart, will not establish any rule on the subject and determine the value of the patent. Like sales of ordinary goods, they must be common, that is, of frequent occurrence, to establish such a market price for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated. In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued. Tested by these conditions, the sums paid in the instances mentioned, upon which the master relied, cannot be regarded as evidence of the value to the defendants of the invention patented. The court below so treated them, and held that without further evidence the complainants would be entitled only to nominal damages, and remanded the case to the master to take further evidence. He did so, but in his second report he stated that the additional evidence did not strengthen the proofs previously made in support of the claim that complainants had established a license fee or royalty which furnished a criterion by which to estimate the damages. He therefore proceeded to estimate the value of the claim or combination patented, to the defendants, who had used it in violation of the complainants' rights,

and for that purpose took the opinions of different persons on the subject. Of the witnesses produced by the complainants, it does not appear that any ever manufactured or used the patented machines. One of the principal witnesses stated that he had never read the patent, had never seen a drill made like that described, had no experience in the matter of licenses, and that he placed his estimate of the value of the claim patented at what he considered would be a fair recompense to the inventor. The estimates of all the witnesses of the complainants were merely conjectural; that is, were made without having knowledge of any saving secured either in the cost of the machine or in the labor required for its use, they simply stating that they considered that the amounts named by them would be a reasonable and fair royalty or license fee for the patented drill. Naturally estimates founded upon supposed but not known benefits were widely apart, varying from three to six dollars for a two-horse drill and half those sums for a single horse drill. On the other hand, witnesses produced by the defendants, who had examined, and some of whom had used, the patented drills, stated that they did not consider them of any more utility than other seeding drills in use, and that they did not bring any greater price in the market. The master does not appear to have given weight to the judgment of any of the witnesses, but concluded, though by what process of reasoning is not perceived, that seventy-five cents on each one-horse drill and double that sum on each two-horse drill would be the proper amount to allow, and as he had found, though upon testimony equally loose and insufficient, that there were one thousand one-horse drills and an equal number of two-horse drills, he reported that the complainants were entitled to $2250 as damages. The court was not satisfied with his conclusion, and, without stating the ground of its action, ordered the amount to be reduced to $1800 as damages which the plaintiff should recover, besides costs, and $150 fee for the master, sustaining the exceptions to the report so far as it was inconsistent with that decree, and in other respects overruling them.

The action of the court is subject to the same objection as

the report of the master. The ruling that a royalty was established, as made in the first report, had been repudiated by it, and no evidence of the value of the invention to the defendants was adduced except the conjectural estimates stated; and they furnished no satisfactory basis for any damages, much less data, which authorized the specific finding made as to the damages for each drill used. Opinions not founded on knowledge were of no value. Conclusions from such opinions were at best mere guesses. By the decision rendered a settled rule of law was violated, that actual, not speculative, damages must be shown, and by clear and definite proof, to warrant a recovery for the infringement of a patent. As was said long ago by this court: "Actual damages must be calculated, not imagined; and an arithmetical calculation cannot be made without certain data on which to make it." *New York* v. *Ransom*, 23 How. 487, 488. There was no question in this case of damages arising from lost sales, or injurious competition, for no machines had been manufactured and put on the market by the patentee, or by the complainants, his assignees.

No legal ground being shown for the recovery of specific damages for the alleged infringement of the patents, the decree must be

Reversed, and the cause remanded, with directions to enter a decree for the complainants for nominal damages.

SMITH *v.* ADAMS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 1498. Submitted March 11, 1889. — Decided April 1, 1889.

The validity of an election to determine the county seat of a county in Dakota under the laws of the Territory, when presented to the courts in the form prescribed by those laws, becomes a subject of action within the jurisdiction of the territorial court, whose judgment thereon is subject to appeal to the Supreme Court of the Territory.

"By the matter in dispute," as that phrase is used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter

upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken; and its pecuniary value may be determined not only by the money judgment prayed, but, in some cases, by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment.

A promise by a third person to grant to a litigant certain lands, or make particular donations exceeding $5000 in value in case of a successful prosecution of a suit, will not confer jurisdiction on this court, if without such promise or conditional donation the court would not have the requisite jurisdiction.

A judgment of a lower appellate court, which reverses the judgment of the court of original jurisdiction and remands the case to it for further proceedings, is not a final judgment.

A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case.

MOTIONS TO DISMISS OR AFFIRM. The case, as stated by the court in its opinion, was as follows:

The facts disclosed by the record are briefly as follows: The Political Code of Dakota, in force in 1886, in providing for the organization of counties and the location of their county seats, authorizes the Governor of the Territory, upon proper application of the voters of any unorganized county, to take measures for its organization, and for that purpose to appoint commissioners to locate the county seat temporarily, and to appoint officers of the county to hold their offices until the next general election. Political Code, c. 21, §§ 2, 3 and 4. It then directs that, at the first general election subsequent to such organization, the legal voters of the county shall designate on their ballots the place of their choice for county seat, and that the place thus designated receiving a majority of all the votes cast shall thereafter be the county seat, but that, if no place receives a majority of such votes, the place designated as the county seat temporarily shall remain the county seat until changed as provided in a subsequent section. c. 21, § 6. That section declares in substance that, upon petition of two thirds of the qualified voters of the county, it shall be the duty of the county commissioners to notify the voters to again designate upon their ballots at the next succeeding general

election the place of their choice, and if, upon the canvass of such votes, any of the places thus designated shall receive two thirds of the votes cast, such place shall be the county seat. c. 21, § 7.

On the 30th of July, 1886, Congress passed an act "to prohibit the passage of local or special laws in the Territories of the United States, to limit territorial indebtedness, and for other purposes." 24 Stat. 170, c. 818. The first section, among other things, enacts: "That the legislatures of the Territories of the United States now, or hereafter to be, organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: granting divorces; changing the names of persons or places; laying out, opening, altering and working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county and township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates and constables," etc. The 7th section declares that all acts and parts of acts subsequently passed by any territorial legislature in conflict with the provisions of this act of Congress shall be null and void.

The county of Brown in Dakota was organized under the provisions of the Political Code, and the city of Columbia was designated by the commissioners as the county seat temporarily, and it remained as such county seat until some time in 1887, no other place having been designated by a majority of the voters of the county. On the 11th of March, 1887, the territorial legislature passed an act "to provide for the relocation of county seats in counties where county seats have been located by a vote less than a majority of all the electors voting thereon." Laws of 1887, c. 173, p. 369. Section 1 of this act, as amended on the same day when the original act took effect, provides: "That in all counties in this Territory having a population not less than twelve thousand as shown by the census of 1885, and having an area of not less than forty-eight Congressional townships, and in which the present county seat thereof has been heretofore temporarily located under the

provisions of section four of chapter twenty-one of the Political Code, and remaining the county seat under the provisions of section six of chapter twenty-one of the Political Code, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section six of chapter twenty-one of the Political Code, there shall be held a special election of the duly qualified voters of such counties on the twelfth day of July, A.D. 1887, at which election the question of the relocation of the county seat of such counties shall be voted upon: *Provided*, That such election shall not be held in any county unless there shall be presented to the judge of the District Court of the district in which such county is situated, or in his absence from such district, or in his inability to act, to the Chief Justice of said Territory, a petition signed by at least one third in number of the electors of said county as shown by the vote cast at the last general election, praying said judge to issue an order directing the holding of said election as provided in this act. If said judge shall find that said petition is signed by one third of the electors of said county as above provided, he shall issue an order directing said election to be held in accordance with the provisions of this act."

In other sections provision is made for giving notice of the election and for canvassing the votes, and for removing the records of the county to the place designated. Under this act an election was held in Brown County on the 12th of July, 1887, on the question of relocating the county seat of that county. A majority of the votes were cast in favor of the city of Aberdeen as the county seat, and the county offices with their records and papers were accordingly removed to it from Columbia.

By a law of the Territory any elector, upon leave of the District Court of the district embracing the county, may contest the validity of such an election. The plaintiff below, John E. Adams, upon a petition setting forth his objections to the election in question, was allowed by the District Court of the Fifth District to contest its validity and to bring an action in that court for that purpose. He accordingly filed a notice of

contest, addressed to the commissioners of the county, in the nature of a complaint, commencing the action authorized.

The ground upon which the validity of the election was assailed was that the act of the territorial legislature was in conflict with the act of Congress of July 30, 1886, prohibiting local or special legislation "locating or changing county seats;" that the territorial act, though general in its terms, was so drawn as to be applicable to only one county, no other county coming within its provisions; that this fact was well known at the time to the legislature; and that the object of passing the act in this form was to evade and nullify the act of Congress. The complaint contains all other allegations as to the status of the contestant, the appointment of the commissioners, the condition of Brown County as an unorganized county, the temporary location of its county seat, the number of its population, the passage of the territorial act and the election thereunder and consequent proceedings, which were necessary to raise the question of the validity of the election. To this notice of contest or complaint the commissioners demurred on the ground that it did not state facts sufficient to constitute a cause of action against them or either of them. The District Court sustained the demurrer as a matter of form, and as the plaintiff elected to stand upon his complaint without amendment, ordered that the same be dismissed. On appeal to the Supreme Court of the Territory this judgment was reversed, and the cause remanded to the District Court for further proceedings according to law and the judgment of the appellate court.

The reversal was ordered on the ground —

"First. That appellant's action was properly brought, and the act of the legislature of the Territory of Dakota, passed March 11, 1887, under which the election was held, by which the county seat of Brown County, D. T., was removed from Columbia to Aberdeen, is in conflict with the act of Congress, approved July 30, 1886, prohibiting special legislation in the Territories of the United States.

"Second. That the appellant has such an interest in the subject matter as enables him to maintain this action.

"Third. That the judgment rendered is such a final judgment as entitles him to an appeal."

To review the judgment of the Supreme Court of the Territory the case was appealed to this court, the appeal being allowed in open court, and also by the Chief Justice of the Territory. There were five commissioners of the county, and three of them afterwards prayed that the order allowing the appeal be vacated, stating that they had become satisfied that no further proceedings should be had in the case, and that, as a majority of the board, they had, before the appeal bond was filed or any citations were issued, directed their attorneys not to perfect the appeal, but that the attorneys had disregarded the instructions. It does not appear that any action was taken in the court below upon the application.

It appears from documents filed in the court below after the appeal was taken, that on the 27th of June, 1887, the city of Aberdeen conveyed to the county of Brown certain real property, exceeding in value $5000, situated within its limits, with the building in process of erection thereon, to be held by the county so long as the building should be used for a courthouse, but when the building ceased to be thus used the land to revert to the grantor.

The respondent now moves that the appeal be dismissed, or that the judgment below be affirmed, for the following among other reasons:

I. Because this court has no jurisdiction of the subject matter of the action, no Federal question being involved.

(*a*) The matter in dispute, exclusive of costs, does not exceed the sum of five thousand dollars; no sum of money being in dispute and no right the value of which can be calculated or ascertained.

(*b*) No question is presented involving the validity of any patent or copyright, nor is there drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

II. Because it appears from the record that before the appeal to the Supreme Court of the United States was perfected a majority of the county commissioners declined to perfect and

prosecute the same, and directed their attorneys not to perfect it, the instructions being given before any bond on appeal had been approved or citations issued.

Mr. George F. Edmunds and *Mr. C. F. Palmer* for the motions.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* opposing.

Mr. Justice Field delivered the opinion of the court.

The designation of the county seat of a county in Dakota, or providing for its designation by popular election, was a matter properly belonging to the legislative department of the territorial government. It was not a matter by itself for judicial cognizance. But when the law of the Territory left the designation of a county seat to the voters of the county, and provided that the validity of the election could be contested by any competent elector of the county before the District Court of the district within which the county was situated, upon leave obtained from such court for that purpose, and prescribed the mode in which such contest should be prosecuted by the contesting elector, and defended by the commissioners of the county under whose direction the election was held, and proofs be taken upon the matter in issue, and that the validity of the election should then be determined by the District Court — the designation of a county seat under the law became the subject of judicial cognizance, a case or controversy arising upon such proceedings being taken to which the judicial power of the Territory attaches. This has been substantially the meaning given to the terms "cases and controversies," used in the judicial article of the Constitution defining the limits of the judicial power of the United States. By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a

form that the judicial power is capable of acting upon it, then it has become a case or controversy. Thus, in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819, this court, speaking by Chief Justice Marshall, after quoting the third article of the Constitution declaring the extent of the judicial power of the United States, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

We are of opinion, therefore, that the validity of an election to determine the county seat of a county in Dakota under the laws of the Territory, when presented to the courts in the forms prescribed by those laws, becomes a subject of action within the jurisdiction of the territorial court. As thus presented, it is a case of controversy between an elector of the county and its commissioners, and the judgment thereon of the District Court of the Territory was subject to appeal to its Supreme Court. Whether the judgment of that court can be reviewed here must depend upon the act of Congress of March 3, 1885, 23 Stat. 443, c. 355, which provides as follows:

"SEC. 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

Opinion of the Court.

The objection that no Federal question is involved undoubtedly has reference to the second section of the above act, which provides that the appellate jurisdiction of this court over cases from the territorial courts shall not be determined by the amount in dispute, if the validity of a treaty or a statute of, or an authority exercised under, the United States, is drawn in question, but that in such cases an appeal or writ of error may be brought without regard to the sum or value in dispute. No such question being involved, our appellate jurisdiction in this case depends upon whether the amount in dispute, exclusive of costs, exceeds the sum designated. By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Stark* v. *Starrs*, 6 Wall. 402; *Jones* v. *Bolles*, 9 Wall. 364, 369, and *Holland* v. *Challen*, 110 U. S. 15. So in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. Thus in *Smith* v. *Whitney*, 116 U. S. 167, 173, where the application was for a writ of prohibition restraining proceedings by court-martial against an officer, an objection being taken to the appellate jurisdiction of this court on the ground that the subject matter of the suit was incapable of pecuniary estimation, the court, by Mr. Justice Gray, replied: "The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary,

as paymaster-general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars. Rev. Stat. §§ 1556, 1565, 1624, arts. 8, 22, 48, 53. The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. *Columbian Ins. Co.* v. *Wheelwright*, 7 Wheat. 534; *United States* v. *Addison*, 22 How. 174." Not doubting the correctness of the doctrine thus stated, we do not perceive how it can help the appellants. It is true they represent the county, but it is impossible to state any rule, by which the benefit the county may gain, or the damage it may suffer from the result of the election contested, can be estimated. The fact that the county may acquire or lose a parcel of land in Aberdeen exceeding in value $5000, with the building thereon, by the conditional conveyance of that city, according as the county seat is kept at or removed from the place designated as county seat by the election, the validity of which is contested, does not obviate the difficulty. The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen, made contingent upon the removal of the county seat to that place and its continuance there. In *Smith* v. *Whitney*, the salary was given by the law and went with the tenure of the office. A promise by a third person to grant to a litigant certain lands or make particular donations in case of a successful prosecution of a suit will not confer jurisdiction on this court to review the judgment, if without such promise or conditional donation the court would not have the requisite jurisdiction. We think, therefore, there is not in the case such an amount in dispute as to enable this court to take jurisdiction of the appeal. Upon this ground the appeal must be dismissed.

It is not necessary, therefore, to consider the alleged refusal

of a majority of the county commissioners to prosecute the appeal, and their application to the court below to vacate the order allowing it. The appeal had been perfected, and the jurisdiction over the cause thus transferred to this court, before the attention of the court below was called to the action of the majority. Whether such majority could afterwards authorize a withdrawal of the appeal, holding the relation the commissioners do to the county, need not now be discussed.

But there is a ground, not taken by the respondent, which forces itself upon our consideration, and that is, that the judgment of the Supreme Court of the Territory is not in form a final judgment. It not merely reversed the judgment of the District Court, but remanded the cause to that court for further proceedings according to law and the judgment of the appellate court. A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case. On this ground, therefore, as well as on the previous ground, the appeal must be

Dismissed.

LYON v. ALLEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 149. Argued January 7, 8, 1889. — Decided April 1, 1889.

Under the laws in force in the District of Columbia, when the cause of action in this case arose, the failure of the commissioner of improvements to deposit with the register a statement exhibiting the cost of setting the curbstone and paving the footway in front of each lot or part of lot, separately, and the amount of tax to be paid by each proprietor, the failure of the register to place without delay in the hands of the collector a list of the persons taxed and the failure of the collector to give the required notice to such persons, rendered invalid a

Statement of the Case.

tax sale under those laws and certificates thereof, as against an innocent purchaser.

The provisions in those laws respecting the deposit of such statement with the register, the placing the list in the hands of the collector, and the notice to the owners were intended as a condition precedent, a strict compliance with which was necessary in order to make the tax a lien upon the lots.

An erasure and interlineation in an assessment roll in the District of Columbia, made nearly twelve months after it was completed and deposited in the register's office, and after lots not assessed had passed into the ownership of a *bona fide* purchaser, is neither a reassessment nor an amendment of the original assessment. Although the illegality of a tax sale is patent on the face of the proceedings, if the property was acquired by a *bona fide* purchaser before the sale and without notice of the tax, a court of equity has jurisdiction to remove the cloud upon the title.

The case, as stated by the court in its opinion, was as follows:

This is a suit in equity, brought by the appellee in the Supreme Court of the District of Columbia, to remove clouds from, and to quiet the title to, certain real estate in the city of Washington. The property is described as lots 1 to 12, inclusive, square 156, fronting on the north side of P Street north, between 17th and 18th Streets west, in that city, and was at one time owned in fee simple by the plaintiff, John B. Alley, who subdivided the lots and sold portions thereof to certain persons named, to whom he gave bonds of indemnity as a security against the claim of the defendant, Isaac S. Lyon. Alley and his grantees are in actual possession of the property, and this suit is brought, therefore, for the benefit of all of them. The claim of the defendant is derived from certain certificates of tax sale issued to him by the District of Columbia, October 15, 1881, the tax being a special improvement tax for setting the curbstones and paving the footways and gutters along the front line of the property.

The bill, after alleging these facts, sets out the various steps and processes by which the claim of the defendant originated, which is alleged to be invalid and illegal, and charges that the said certificates were issued without authority of law and

are not any evidence of title to, or lien upon the said lots. The relief asked for is a decree declaring the tax sale void, and an injunction against Lyon from setting up any right, title or claim by virtue of the certificates issued to him on his purchase.

The defendant answered denying the validity of the title of the plaintiff and his grantees, and also filed a cross-bill setting out in detail the proceedings by which his own claim originated; alleging that such claim was valid and legal, and superior in law and in equity to that of the plaintiff and his grantees; and praying that his certificates might be decreed a lien upon the lots. Upon an agreed statement of facts, the court at special term rendered a decree in accordance with the prayer of the cross-bill. Upon appeal to the court in general term that decree was reversed, and a decree made in accordance with the prayer of the original bill; and an appeal from the latter decree brings the case here.

The material facts as gathered from the record, are substantially as follows: On the 2d of November, 1869, the then corporation of the city of Washington passed the following act:

"Be it enacted, . . . That the mayor be, and he is hereby, authorized and required to cause the curbstones to be set and the footways and gutters paved on the north side of P Street north, between Sixteenth Street west and Rock Creek, the work to be contracted for and executed in the manner and under the superintendence provided by law, and to defray the expenses of said improvements a special tax, equal to the cost thereof, is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." Acts 67th Council, c. 236, p. 116.

The act of October 12, 1865, referred to, extended prior acts of May 23 and 24, 1853, to special improvements thereafter made, and provided that the cost and expense of every local improvement thereafter made, "unless otherwise provided for in the act or acts ordering the same, shall be levied, assessed, collected and paid, and the payment thereof enforced," as provided in those acts. Webb's Digest, 360–2.

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The act of May 23, 1853, (Webb's Digest, 155,) provided for proposals for setting curbstones, etc., petition for the improvement and plan of the property, time within which the improvement is to be made, and by its 5th section required the appointment of two assistant commissioners. Its 6th section reads as follows:

"So soon as the setting and paving of any such curbstone and footway shall have been completed by the commissioner of improvements, he shall deposit with the register a statement, exhibiting the cost of setting the curbstone and paving the footway in front of each lot or part of lot, separately, and the amount of tax to be paid by each proprietor of said lots or parts of lots, and the register shall then, without delay, place in the hands of the collector of taxes a list of the persons chargeable with such tax, together with the amount due by each person; and the collector shall, within ten days after receiving such list, give notice in writing to each proprietor, if residents of this city; if non-residents, then to their tenants or agents, if known, stating the amount of tax by them respectively due, and requiring that the same be paid within thirty days from the date of such notice; and if any of the taxes so due shall remain unpaid for more than thirty days after the date of such notice, then the said collector shall proceed to collect the same, together with interest in addition thereto at the rate of ten per centum per annum, to be computed from the date of the commissioner's return to the register, in the same manner as other taxes upon real property are by law collected; and the collector shall deposit the same in bank to the credit of the ward entitled thereto, first deducting the commissions prescribed for collecting the same."

The 8th section provided that such work shall be paid for by certificates of stock, commonly known as "paving stock," issued by the mayor and given to the contractor, and redeemable from time to time as the taxes were collected.

None of the provisions of the act of May 24, 1853, are important in connection with this case.

The act of June 10, 1867, (Webb's Digest, 467,) created an officer known as superintendent and inspector of improvements,

whose duty it was to prepare plats and fix grades, and to superintend the paving of footways, etc., and provided that, with two assistant commissioners to be appointed by the mayor from among those along or near the line of any proposed improvement, he should have the exclusive control of such improvement; further, that the superintendent and inspector should "be charged with the duty of making all assessments on lots bordering on any street, alley, or avenue which shall have been paved," etc. The last act on the subject, that of October 28, 1867, (65th Council, c. 6,) provided that all taxes for paving, etc., should be payable in four instalments, one-fourth within thirty days after the service of the notice by the collector of taxes, and the remaining three-fourths in three equal annual payments, for which certificates of indebtedness bearing interest at the rate of ten per centum per annum, and chargeable against the property involved, should be issued by the mayor to the contractor.

The lots in question are situated in what was formerly the 1st ward of the city of Washington, along the line of street the pavement of which was provided for by the act of November 2, 1869, *supra*, and were at that time owned by one Thomas Young.

On the 1st of April, 1870, the corporation of Washington contracted with one Henry Birch to set the curbstones and pave the footways and gutters in the 1st ward of the city; and between that date and November 16, 1870, he performed that part of the work bordering upon the lots in question, and the same was accepted by the corporation. Its cost was $2054.10. At that time William Forsyth was the superintendent and inspector of the paving of carriageways and footways of the corporation under the act of June 10, 1867. When the work under Birch's contract was completed Forsyth, as it was his duty to do, entered all of it in the ward book with the proper proportionate charge against each lot, with the exception of that appertaining to the lots in question. As to these no entry was made until November, 1871, when the following was interlined in red ink: "Entered November 17, 1870. This work was done at this date, but, by request of

the owner, not entered until Nov. —, 1871. Wm. Forsyth, S'v'yor, D. C."

On the 13th day of January, 1871, there were issued to Henry Birch fifty-two certificates of paving stock for the four instalments, being for the entire amount on the assessment roll, except as to the twelve lots in question.

Between November, 1870, and November, 1871, to wit, February 21, 1871, the government of the city of Washington was succeeded by that of the District of Columbia, and Forsyth became the surveyor of the District.

The contractor testifies on oath that he had nothing to do with the omission of the lots in question from the assessment roll, and, in fact, knew nothing of such omission; that during the progress of the work the owner of the lots, Thomas Young, promised in person to pay in full for the improvements when finished, provided he, Birch, would deduct ten per cent from the contract price, and that he, Birch, agreed to this arrangement. When the entries relative to the lots were made, in November, 1871, the collector entered the amounts in the "special ledger" in his office as assessed against the lots, and then gave the notice thereof prescribed by law. Certificates of indebtedness against the lots, agreeably to the act of October 28, 1867, were therefor issued to the contractor, who sold and transferred the same to the appellant, Lyon, for value before maturity. After their maturity, and for default in their payment, Lyon procured the collector of taxes of the District of Columbia, in 1881, to sell the lots in question, and bought them in, paying the purchase price by surrendering the certificates of indebtedness aforesaid, and paying the difference in cash. In return, he obtained twelve several certificates of tax sale, one as to each lot, bearing date October 15, 1881.

Prior to the aforesaid entry in red ink, however, and while the records all showed no assessment or claim of any kind against the lots in question, to wit, October 2, 1871, Young sold and conveyed them to Hallett Kilbourn, and by various transfers thereafter, all made subsequent to the red ink entry, they came into the possession and ownership of the plaintiff, January 26, 1881.

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In 1875, while the title to the lots was in one James M. Latta, a sale of them was attempted to satisfy the delinquent taxes assessed against them as aforesaid. Latta thereupon filed his bill in equity against the District of Columbia and John F. Cook, collector, to enjoin such sale thereof, and a temporary restraining order was granted on the 29th day of July of that year, which still continues in force. Neither Lyon nor the contractor, Birch, was made a party to that bill; and the collector, upon the service of said restraining order, made no entry or memorandum of the same against the lots in question, but by mistake entered the memorandum thereof as applying to the same numbered lots in square 256.

Mr. Henry E. Davis for appellant.

Mr. H. H. Wells for appellee.

Mr. Justice Lamar delivered the opinion of the court.

The court below held —

(1) That the act of the common council of November 2, 1869, levying a tax for the paving and curbing of P Street in front of the lots involved in this controversy, created an inchoate lien upon them which would have been complete had the assessment been made by the proper officer in conformity with the law and the ordinances upon the subject;

(2) That inasmuch as the omission of this lot from the assessment roll was not made by mistake, or through ignorance or negligence, but intentionally and at the request of the party then owning the lots, and as Kilbourn, before purchasing the lots, exercised proper diligence in examining the records, and found no claim or lien of any kind existing against them, he should be considered as a *bona fide* purchaser, without notice of the lien imposed by the tax, and therefore as having taken his title free and clear of the tax in question; and,

(3) That as Kilbourn took the lots discharged of any lien imposed by the tax under consideration, any subsequent pur-

chaser from him would acquire the same sort of title — that is, a title not affected by the tax certificates involved in this case. It, therefore, granted Alley's prayer for a removal of the cloud upon his title occasioned by such tax sale.

To the correctness of these rulings the appellant's counsel have raised several objections, which it is necessary to consider. It is contended that the requirements of the statute, which were not complied with, were mandatory only so far that it was necessary they should be substantially observed; and that unless some injustice has been done, or some inequality occasioned, equity will disregard a mere failure to follow the law. This proposition presents the question whether the failure of the commissioner to deposit with the register a statement of the taxes upon the lots, the failure of the register to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give the required notice to such persons, constituted such a non-observance of the requirements of the statute as to render invalid, as against the appellee, the tax sale and the certificates thereof issued to the appellant.

In view of the specific and imperative language of these provisions, and more especially of their nature and obvious purpose, we cannot doubt that they were intended as conditions precedent, a strict compliance with which was necessary in order to make the tax chargeable as a lien upon the lots. This question was directly presented and distinctly settled in the case of *French* v. *Edwards*, 13 Wall. 506, in which the rule was laid down with regard to directory and mandatory provisions of tax laws, which has been since approved by the Federal and state courts.

In that case the defendant asserted a title to the land in dispute under a deed executed by the sheriff of Sacramento County, California, upon a sale on a judgment rendered for unpaid taxes on the property described, and the whole case turned on the validity of this tax deed. It was a case of non-compliance with the requirements of the statute, the main question being whether the departure of the officer from such requirements rendered the sale invalid. The court said:

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"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system and despatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

Judge Cooley in his work on taxation refers to this case, and says: "The doctrine therein stated seems a sound and just rule, and may be reasonably believed to be in accord with the legislative will in the cases to which it is applied." Chief Justice Shaw in the earlier case of *Torrey* v. *Millbury*, 21 Pick. 64, lays down the same rule in nearly the same terms.

The rule thus stated applies unquestionably to the case before us, which is a much stronger one in the number and character of the prerequisites to the tax sale which were disregarded. The provisions of statutes as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are, according to the highest authority, designed for the benefit of the taxpayers, and the protection of their property from sacrifice. *Sandwich* v. *Fish*, 2 Gray, 298, 301; Cooley, Taxation, 216, 217, 218. When, therefore, Kilbourn, from whom the appellee derived title, purchased the lots in question, there was, so far as we can learn from the record in this case, nothing in the register's office or in the collector's office, or in the hands of the latter, to put a *bona fide* purchaser upon notice either actual or constructive.

We cannot concur with the counsel for appellant in the proposition that the requirements of the statute were substantially complied with. The erasure and interlineation in the assessment roll, made nearly twelve months after it was completed and deposited in the register's office, and after the lots not assessed had passed into the ownership of a *bona fide* purchaser, cannot be considered in any sense as a re-assessment, or an amendment of the original assessment. It was simply an unauthorized and improper alteration, by a person with not even the semblance of authority, of an official document in the assessor's office, where the law required it to be. Its only effect, if it has any, is to show, in connection with other facts upon the record, that the withholding of the assessment of these lots was not a mere mistake of the officers, but the result of an agreement between the then owner of the lot and the contractor, whereby the former promised to pay, and the latter to accept, 90 per cent of the contract price for the improvements in lieu of the certificates of indebtedness otherwise to be issued by the mayor, and that, in pursuance of this agreement, the assessment of the lots was omitted by the officer at the request of the owner, and those certificates of indebtedness were not issued until more than twelve months after the certificates for the other improvements were issued, and until after the lands had been sold to Kilbourn. We are of opinion that Kilbourn obtained a title to the lots in question free from the lien of the alleged assessment, and that Alley acquired the same title alike unencumbered.

But it is contended that even if we adopt the conclusion reached by the court below, as to the illegality of the tax sale and the nullity of the certificate issued to the appellee, still the case made by the appellee does not show such a cloud upon his title as calls for relief from a court of equity. In other words, that when the illegality of a tax sale is patent upon the face of the proceedings, as is the case as to the sale here complained of, the jurisdiction of a court of equity to remove a cloud does not attach. The case of *Hannewinkle* v. *Georgetown*, 15 Wall. 547, cited by counsel, fails to support the contention that such is the law of this court. That case was not

a suit to remove a cloud from a title. The complainant filed a bill to enjoin the collection of a tax, alleged to be illegal, and the court decided that there was no remedy in equity to enjoin the collection of a tax, upon the sole ground of its illegality.

It is a well settled doctrine of this court that equity will not interpose to arrest the proceedings for the collection of a tax, upon the sole ground of its illegality. It is equally well settled by the decisions of this court and the state courts, that after the land has been sold, and a conveyance of some sort made to the purchaser, courts of equity have inherent jurisdiction to give relief to the owner against vexatious litigation and threatened injury to the market value of the land, by removing the cloud which such illegal sale, and the illegal claim arising from it, may cast upon the title. And in such case of damage, either existing or apprehended, equity will interpose for relief, even during the progress of the proceedings before the sale.

In the *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525, this court thus presents the whole law on this point:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

It may be proper to observe that in the present case the illegality does not appear wholly on the face of the record,

but that it is shown in part by evidence outside, to wit, the fact that the title to the land sought to be charged was acquired by a *bona fide* purchaser without notice. We think, therefore, that the allegations of the bill and the facts proved in this case bring it fully within the equity jurisdiction of the court.

Another ground upon which we are asked to reverse the decision of the court below is, that apart from the tax sale certificates, the act, itself a notice to all purchasers, in terms levied the tax directly upon the lots in question, and thereby a lien attached at once, and, the lien never having been removed, the decree should have required the appellee to pay to the defendant the amount of the tax due before granting the relief prayed for.

It is clear that the act does not in so many words create an express lien, and that the acts of Congress do not expressly confer upon the corporation the authority to create such liens. The statement, therefore, must be taken as true, only in the sense that every municipal tax, in cases of local improvement, paving, etc., involves a lien upon the particular real estate on which it is imposed. The error of the argument of counsel, we think, lies in the assumption that the lien attaches at the date of the passage of the act. The general rule is, that when no time is expressly fixed by the statute for the lien to take effect, it accrues upon the assessment of the tax. Now, the act of the common council imposed and levied a tax to defray the cost of the improvement, but it also declared that the tax should be assessed and collected in conformity with the provisions of certain acts which prescribed in detail, the mode, manner, and time of assessment, and the different steps to be taken preliminary to such assessment and collection. If any lien was created by the terms of the statute, it must have existed and attached according to such terms and conditions as were prescribed by the law creating it.

In the case of *Heine* v. *The Levee Commissioners*, 19 Wall. 655, 659, the court said:

"Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of

Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens. But here no taxes have been assessed except those which have been released by the bondholders accepting new bonds for the interest of the year so assessed. And it is too clear for argument that taxes not assessed are no liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed."

From the record before us, we think the decision of the court below, that no lawful assessment of the tax had been made; that no lien upon the lots in question exists; and that the appellant is not entitled to the relief prayed for in his cross-bill, accords fully with the decisions of this court, above referred to.

As the points disposed of are decisive of the case, we deem it unnecessary to discuss the effect of the temporary restraining order upon the validity of the collector's sale. The decree of the Supreme Court is

Affirmed.

WILLIAMSON *v.* NEW JERSEY.

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

No. 193. Argued March 12, 1889. — Decided April 1, 1889.

The legislature of New Jersey, by a statute, enacted that a "poor farm," belonging to the city of New Brunswick, and situated in the township of North Brunswick, should be at all times thereafter liable and subject to taxation by that township so long as it should be embraced within its limits. Subsequently, it was enacted by a statute, that the property of the cities of the State, and all land used exclusively for charitable purposes should be exempt from taxation, and that all inconsistent acts were repealed. The "poor farm" was used exclusively for charitable purposes; *Held:*

(1) The provision of the first statute was repealed;

(2) The legislature could constitutionally repeal the power of taxation given by the first statute;

(3) The first statute did not create a contract between the State and the township, the obligation of which could not be constitutionally impaired by its repeal.

The power of taxation on the part of a municipal corporation is not private property, or a vested right of property in its hands; but the conferring of such power is an exercise by the legislature of a public and governmental power which cannot be imparted in perpetuity, and is always subject to revocation, modification and control, and is not the subject of contract.

THE case is stated in the opinion of the court.

Mr. John S. Voorhees for plaintiff in error.

Mr. Robert Adrian for defendant in error.

Mr. Frederick Weigel filed a brief for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of New Jersey. The case arose on a writ of *certiorari* issued by that court at the instance of the mayor and common council of the city of New Brunswick, to review an assessment for taxation made by the township of North Brunswick, and a levy made by the collector of that township, against a farm known as the "poor farm," and personal property thereon, situated in the township of North Brunswick, and owned by the mayor and common council of the city of New Brunswick. The case arose on the following facts, which were agreed upon by the counsel for the respective parties:

By a special act of the legislature of New Jersey, approved February 28, 1860, (Laws of 1860, c. 67, p. 162,) parts of the townships of North Brunswick and Monroe, in the county of Middlesex were set off and established as a separate township, to be called East Brunswick, and part of the township of North Brunswick was set off and established as a separate township, to be called the township of New Brunswick, and the township committees of the said townships of North Brunswick, East Brunswick and New Brunswick were author-

ized and required to divide the real and personal property of the township of North Brunswick between said townships.

The poor farm of the original township of North Brunswick was situated within the limits of what remained of the township of North Brunswick, after the setting off of the townships of East Brunswick and New Brunswick as aforesaid.

By a special act of the legislature, approved March 15, 1861, (Laws of 1861, c. 170, p. 507,) the said township of New Brunswick and the city of New Brunswick were declared to be one corporate body under the name of "The Corporation of the City of New Brunswick," and the said corporation was made subject to all the liabilities of the inhabitants of the township of New Brunswick.

The poor farm and the personal property thereon were never divided between the townships of North Brunswick and East Brunswick and the corporation of the city of New Brunswick, but the townships agreed to sell and convey their interests in the same to said corporation.

By a special act of the legislature, approved February 18, 1862, (Laws of 1862, c. 37, p. 52,) the township committees of North Brunswick and East Brunswick were authorized to convey all the interests of the said townships in said farm and the personal property thereon to the said corporation; and it was thereby further enacted that the said poor farm and the personal property thereon should be at all times thereafter liable and subject to taxation by the township of North Brunswick so long as it should be embraced in the limits of said township.

By virtue of the authority thereby given, the township committees of said townships sold and conveyed said farm and the personal property thereon to said corporation by deed of conveyance bearing date March 27, 1862.

The said corporation of the city of New Brunswick entered into possession of said farm and the personal property thereon under the contract expressed in said deed of conveyance, and is still in possession of the same, and the said farm is still within the limits of the township of North Brunswick.

The said farm and property have been duly assessed by the

township of North Brunswick each year since said sale and conveyance, and the taxes so assessed have been paid by the corporation of the city of New Brunswick to the township of North Brunswick up to and including the year 1877, when further payments were refused on the ground that said poor farm was used exclusively for charitable purposes, and therefore was not liable to taxation.

This *certiorari* brings up the assessment for the year 1878, for the purpose of determining whether said farm and personal property thereon are liable and subject to taxation by said township of North Brunswick.

The deed of March 27, 1862, which contains a copy of the act approved February 18, 1862, is set forth in the margin.[1]

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[1] Deed from James C. Edmonds, William Dunham, Abm. L. Van Liew, Ellsworth Farmer and James H. Webb, township committee of the township of North Brunswick, and John Griggs, John Culver, Charles P. Blew and Joseph H. Bloodgood, township committee of the township of East Brunswick, to the corporation of the city of New Brunswick.

This indenture, made this 27th day of March, in the year of our Lord one thousand eight hundred and sixty-two, between James C. Edmonds, William Dunham, Abraham L. Van Liew, Ellsworth Farmer and James H. Webb, township committee of the township of North Brunswick, John Griggs, John Culver, Charles P. Blew and Joseph H. Bloodgood, a majority of the township committee of the township of East Brunswick, in the county of Middlesex and State of New Jersey, of the first part, and the corporation of the city of New Brunswick, in the State of New Jersey, of the second part witnesseth: That the said party of the first part, for and in consideration of the sum of two thousand six hundred and eleven dollars and thirteen cents, lawful money of the United States of America, to them, the said party of the first part, in hand well and truly paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, being fully satisfied, contented and paid, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm, to the said party of the second part and to their successors and assigns forever, all that certain farm and tract of land and premises known as the poor farm, situate, lying and being in the township of North Brunswick, in the county of Middlesex and State of New Jersey, 'butted and bounded as follows: Beginning at the southeasterly corner of a lot of land of Thomas Van Deursen on George's road, thence running along said Van Deursen's line north seventy-one degrees and twenty-five minutes west twenty-three chains to another corner of said Van Deursen's land; thence along his land north

It was agreed between the attorney for the plaintiff in the *certiorari* and the attorney for the defendant, that the sole

eighteen degrees and twenty-five minutes east five chains and ten links to Mill lane; thence along Mill lane north seventy-one degrees and thirty minutes west ten chains and fifteen links; thence still along Mill lane north sixty-two degrees thirty minutes west two chains and sixty links to a corner of land formerly of David Freeman; thence along the line of said land south forty-four degrees twenty-five minutes west thirty chains and twenty-five links; thence south sixty-two degrees and five minutes east thirty-one chains and fifty links to a corner of Belcher's land; thence north forty-four degrees and thirty minutes east ninety-six links to another corner of Belcher's land; thence south along the line of Belcher's land forty-three degrees and thirty minutes east thirty chains to George's road; thence along said road north twenty-six degrees fifteen minutes east three chains and eighty-five links; thence still along said road north three degrees thirty minutes east nine chains; thence still along said road north five degrees east seven chains and sixty-five links; thence still along said road north two degrees thirty minutes west six chains; thence still along said road north fifteen degrees thirty minutes west seven chains thirty-five links; thence still along said road north sixteen degrees east two chains and eight links; thence still along said road north thirty degrees forty-five minutes east six chains and eight links, to the place of beginning; containing one hundred and forty-one acres.

The above described farm and premises are conveyed by the parties of the first part aforesaid by virtue of the power and authority in them vested by the act of the legislature of the State of New Jersey entitled "An act to authorize the township committees of the township of North Brunswick and East Brunswick, in the county of Middlesex, to convey to the corporation of the city of New Brunswick, the poor farm in the township of North Brunswick, together with all the personal property on said farm," passed 18th February, A.D. 1862, a copy of which is hereto annexed and taken as part of this deed:

"An act to authorize the township committees of the township of North Brunswick and East Brunswick, in the county of Middlesex, to convey to the corporation of the city of New Brunswick the poor farm in the township of North Brunswick, together with all the personal property on said farm.

"Whereas, by an act of the legislature, passed February twenty-eighth, Anno Domini one thousand eight hundred and sixty, the then township of North Brunswick was divided into the townships of North Brunswick, East Brunswick and New Brunswick, and the town committees of said townships were authorized and required to divide the real and personal property of the township of North Brunswick between the new townships of North Brunswick, East Brunswick and New Brunswick; and whereas the poor farm, which is situate in the limits of the present township of

question to be discussed in the Supreme Court of New Jersey was whether the poor farm, situated in the township of North

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North Brunswick, and which belonged to the former township of North Brunswick, and the personal property thereon, has never been divided, but is owned and held in common by the said townships of North Brunswick, East Brunswick and the corporation of the city of New Brunswick, which said corporation has, by an act of the legislature, passed March fifteenth, Anno Domini one thousand eight hundred and sixty-one, succeeded to, and become invested with, and entitled to, all the rights and property of the said township of New Brunswick; and whereas such ownership and holding in common is found inconvenient and injurious; and whereas the said townships of North Brunswick and East Brunswick have agreed with the corporation of the city of New Brunswick to convey and sell to the said corporation of the city of New Brunswick all their and each of their right, title, interest and estate in the said poor farm and personal property thereon, for the sum of two thousand six hundred and eleven dollars and thirteen cents, the value of the interest of those townships therein — therefore

"1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the township committees of the townships of North Brunswick and East Brunswick, or a majority of each of the said town committees, be and they are hereby authorized and empowered to convey all the right, title, interest and estate of the said townships in the said poor farm and the personal property thereon, to the said corporation of the city of New Brunswick, for the sum aforesaid.

"2. *And be it enacted*, That the said poor farm and the personal property thereon shall be at all times hereafter liable and subject to taxation by the said township of North Brunswick so long as it is embraced in the limits of the said township of North Brunswick.

"3. *And be it enacted*, That any person sent from the corporation of the city of New Brunswick, or township of East Brunswick, to the said poor farm, or any person born upon the said poor farm, shall not, by reason of any residence or being born on said farm, acquire a residence or settlement in the said township of North Brunswick, the place of settlement of any person sent as aforesaid to the said poor farm, or born thereon, shall be determined in all cases without reference to their residence or being born on said poor farm.

"4. *And be it enacted*, That this act shall take effect immediately."

Together with all and singular the buildings, improvements, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and every part and parcel thereof; and also all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, both in law and equity, of aforesaid townships of North Brunswick and East Brunswick, to the said premises, and to every part and parcel thereof; to have and to hold the same to the

Brunswick, and owned by the city of New Brunswick, was exempt from taxation; and that the poor farm referred to, the buildings thereon and the furniture and fixtures therein, were used exclusively for charitable purposes by the city of New Brunswick, the owner thereof.

The questions considered by the Supreme Court of New Jersey were (1) whether the 2d section of the act approved February 18, 1862, was repealed by the general tax law of the State, approved April, 11, 1866, (Revised Laws 1150,) the 5th section of which enacted that the property of the cities of the State, and all buildings used exclusively for charitable purposes, with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof, and the furniture and personal property used therein, shall be exempt from taxation; and the 32d section of which, after repealing certain acts named, repealed all other acts or parts of acts, whether special or local or otherwise, inconsistent with the provisions of the act of 1866, except one act approved in 1864 and such special or local acts as had been approved since 1862; (2) whether, if the legislature had, by the act of April 11, 1866, declared its purpose to repeal the 2d section of the act of February 18, 1862, such purpose could be constitutionally enforced.

The Supreme Court held 15 Vroom, (44 N. J. Law,) 165, (1) that the declaration in the general law of 1866 that all acts and parts of acts, whether special or local or otherwise, inconsistent with its provisions, were repealed, abrogated the provisions in the prior special act of 1862 for the taxation of the poor farm and the personal property thereon by the township of North Brunswick, because such provision in the act of 1862 was inconsistent with the provision in the act of 1866 exempting from taxation all property of the cities of the State and all property used exclusively for charitable purposes; (2) that the legislature could constitutionally repeal the power of taxing

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said party of the second part, their successors and assigns, to the use of the party of the second part, their successors and assigns.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

the poor farm and the personal property thereon, given by the act of 1862 to the township of North Brunswick. The court decided that the provisions of the two statutes could not stand together, and that it was impossible to give full effect to the language of the repealing provision of the act of 1866 and keep in operation the second section of the act of 1862. It also decided that the provision of the second section of the act of 1862 did not become, by reason of the subsequent conveyance of March 27, 1862, to the corporation of the city of New Brunswick, a contract between that corporation and the township of North Brunswick, the obligation of which the legislature was forbidden to impair; that one legislature could not confer upon a township a power of taxation which a subsequent legislature could not revoke against the objection of the township; that the power of a legislature over a corporation created for the purposes of local government was supreme; that no contract with such a corporation arose from the delegation to it of taxing authority, citing *Tinsman* v. *Belvedere Del. Railroad*, 2 Dutcher (26 N. J. Law), 148; *Mayor* v. *Jersey City & Bergen Railroad*, 5 C. E. Green (20 N. J. Eq.), 360; and *Rader* v. *Southeasterly Road Dist.*, 7 Vroom (36 N. J. Law), 273; and that the power of taxation was not in any sense the private property of the municipality, but was peculiarly a public and governmental power, and must, as such, be at all times susceptible of repeal or modification, according to legislative discretion, so far as the mere right of the township to exercise it was concerned.

The judgment of the Supreme Court was that the assessment of taxes should be set aside. The collector of the township removed the case, by a writ of error, to the Court of Errors and Appeals of the State, which affirmed the judgment, in an opinion 17 Vroom, (46 N. J. Law,) 204, adopting the reasons given by the Supreme Court. The case having been remitted to the Supreme Court, the collector has brought it here by a writ of error to that court.

On the question as to the effect of the act of 1866, in repealing the 2d section of the act of 1862, we concur with the highest court of New Jersey, that the provisions of the two

statutes cannot stand together, and that it is impossible to give full effect to the language of the repealing provision of the act of 1866, and keep in operation the 2d section of the act of 1862. We must therefore hold, as the state court held, that the 2d section of the act of 1862 was repealed by the act of 1866. This leaves open only the consideration of the question as to whether the 2d section of the act of 1862 created a contract, the obligation of which could not be constitutionally impaired by the repeal of such 2d section.

It is contended for the collector, that the tax provided for by the 2d section of the act of 1862 is in the nature of a ground-rent, and of a right reserved by the township of North Brunswick, out of the land conveyed by the deed of March, 1862; that the fee of the poor farm belonged to the township in its private and proprietary character; that the farm had been acquired by the taxation of the inhabitants of the township; that the legislature could not deprive them of it without their consent; that the township was authorized by the legislature to convey the farm to the corporation of the city of New Brunswick for the consideration, in part, of the right of the township of North Brunswick to tax it so long as it should be embraced in the limits of that township; that, in taking the title, the city of New Brunswick agreed to pay to that township an annual sum to be determined in amount by the annual tax-rate of that township, so long as the farm should remain under, and receive the benefit of, the municipal government of that township; that the right thus reserved, of levying and collecting such tax, became thereby vested in that township, and the amount of tax, when determined, became its private property; and that the case involves the question of the authority of the legislature over the private property and vested rights of the township, and not the question of its authority over the public and governmental powers of the township.

We concur in the views of the Court of Errors and Appeals of New Jersey on this question. It is not the same question as that involved in the principle recognized by this court, that a provision in an act of a legislature, exempting certain speci-

fied property from taxation by the authorities of a State or a municipality, for all time or for a limited time, constitutes a contract in respect of such property, the obligation of which cannot be impaired by a subsequent legislature, and is, therefore, a contract within the protection of the Constitution of the United States.

It is to be observed in the present case, that the act of February 18, 1862, does not assert or recognize the fact that the privilege of taxing the poor farm in the future was a part of the consideration for the conveyance of that farm by the township of North Brunswick. The act recites that the townships of North Brunswick and East Brunswick had agreed to convey and sell to the corporation of the city of New Brunswick their interest in the poor farm and the personal property thereon, for the sum of $2611.13, "the value of the interest of those townships therein." It then empowers the two townships to convey their interest in the poor-farm and the personal property thereon to the corporation of the city of New Brunswick "for the sum aforesaid." It then enacts, in the 2d section, which is a separate and independent section, "that the said poor farm and the personal property thereon shall be at all times hereafter liable and subject to taxation by the said township of North Brunswick so long as it is embraced in the limits of the said township of North Brunswick."

So, also, the deed of March 27, 1862, recites as its consideration the sum of $2611.13, paid by the corporation of the city of New Brunswick to the grantors. No other consideration is expressed. The act of February 18, 1862, is incorporated in the deed, as the authority by virtue of which the grantors convey the property.

It is not intended to suggest that, if the right of taxation had been named in the act or in the deed as a part of the consideration for the conveyance, it would have made a different case; but reference is made to the actual provisions of the act and the deed solely for the purpose of showing that they evince no idea on the part of the legislature, or of the parties to the conveyance, that the perpetual right of taxation, now asserted, formed any part of the consideration of the transaction.

Opinion of the Court.

The true principle involved in the case is, whether the power of taxation on the part of a municipal corporation is private property, or a vested right of property, in its hands, which, when once conferred upon it by an act of the legislature, cannot be subsequently modified or repealed. Even without the special provision of the 2d section of the act of February 18, 1862, it is to be presumed that the poor farm and the personal property thereon would, while situated in the township of North Brunswick, be subject to taxation by that township unless exempted from such taxation on the ground of a charitable use. The special question in this case arises, therefore, solely out of the use of the words, in the 2d section, "at all times hereafter." The provision of the 2d section, and the contention here made on the part of the collector, necessarily imply the authority of the legislature to confer the power of taxation upon the township, and the non-existence of such power unless conferred by the legislature. The question arising is, therefore, whether the legislature which passed the act of February 18, 1862, could lawfully so grant the power of taxation to the township in perpetuity, that a subsequent legislature could not repeal or modify such grant of power.

We are clearly of opinion that such a grant of the power of taxation, by the legislature of a State, does not form such a contract between the State and the township as is within the protection of the provision of the Constitution of the United States which forbids the passage by a State of a law impairing the obligation of contracts. The conferring of such right of taxation is an exercise by the legislature of a public and governmental power. It is the imparting to the township of a portion of the power belonging to the State, which it can lawfully impart to a subordinate municipal corporation. But, from the very character of the power, it cannot be imparted in perpetuity, and is always subject to revocation, modification and control by the legislative authority of the State. The authorities to this effect are uniform. 1 Dillon on Mun. Corp. 3d ed. §§ 61, 63, and cases there cited; Cooley on Const. Lim. 3d ed. *192, *193, *237, and cases there cited: *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 534; *State Bank* v.

Knoop, 16 How. 369, 380; *United States* v. *Railroad Co.*, 17 Wall. 322, 329; *Philadelphia* v. *Fox*, 64 Penn. St. 169; *Mayor* v. *Jersey City & Bergen Railroad*, 5 C. E. Green (20 N. J. Eq.), 360; *Police Jury* v. *Shreveport*, 5 La. Ann. 661, 665; *State* v. *St. Louis County Court*, 34 Missouri, 546, 552; *People* v. *Morris*, 13 Wend. 325, 331; *Warner* v. *Beers*, 23 Wend. 103, 126; *City of Richmond* v. *Richmond & Danville Railroad*, 21 *Grattan*, 604, 613; *County of Richland* v. *County of Lawrence*, 12 Illinois, 8; *Trustees of Schools* v. *Tatman*, 13 Illinois, 27, 30; *Gutzweller* v. *People*, 14 Illinois, 142; *Sangamon County* v. *City of Springfield*, 63 Illinois, 66, 71.

In the present case the 2d section of the act of February 18, 1862, has no more force than if the words "at all times hereafter" had been omitted; and the section is to be construed as if it only temporarily conferred the right of taxation on the township, subject to be recalled at the pleasure of the legislature. There is no element of private property in the right of taxation conferred upon a municipal corporation. Property acquired by paying for it with money raised by taxation is property. The legislation in question does not affect or interfere with any such property. The poor farm and the personal property thereon are not the property of the township of North Brunswick, but are the property of the corporation of the city of New Brunswick. Nor is there anything violative of any provision of the Constitution of the United States in the enactment of the legislature of New Jersey, that the property in question shall be exempt from taxation because it is used exclusively for charitable purposes. The long recognized and universally prevalent policy of making such exemption is a warrant for saying that the 2d section of the act of February 18, 1862, is fairly to be regarded as containing an implied reservation that such exemption might be thereafter made, as being the exercise of a public and governmental power, resting wholly in the discretion of the legislature, and not the subject of contract.

Judgment affirmed.

THE ALASKA.[1]

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

No. 1217. Submitted March 11, 1889. — Decided April 1, 1889.

In a suit in admiralty, *in rem*, in a District Court, against a British steamship, brought by the widows of five persons, to recover $5000 each, for the loss of their lives, on board of a pilot-boat, by a collision which occurred on the high seas between the two vessels, through the negligence of the steamship, a stipulation for value was given by the claimant of the steamship, in the sum of $25,000, to obtain her release. The District Court dismissed the libel. It was amended by claiming $10,000 for the loss of each life, and then the libellants appealed to the Circuit Court, which made the same decree. The libellants having appealed to this Court, the appellee made a motion, under subdivision 5 of Rule 6, to dismiss the appeal for want of jurisdiction, and united with it a motion to affirm; *Held*, that the amount involved, if not the entire sum of $25,000, was, at least, the sum of $10,000 in each case, and that the motion to dismiss must be denied:

But as there was sufficient color for the motion to dismiss to warrant this court in entertaining the motion to affirm, the decree was affirmed, on the ground that the appeal was taken for delay only, in view of the decision in *The Harrisburg*, 119 U. S. 199, that in the absence of an act of Congress or of a statute of a State giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which was caused by negligence.

MOTIONS TO DISMISS OR TO AFFIRM. The court in its opinion stated the case as follows:

This is a motion to dismiss the appeal in this case, and united with it is a motion, under subdivision 5 of Rule 6, to affirm the decree below, on the ground that, although the record may show that this court has jurisdiction, it is manifest

[1] The docket title of this case was *Catharine A. Metcalfe, Mary E. Noble, et al., Appellants*, v. *The Steamship Alaska, her Engines etc., Lady D. E. Pearce, Sir William George Pearce, James Robertson, and Richard Barnwell, Executors of William Pearce, Deceased, Claimants.*

the appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

The suit is a libel *in rem*, in admiralty, filed in the District Court of the United States for the Southern District of New York, by the owners of the pilot-boat Columbia, against the British steamship Alaska, to recover damages for the loss of the Columbia by a collision with the Alaska, on the 2d of December, 1883, on the high seas near the coast of Long Island, New York. The libel also embraced a claim for the loss of property and personal effects by some of the libellants. There was claimed for the loss of the pilot-boat, $16,000, and for the loss of the other property, $2100. It was alleged that the collision occurred solely through the negligence of the persons in charge of the Alaska. All the persons on board of the pilot-boat were drowned. Among them were four pilots and a cook. One of the four pilots was a part-owner of the Columbia.

William Pearce, of Glasgow, Scotland, filed a claim to the Alaska, after her attachment, and also gave a stipulation for value, in the sum of $20,000, to secure the release of the Alaska from the claims for the loss of the Columbia and of the personal effects. A supplemental libel was filed by the widows of the four pilots and of the cook who were drowned, and in it four of them on behalf of themselves and infant children severally, and the other one on her own behalf, claimed in each of the five instances damages in the sum of $5000, for the loss severally of the lives of the persons so drowned. After the filing of the supplemental libel, Pearce gave a further stipulation for value, in the sum of $25,000, to secure the release of the Alaska from the claims for the loss of the five lives. The latter stipulation was in the following terms:

"Whereas a supplemental libel was filed on the 22d day of November, in the year of our Lord one thousand eight hundred and eighty-four, by Catherine A. Metcalfe, Mary E. Noble, Agnes Arnold, Mary Wolf, and Bella Forblade against the British steamship Alaska, her engines, etc., for the reasons and causes in the said libel mentioned; and whereas the said

steamship Alaska, her engines, in the original action brought against said vessel by Augustus Van Pelt and others, was in the custody of the marshal under the process issued in pursuance of the prayer of the said libel; and whereas a claim to said vessel has been filed by William Pearce, and the value thereof has been fixed by consent at twenty-five thousand dollars for the purposes of this action, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of claimant, or his surety, execution for the above amount may issue against their goods, chattels, and lands:

"Now, therefore, the condition of the stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Wilcox, Adams & Macklin, Esquires, proctors for the claimant of said steamship Alaska, her engines, etc., abide by and pay the money awarded by the final decree rendered by this court or appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue."

Pearce put in exceptions and an answer to the libel and the supplemental libel, denying the liability. The District Court, on a hearing on pleadings and proofs, entered an interlocutory decree, adjudging that the collision was caused by the mutual fault of the Alaska and the Columbia, and referring it to a commissioner to ascertain the damages. 27 Fed. Rep. 704. The commissioner made his report, which was excepted to by both parties, and a decree was made by the District Court awarding to the libellants certain sums as damages for the loss of the Columbia and of personal effects, and dismissing the supplemental libel in respect of the damages claimed for the loss of lives.

Both parties appealed to the Circuit Court, the claimant on the ground that the libellants were not entitled to any damages, or, if to any, that the damages allowed were excessive; the libellants on the ground that they were entitled to full

damages, instead of only half damages, and that the value of the Columbia had been allowed at too small a sum; and the libellants in the supplemental libel on the ground that they were entitled to full damages. Before these appeals were perfected, it was consented by the parties that the supplemental libel might be amended so that the claim for the loss of life should be $10,000 in each of the five cases, instead of $5000.

The Circuit Court (33 Fed. Rep. 107) made a like decree with that of the District Court, finding that both vessels were in fault for the collision, and dividing the damages and the costs of both courts between the respective parties; and dismissing the supplemental libel for the loss of the lives, without costs of either court to either party.

The sums awarded by the decree of the Circuit Court were paid, and the libellants in the supplemental libel appealed to this court.

Mr. George Bethune Adams for the motions.

Mr. James Parker opposing.

The motion to dismiss cannot be granted, as it is clear that the amount in controversy exceeds the jurisdictional amount. *Oliver* v. *Alexander*, 6 Pet. 143; *The Mamie*, 105 U. S. 773; *Ex parte Baltimore and Ohio Railroad*, 106 U. S. 5; *Davies* v. *Corbin*, 112 U. S. 36. And it is well settled that the motion to affirm will not be entertained unless there is color of right to the other motion. *Whitney* v. *Cook*, 99 U. S. 607; *Hinckley* v. *Morton*, 103 U. S. 764; *Micas* v. *Williams*, 104 U. S. 556; *Ackley School District* v. *Hall*, 106 U. S. 428; *Davies* v. *Corbin*, 113 U. S. 687.

Should, however, this court deem it proper under the rule, to entertain the motion to affirm, we present the following in opposition to such action.

Such motion under subdivision 5 of Rule 6, can only be made upon two grounds. 1. That the appeal was taken for delay only. 2. That the same is so frivolous as not to need further argument.

Argument against the Motions.

This appeal cannot be said to be taken for delay only, because there is no decree against the appellants, the execution of which can be delayed by appeal. They are under no obligation to the appellees of any nature. There is nothing to delay about. Their libels were dismissed without costs to either party, because the Circuit Court felt itself bound by the decision of this court in *The Harrisburg*, 119 U. S. 199.

The second ground demands more consideration. It is always with great embarrassment that a counsel stands before this court to appeal to it to do anything that will tend to cast a doubt upon the correctness of its own decisions; but, on the other hand, I am sure that inasmuch as my duty to my clients requires me so to do, no pride of opinion will induce the court to refuse to hear their plea in the ordinary course of its administration of justice.

Ever since admiralty law began to be administered a conflict has existed between the admiralty and common law courts of Great Britain as to the jurisdiction of the former. It is now settled there that "collisions and injuries to property and persons on the high seas" are subjects of admiralty jurisdiction. Benedict Adm. §§ 74, 111.

In the United States the same struggle began with the adoption of the Constitution, and has continued until now. In *The Thomas Jefferson*, 10 Wheat. 428 (1825), Chief Justice Marshall, as the mouthpiece of a unanimous court, declared that: "The admiralty has no jurisdiction over contracts for the hire of seamen, except in cases where the service is substantially to be performed on the sea or upon waters within the ebb and flow of the tide." This was reasserted in *Peyroux* v. *Howard*, 7 Pet. 324; *The Hope*, 10 Pet. 108; *The Orleans* v. *Phœbus*, 11 Pet. 175; *Waring* v. *Clarke*, 5 How. 441. Thus the law continued until 1851, when, in the case of *The Genesee Chief*, 12 How. 443, this court, Mr. Chief Justice Taney delivering the opinion, (Mr. Justice Daniel alone dissenting,) overruled all the foregoing decisions, and held that admiralty jurisdiction was *not* confined to waters within the ebb and flow of the tide, and that, too, upon the ground *that the former contrary decisions had not been well considered*,

although the learned Chief Justice himself and his associates, McLean, Wayne and Catron, JJ.; and such justices as Marshall, Johnson, Story, Washington, Thompson, Baldwin, Duvall and Todd had united in making them.

In respect to the admiralty jurisdiction to award damages growing out of loss of life, prior to the decision of *The Harrisburg*, a Chief Justice (Chase) and two of the justices of this court, (Woods and Blatchford, 6 Ben. 370,) the Circuit Courts of four Circuits, the District Courts of nine or ten Districts, had united in maintaining the jurisdiction on various grounds. See also *Ex parte Gordon*, 104 U. S. 515. The decision in *The Harrisburg* changed the uniform current of admiralty decisions on this subject.

In other matters this court has reversed its rule of jurisdiction and its views of the law. *Dred Scott* v. *Sandford*, 19 How. 393; *The Legal Tender Cases; Osborne* v. *Mobile*, 16 Wall. 479, reversed in *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, are instances; and there are many others.

Since the case of *The Harrisburg* was decided, in the case of *The Cephalonia*, 29 Fed. Rep. 332, which decision was affirmed on appeal by Mr. Justice Blatchford sitting as circuit judge, 32 Fed. Rep. 112, Judge Benedict held that damages for loss of life may be recovered in admiralty. That was, to be sure, a suit *in personam* by an administratrix. A tug had been sunk and several persons drowned by a collision which occurred within the Narrows in the harbor of New York, by the steamer Cephalonia, coming up astern of her. Suppose the same steamer had followed the tug to a point on the high seas just without the three mile limit and sunk her, and drowned the same parties under the same circumstances, would the admiralty court in such case have lost its jurisdiction?

The case is not identical with *The Harrisburg*. There the parties were all citizens of the United States. The vessel was owned in Pennsylvania, and the killing occurred in waters of Massachusetts. There was a remedy at common law in each of those States had the parties sued in time. But here the libellants and those who were wrongfully killed are, and were, citizens of New York; the wrong-doing vessel is owned

in Great Britain, and the wrongful killing occurred on the high seas, without the territorial jurisdiction of any State or country, and in a place to which the general law, the *jus gentium*, applies, and to which the *common law* does not, and never could or did apply.

In *The Harrisburg*, the libels had not been brought within the time limited by the statutes of Massachusetts or Pennsylvania.

By the statutes of the State of New York, (Code of Civil Procedure, § 1902,) such a suit must be brought within two years after the death. The deaths in this case occurred December 2d, 1883, and the libel was filed November 11th, 1884, within the two years prescribed by the statutes of New York.

In *The Harrisburg*, this court did not decide that branch of the case. How far the fact that we began within the time limited by the Code of New York affects jurisdiction; whether the suit should have been brought by the administrators; whether an action *in rem* against the offending vessel will lie: these questions will all arise in this case; and, in respect to them, this case is different from that of *The Harrisburg*.

Unless these libellants can appeal to an Admiralty Court, they are remediless. They could not have appealed to the courts of the State of New York, because the deaths did not occur within that State, or in waters subject to its jurisdiction. Numerous decisions of the courts of that State of which these libellants are citizens have settled it, that, no action by an administrator will lie where the death complained of occurred without the State, unless proof is given that the statutes of the State in which the death occurred authorized such an action. *Whitford* v. *Panama Railroad*, 23 N. Y. 465; *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48; *Debevoise* v. *New York, Lake Erie &c. Railroad*, 98 N. Y. 377.

No statute law applies on the high seas, as between vessels and persons of different nations. There the admiralty law reigns supreme; and the Court of Admiralty is the only court whose jurisdiction applies there.

In view of all these decisions and considerations, it cannot properly be said that the question upon which the jurisdiction

in this case depends is so frivolous as not to need further argument.

Mr. Justice Blatchford delivered the opinion of the court.

The object of the appeal is to obtain a decree here that the Alaska is liable for the loss of the five lives. The ground alleged for the motion to dismiss the appeal is, that the sum in dispute as to each of the five lives is not over the sum of $5000, and, therefore, is not sufficient to give jurisdiction to this court. The view urged is, that the amount originally claimed by the supplemental libel for the loss of each of the five lives was $5000; that the stipulation in the sum of $25,000, given to release the Alaska from the five claims, was $5000 for each claim, the amount in dispute in each case being one fifth of $25,000, and that the case stands as if each of the five parties had commenced a separate suit for $5000, and five separate stipulations had been given, each in that amount.

But, as the stipulation is a unit, and is for the sum of $25,000, and in it the stipulators agree that execution may issue for the $25,000 against their property, and the condition of the stipulation is, that the stipulators shall pay the money awarded by a final decree, (not exceeding, of course, $25,000,) and as the claim of damages made by each one of the five parties is, by the amendment of the libel, $10,000 instead of $5000, it might very well be that some of the libellants would recover more than $5000, even on an apportionment of the damages. The fund of $25,000 is a common fund for the benefit of the five parties; and, on the facts of this case, the amount involved, on the question of jurisdiction, if not the entire sum of $25,000, is, at least, the sum of $10,000 in each case. *Gibson* v. *Shufeldt*, 122 U. S. 27, 31 *et seq.* and cases cited.

But there is sufficient color for the motion to dismiss, to warrant us in entertaining the motion to affirm. *Whitney* v. *Cook*, 99 U. S. 607; *Hinckley* v. *Morton*, 103 U. S. 764; *Micas* v. *Williams*, 104 U. S. 556; *The S. C. Tryon*, 105 U. S. 267; *Independent School Dist.* v. *Hall*, 106 U. S. 428; *Davies* v. *Corbin*, 113 U. S. 687.

On the merits, we are of opinion that this case is governed

by the decision in the case of *The Harrisburg*, 119 U. S. 199, and that this appeal was taken for delay only. In the case of *The Harrisburg*, it was held that, in the absence of an act of Congress or of a statute of a State, giving a right of action therefor, a suit in admiralty could not be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which was caused by negligence. It is admitted by the counsel for the libellants that the statute of New York, (Code of Civil Procedure, § 1902,) on the subject of actions for death by negligence, does not apply to the present case, because the deaths did not occur within the State of New York, or in waters subject to its jurisdiction. It is further to be said, that that statute gives a right of action only to the executor or administrator of the deceased person, while the present suit is brought by widows; and that the statute provides only for a suit against an individual person or a corporation, and not for a proceeding *in rem*.

A distinction is sought to be drawn between the present case and that of *The Harrisburg*, on the ground that in that case the vessel was owned in Pennsylvania, while here the Alaska is a British vessel; and that in that case the wrongful killing occurred in the waters of the State of Massachusetts, while here it occurred on the high seas. But we see no sound distinction between the two cases. In the case of *The Harrisburg*, the alleged negligence which resulted in the death occurred in a sound of the sea, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The question involved and decided in that case was, whether the admiralty courts of the United States could take cognizance of a suit to recover damages for the death of a human being on the high seas or on waters navigable from the sea, caused by negligence, in the absence of an act of Congress or a statute of a State, giving a right of action therefor. That question was answered by this court in the negative, and the decision entirely covers the present case.

The motion to dismiss the appeal is denied, and the decree of the Circuit Court is affirmed.

BALTIMORE AND POTOMAC RAILROAD COMPANY *v.* HOPKINS.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1173. Submitted November 26, 1888. — Decided April 1, 1889.

The validity of a statute is drawn in question when the power to enact it is fairly open to denial, and is denied: but not otherwise.

The "validity of a statute of the United States," as the term is used in the act of March 3, 1885, c. 355, § 2, 23 Stat. 443, "regulating appeals from the Supreme Court of the District of Columbia" to this court, refers only to the power of Congress to enact the particular statute drawn in question, and not to a judicial construction of it which does not question that power.

In an action against the Baltimore and Potomac Railroad Company to recover for injuries suffered by an unlawful use of the streets of Washington by the company, the judgment being for less than the jurisdictional amount necessary to sustain a writ of error, this court will not acquire jurisdiction by reason of a charge to the jury which instructs them that certain uses of those streets were warranted by statutes of the United States, and that certain other uses were not authorized by them.

Semble, that that company is not authorized to occupy the public streets of Washington for the purposes of a freight yard as such.

This was an action on the case brought by Hopkins in the Supreme Court of the District of Columbia against the Baltimore and Potomac Railroad Company for injuries alleged by him to have resulted from a nuisance maintained by the railroad company on the public street in front of his door, from the 5th day of October, 1880, to the 5th day of October, 1883, the date of the commencement of the suit, consisting in suffering great numbers of freight cars to remain on said street for an unreasonable length of time; in shifting cars back and forth in an unreasonable manner, with engines making disturbing noises and giving out volumes of smoke, cinders, etc., the cars being often filthy and emitting offensive odors, etc.

The freight station of the company was situated in square 386, at the original terminus of the road between Ninth and Tenth streets on Maryland avenue. Hopkins's dwelling-house was in the square opposite on the north side of Maryland avenue between the same lateral streets.

Statement of the Case.

On the trial of the cause the plaintiff gave evidence tending to prove the truth of the allegations in his declaration, and the defendant gave evidence in its own defence, and, among other things, to establish that the authorities of the District of Columbia in 1874 enclosed the tracks of the railroad with a line of stone curbing on each side about six inches higher than the adjacent surface of the streets, and that the tracks were elevated so as to be flush with this curbing; that the point between Ninth and Tenth streets was regarded and treated as the termini of two lines of railroad, one coming from Virginia and the other from Maryland, and that the freight trains habitually stopped there as at the end of the route, to change engines, etc.; and it was claimed on behalf of defendant that it possessed and exercised authority by virtue of grants from the United States to do all that it did do in the premises, the validity of which authority, it is now insisted, was denied by the court.

Among other instructions given by the court, at plaintiff's request, was the following:

"8. The defendant company, under its charter, had no right to convert Maryland avenue, between 9th and 10th streets, into a freight yard by using the same for loading or unloading its cars, or to encumber said place with cars by leaving them standing there an unreasonable time when not in use, or to use said part of the avenue for making up freight trains or shifting the same, except so far as may be reasonably necessary for the purpose of carefully carrying cars out of said station over the different tracks for the purpose of making up freight trains; and, if the jury shall find from the evidence that the defendant company did use said parts of Maryland avenue between the times named in the declaration for such loading or unloading of cars, or encumbered the same by leaving the cars standing there an unreasonable time when not in use, and used the same for making up and shifting its freight trains, (except in so far as was reasonably necessary in connection with the careful carrying of such cars into the freight station, or the careful carrying of such cars out of the station over the different tracks for the purpose of making up freight trains,)

and shall further find that such acts on the part of the defendant interfered with the comfortable enjoyment by the plaintiff of his dwelling-house, No. 941 Maryland avenue, then the plaintiff is entitled to recover."

And by instruction 7 the jury were told that —

"The plaintiff is not entitled to recover for any annoyances, discomforts or inconveniences to himself or his family, or for any injury to the use and enjoyment of said dwelling-house, which resulted from such uses of Maryland avenue by the defendant as were reasonably incident to the careful conduct of its through business, and to the maintenance and careful use of its freight depot or station, abutting on the south side of said avenue between said 9th and 10th streets southwest."

And the court gave, on defendant's behalf, these instructions:

"1. The defendant is entitled to make such careful use of the tracks between 9th and 10th streets on Maryland avenue as may be necessary for the lawful use and enjoyment of its freight depot or station opposite the plaintiff's premises and on square 386.

"2. The plaintiff is not entitled to recover anything in this case for noise, smoke, odors, or any other inconveniences suffered by him or his family by reason of the lawful use by the defendant of the freight station or the tracks in the street in front of the plaintiff's property; and the burden of proof is upon the plaintiff to point out to the jury by satisfactory testimony the acts of the defendant which were unlawful and unauthorized, if any such there were.

"3. The plaintiff, under his declaration and upon the evidence, cannot recover anything under or upon the third and fourth counts of his declaration.

"5. If the jury shall find from the evidence that the Board of Public Works or the Commissioners of the District of Columbia erected or caused to be erected a stone curb higher than the surface of the adjacent parts of Maryland avenue on each side of the railroad tracks, in front of the plaintiff's premises, on said Maryland avenue between 9th and 10th streets, and raised the grade of the street between said curb line, then the defendant is not liable to the plaintiff for any inconvenience or obstruction caused by such curb lines.

Statement of the Case.

"6. The Board of Public Works or the Commissioners of the District of Columbia were authorized by law to erect the curb lines along the outside of the tracks of the defendant and to raise the grade between them, and the said board and their successors had and have lawful authority to maintain the same.

"10. The plaintiff, under the declaration in this case and upon the evidence, cannot recover for injury or inconvenience caused by any obstruction or obstructions in or upon Maryland avenue without showing special damage to himself.

"14. The defendant possesses the lawful right in the conduct of its business to place its trains containing cars loaded with cattle, hogs, or other animals, or vegetables, fruit, fertilizers, or other odoriferous freight, on the tracks in front of the plaintiff's premises for such a reasonable time as may be necessary to enable other trains to pass and also to enable the defendant to take cars out of and to put cars into such trains, and before any damages can be assessed in favor of the plaintiff because of the standing of such cars upon the tracks in front of the plaintiff's premises the plaintiff must show, by satisfactory proof, that such cars on such occasion were kept standing on said tracks for an unreasonable length of time and that the plaintiff was thereby specially injured.

"17. The defendant was authorized and empowered to unload railroad iron upon the surface of the streets in front of the plaintiff's premises for the purpose of repairing its tracks in front of the plaintiff's premises on Maryland avenue between 9th and 10th streets.

"19. The defendant possessed the lawful right to use the several tracks on Maryland avenue between 9th and 10th streets for carefully passing and moving thereon its trains, either loaded or empty, north and south; and for any injury or inconvenience unavoidably caused by such passing and moving of trains the defendant is not liable."

But refused to give at defendant's request, among others, the following:

"10. The plaintiff is not entitled to recover anything on account of dust or noises caused by the loading and unloading

of cars on or within the sixty-foot space between the lateral streets enclosed by the Board of Public Works of the District of Columbia.

"11. The space of sixty feet enclosed by the two lines of curb by the Board of Public Works within which are the tracks of the railroad, and between the streets running north and south, were set aside by the proper authorities of the District of Columbia for railroad purposes, and the plaintiff cannot recover under the pleadings in this case for any discomfort to him or his family, or other injury caused by the loading or unloading of cars at that place.

"14. The defendant has the legal right to the unlimited use of the tracks in the vicinity of its freight depot, in front of the plaintiff's premises, for the purposes of its freight depot between 9th and 10th streets, opposite the plaintiff's premises, provided such tracks are carefully and skilfully used by the defendant."

The court also instructed the jury upon its own motion:

"Congress allowed the company to run its road into the District, along certain streets and avenues, to a certain point — that is, to 9th street, where the present station is located. We have supposed that that implied a right to construct a station building and to construct tracks in the street; but if the business of the company increase beyond the capacity of that freight yard to accommodate it, we have thought that that was no reason which would justify the company in occupying the public streets for the purposes of a freight yard, and that they had no right to stow away or store away their cars and freight in the public streets, nor had they the right to occupy the streets in making up trains to despatch north and south; but we thought that their duty was to acquire more property and to enlarge their freight yard for these purposes. If, in point of fact, without authority of law they did occupy the streets for these purposes it was an illegal thing; but if nobody was hurt by it it would simply be a public nuisance, which would be the subject of an indictment and would not give any private person a right of action against the company; but if, in addition to being a public nuisance, it became a grievance to

private persons owning property in that neighborhood by reason of the obstruction of the street, the noise and the disagreeable odors, then it was a private wrong, also, which these parties are entitled to have redressed. . . . I should further caution you against supposing that the plaintiff is entitled to recover for all the inconvenience he may suffer in consequence of the railroad being located there at all. The railroad company has the right to lay its tracks there by authority of law, and everything which is the inevitable result of the legal use of the road are things which the law does not consider grievances, and does not allow damages for. For example, the trains have a right to pass over the street, to stop there at the station, and to go on in each direction. That necessarily gives some inconvenience to everybody. The noise, the smoke and the dust along the street is a disagreeable thing to the whole neighborhood, but inasmuch as the law authorizes that it is not the subject of a private action. It is only the illegal use of the street which will give a person a right of action against the company, and this I have already explained. The inevitable consequences of the road being located there and of trains travelling in a legal way over the road are what the law calls '*damnum absque injuria*' — that is, an injury without any wrong or damage. You will confine your consideration entirely to the temporary inconvenience occasioned by the unlawful occupation of the street for the purposes that have been mentioned."

The jury found for the plaintiff and assessed his damage at one thousand three hundred and twenty-eight dollars, and judgment was entered on the verdict, which was subsequently affirmed in general term.

To reverse this judgment the writ of error was sued out which defendant in error now moves to dismiss.

The following are the statutory provisions relating to the Baltimore and Potomac Railroad which are deemed material.

The first section of the act of Congress of February 5, 1867, 14 Stat. 387, c. 29, is as follows:

"WHEREAS, it is represented to this present Congress that the Baltimore and Potomac Railroad Company, incorporated

by an act of the General Assembly of Maryland, entitled 'An act to incorporate the Baltimore and Potomac Railroad Company,' passed the sixth day of May, eighteen hundred and fifty-three, are desirous, under the powers which they claim to be vested in them by the provisions of the before recited act, to construct a lateral branch from the said Baltimore and Potomac Railroad to the District of Columbia: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Baltimore and Potomac Railroad Company, incorporated by the said act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia, a lateral railroad, such as the said company shall construct or cause to be constructed, in a direction towards the said District, in connection with the railroad which they are about to locate and construct from the city of Baltimore to the Potomac river, in pursuance of their said act of incorporation; and the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to, under and by intent of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland; and shall be entitled to the same rights, compensation, benefits and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said District, from the said lateral branch or road hereby authorized; it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Baltimore and Potomac Railroad one lateral road within the said District to some point or terminus within the city and county of Washington, to be determined in the manner hereinafter mentioned."

By § 3 it was provided that the company "in passing into the District aforesaid, and constructing the said road within

the same, shall enter the city of Washington at such place, and shall pass along such public street or alley, to such point or terminus within the said city as may be allowed by Congress, upon presentation of survey and map of proposed location of said road: *Provided*, That the level of said road within the said city shall conform to the present graduation of the streets, unless Congress shall authorize a different level."

The twelfth section of the act of the Legislative Assembly of Maryland, referred to in the above-mentioned act of Congress, Laws of Maryland, 1853, pp. 234, 239, reads thus:

"SEC. 12. And be it enacted, That the president and directors of the said company shall be, and they are hereby, invested with all the rights and powers necessary to the construction, working, use and repair of a railroad from some suitable point in or near the city of Baltimore, and thence within one mile of the town of Upper Marlboro, in Prince George's county, and as near to said town, within the limits of said distance, as may be practicable, and by or near the town of Port Tobacco in Charles county, to a point on the Potomac river, to be selected by the president and directors of said company hereby incorporated, not higher up than Liverpool Point, and not lower down than the mouth of St. Mary's river, with such branches at any point of said railroad, not exceeding twenty miles in length, as the said president and directors may determine; the said road when completed not to be more than sixty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary; and the said president and directors may cause to be made, or may contract with others for making, said railroad or any part of it, and they or their agents, or those with whom they may contract or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair; and that they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, timber, or other mate-

rials which may be needed for the construction and repair of the said road or any of its works, and may make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road; and they may make, or cause to be made, lateral railways in any direction whatever from the said railroad, and for the construction, repair and maintenance thereof shall have all the rights and powers hereby given in order to the construction and repair of said principal railroad, and may also own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication: *Provided*, Nothing herein contained shall be construed to authorize the said company to take private property for their use without compensation agreed upon by the company and the owners thereof, or awarded by a jury, as hereinafter provided, being first paid or tendered to the party entitled to receive such compensation."

By act of Congress of March 18, 1869, 16 Stat. 1, 2, c. 2, it was declared that the Baltimore and Potomac Railroad Company "may enter the city of Washington with their said railroad and construct the same within the limits of said city on and by whichever one of the two routes herein designated the said company may elect and determine upon;" and by the act of March 25, 1870, 16 Stat. 78, c. 32, § 2, a modification of the second of these two routes was authorized. The terminal point in each was described as a point at the intersection of South C and West Ninth streets.

The company made choice of the second of the projected routes, commencing on the western shore of the Eastern Branch, between South L and South M streets, and thence passing through K Street and Virginia Avenue to the terminal point on Ninth Street.

By act of June 21, 1870, 16 Stat. 161, c. 142, Congress enacted "that the Baltimore and Potomac Railroad Company be, and they are hereby, authorized and empowered to *extend their lateral branch*, authorized by the act to which this is a supplement, and by former supplements to said acts, *by the way of Maryland Avenue, conforming to its grade*, to the via-

Argument against the Motion.

duct over the Potomac River at the city of Washington, known as the Long Bridge, and to extend their tracks over said bridge, and connect with any railroads, constructed or that may hereafter be constructed, in the State of Virginia," the act authorizing the railroad company, to effect these purposes, to take possession of and use the bridge free of cost and maintain the same, etc. By virtue of the authority granted by this act the railroad extended its "lateral branch" to the Potomac River from Ninth Street south, by way of Maryland Avenue; and it was further authorized by act of March 3, 1871, 16 Stat. 585, c. 137, in making this extension, to change the grade of Maryland Avenue from Twelfth Street to the Long Bridge in the manner specified in that act, under the supervision of the municipal authorities of Washington.

The act of Congress of May 21, 1872, 17 Stat. 140, c. 189, relating to the establishment of a passenger depot of the company at Sixth and B streets, makes mention of no streets or avenues except B Street and Sixth Street and Virginia Avenue.

Mr. S. S. Henkle and *Mr. Samuel Maddox* for the motion.

Mr. Enoch Totten opposing.

The plaintiff in error, in the trial court, relied on an authority exercised under the United States, derived through several acts of Congress, to occupy and use the portion of the streets in controversy, in the manner and for the purposes claimed, and the defendant in error denied the validity of the asserted authority. The question made by this motion is this: Has this court jurisdiction to review the judgment of the court below under the provisions of the second section of the act of March 3d, 1885?

The terminus of the railroad being fixed at the junction of Ninth and C streets, the company had a right under its charter to construct stations, and so forth, there; even if it did not possess this right, it claimed and exercised it, and it has the right to be heard on that question in this court, under this act of Congress.

Statutory authority to build and conduct a railroad includes the authority to build turnouts or side tracks, turn-tables, switches, depots, etc., those permanent and irremovable appendages which constitute parts of the complete structure. *Lake Superior &c. Railroad* v. *United States*, 93 U. S. 442, 453–4; *Rock Creek* v. *Strong*, 96 U. S. 271, 276.

The decision of this court in the case of *Dupasseur* v. *Rochereau*, 21 Wall. 130, seems to be decisive of the question of jurisdiction presented here.

That was a writ of error prosecuted under the provisions of § 709 of the Revised Statutes. A judgment had been rendered by the Circuit Court of the United States for Louisiana, on a vendor's privilege and mortgage, declaring it to be the first lien and privilege on the land; and the marshal sold the property clear of all prior liens; and the mortgagee purchased, and paid into court for the benefit of subsequent liens, the surplus of his bid beyond the amount of his own debt. This judgment and sale were set up by way of defence to a suit brought in the state court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit in the Circuit Court. The state court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to this court by writ of error and a question was made as to jurisdiction. This court sustained the jurisdiction. Mr. Justice Bradley, in delivering the opinion of the court, said in reference to the question of jurisdiction:

"The case would be one in which a title or right is claimed under an *authority exercised* under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts." Although the court sustained the jurisdiction, it held that the decision of the court below was correct. See also *Embry* v. *Palmer*, 107

U. S. 3; *Day* v. *Gallup*, 2 Wall. 97; *Verden* v. *Coleman*, 1 Black, 472; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Railroad Co.* v. *Maryland*, 21 Wall. 456; *McGuire* v. *Commonwealth*, 3 Wall. 382, 387; *Hall* v. *Jordan*, 15 Wall. 393.

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

Appellate jurisdiction was conferred on this court by the 25th section of the Judiciary Act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, in three classes of cases: First, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; secondly, where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; thirdly, where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission. 1 Stat. 73, 85, c. 20, § 25.

By the second section of the act of February 5, 1867, 14 Stat. 385, 386, c. 28, this original 25th section was re-enacted with certain changes, and among others the words "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission," were made to read "or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against

the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority," and this was carried into § 709 of the Revised Statutes.

The act of Congress entitled "An act regulating appeals from the Supreme Court of the District of Columbia, and the Supreme Courts of the several Territories," approved March 3, 1885, 23 Stat. 443, c. 355, provides:

"That no appeal or writ of error shall hereafter be allowed from any judgment, or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

When the validity of a statute of, or authority exercised under, the United States, is drawn in question in a state court, the decision of the latter must be against its validity in order to justify a review of such decision, but under this act it is sufficient if the validity is drawn in question irrespective of the conclusion reached. So that the inquiry is confined to whether the validity of such a statute or authority is actually controverted.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134, Mr. Justice Bradley, delivering the opinion of the court, says: "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the

United States establishing the Circuit Court, and vesting it with jurisdiction." This is so because a claim of right or title under an authority exercised under the United States was sufficient to give jurisdiction under that act, whereas the act of 1885 does not so provide, but only that *the validity* of the authority must be drawn in question. The distinction is palpable between a denial of the validity of the authority and a denial of a title, right, privilege or immunity claimed under it.

That part of original § 25, and of the act of 1867, as to decisions in favor of the validity of a statute of, or of an authority exercised under, any State, when drawn in question on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, has been frequently passed upon, and the distinction between the construction of a statute, or the extent of an authority, and the validity of a statute, or of an authority, pointed out. Thus in *Commercial Bank of Cincinnati* v. *Buckingham*, 5 How. 317, where a general law had declared all banks liable to pay six per cent interest on their notes, when they had refused payment on demand, and a subsequent act, incorporating the bank in question, provided for the payment of twelve per cent, and the question was whether the bank was liable to pay eighteen, this court held that the question submitted to and decided by the state court was one of construction and not of validity. There both the prior and subsequent statutes were admitted to be valid under any construction of them, "and therefore no construction placed by the state court on either of them, could draw in question its validity, as being repugnant to the Constitution of the United States, or any act of Congress." *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144.

In *Lawler* v. *Walker*, 14 How. 149, where, in 1816, the legislature of Ohio had passed an "act to prohibit the issuing and circulation of unauthorized bank paper," and, in 1839, an act amendatory thereof, and the question arose whether or not a canal company, incorporated in 1837, was subject to these acts, it was held that the Supreme Court of Ohio, in deciding that it was, "only gave a construction to an act of Ohio, which neither of itself, nor by its application, involved in any way a

repugnancy to the Constitution of the United States, by impairing the obligation of a contract."

Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.

In *Millingar* v. *Hartupee*, 6 Wall. 258, 261, 262, it was held that the word "authority" stands upon the same footing with "treaty" or "statute;" and said the court, through Chief Justice Chase:

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States." "In many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the state court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the case brought here by writ of error, we can perceive no reason for retaining it upon the docket."

So in *Lewis* v. *Campau*, 3 Wall. 106, where the final judgment of the highest court of law and equity in the State of Michigan was that the revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed, were sufficient, was held not a subject for review by this court under the 25th section of the Judiciary Act; and in *Mining Company* v. *Boggs*, 3 Wall. 304, 310, which was an action of ejectment

brought for the possession of certain mineral lands in California, where the defendant contended that he was in possession by virtue of an authority inferred from the general policy of the United States in relation to mines of gold and silver, Chief Justice Chase, speaking for the court, in dismissing the writ of error, said:

"The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation in defence to an action of ejectment, of a patent from the United States with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant (plaintiff). Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it."

In *Gill* v. *Oliver's Executors*, 11 How. 529, under a treaty between the United States and Mexico a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, and the proceeds of one of the shares of this company were claimed by two parties, and the judgment of the Court of Appeals of Maryland as to which of the claimants was entitled to the money was held not reviewable by this court. *Williams* v. *Oliver*, 12 How. 111.

The case at bar does not involve the exercise of an authority under the United States, in the sense of an authority to act for the government, but it is claimed that the railroad company acted under certain statutes of the United States authorizing such action, and that the validity of these statutes, or of authority under them, was denied.

But the Supreme Court of the District of Columbia did not deny the right of the defendant company to use its tracks in Washington on Maryland Avenue between Ninth and Tenth streets, in a lawful manner, for the purpose of transacting its lawful business; but, on the contrary, the jury was instructed that the plaintiff was not entitled to recover for any annoyances, discomforts, or inconveniences, which resulted from such

uses of Maryland Avenue by the railroad company "as were reasonably incident to the careful conduct of its through business, and to the maintenance and careful use of its freight depot or station abutting on the south side of said avenue between said Ninth and Tenth streets southwest," and the lawful uses to which the street might be put by the railroad company were clearly explained.

The jury were told that all stoppage of trains and shifting of cars necessary for carrying cars out of its freight depot over the different tracks for the purpose of making up freight trains were lawful. The right of the railroad company to establish freight stations or to lay as many tracks "as its president and board of directors might deem necessary" was not questioned. But the court also held that the company was not justified in occupying the public streets for the purposes of a freight yard as such, because the various statutes bearing upon the matter did not authorize such occupation, with which conclusion we are inclined to agree, though we forbear a determination of the point until presented in a case properly pending before us. The validity of the statutes and the validity of authority exercised under them, are, in this instance, one and the same thing; and "the validity of a statute," as these words are used in this act of Congress, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. In our opinion the validity of no act of Congress, or authority under the United States, was so drawn in question here as to give us jurisdiction, and therefore, as the amount of the judgment did not exceed five thousand dollars,

The writ of error must be dismissed.

DISTRICT OF COLUMBIA *v.* GANNON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 182. Argued March 5, 6, 1889. — Decided April 1, 1889.

The amount necessary to give this court jurisdiction to re-examine a judgment or decree against a defendant in the court below (whether rendered in the trial court or in the appellate court) is to be determined by the amount of the judgment in the trial court without adding interest, unless interest is part of the claim litigated, or forms part of the judgment in the trial court and runs from a period antecedent to that judgment.

At the trial of an action against the District of Columbia to recover for personal injuries received by reason of a defect in the streets of Washington, the refusal to charge that the District cannot be held responsible for the negligence of a government which is imposed upon it by Congress; or that no such action can be maintained against it because it derives no profit from the duty of maintaining the streets, does not draw in question the validity of the statutes of the United States creating the government of the District, so as to give this court appellate jurisdiction of the cause, independently of the amount of the judgment in the trial court.

MOTION TO DISMISS for want of jurisdiction. The case is stated in the opinion of the court.

Mr. S. S. Henkle (with whom was *Mr. John F. Ennis* on the brief) for the motion.

Mr. A. G. Riddle and *Mr. H. E. Davis* opposing.

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

The defendant in error recovered judgment in the Supreme Court of the District of Columbia, against the District, for five thousand dollars, in an action on the case for personal injuries, on the 17th day of January, 1885, which judgment was affirmed in general term on the 28th of May succeeding, and the cause brought here on writ of error.

Under the act of Congress of March 3, 1885, (23 Stat. 443,) no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court

of the District of Columbia, unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars, or unless the validity of a patent or copyright is involved in the suit, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question therein.

The judgment in the case at bar, as rendered at special term, was for five thousand dollars and costs, and this was affirmed with costs, but not with interest; the general term thereby simply declaring that it was satisfied to let the former judgment stand. In all particulars material to the inquiry as to the value of the matter in dispute, the record is the same as in *Railroad Company* v. *Trook*, 100 U. S. 112, where this court, speaking by Mr. Chief Justice Waite, said: "In cases brought here on writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs."

The general rule has been repeatedly so laid down. *Western Union Telegraph Company* v. *Rogers*, 93 U. S. 565; *Walker* v. *United States*, 4 Wall. 163, 165; *Knapp* v. *Banks*, 2 How. 73; *New York Elevated Railroad* v. *Fifth National Bank*, 118 U. S. 608.

Where interest, instead of accompanying the judgment or decree as damages for the detention of a specific amount adjudged or decreed, is part of the claim litigated, and the judgment or decree is so framed as to provide for it to run from a period antecedent to the rendition of such judgment or decree, or, in actions *ex contractu*, according to the terms of the contract upon which the action is based, jurisdiction may attach. *Zeckendorf* v. *Johnson*, 123 U. S. 617; *The Patapsco*, 12 Wall. 451; *The Rio Grande*, 19 Wall. 178.

This result would have followed here, if, by the judgment of affirmance, interest had been directed to be added to the judgment at special term. As it is, however, the judgment falls below the amount necessary to give us jurisdiction.

Upon the trial, the following, among other instructions, were asked for the defendant and refused:

"The present government of the District of Columbia having been imposed by the people of the District without any power or opportunity on the part of said people to accept or reject the same, the District cannot be held responsible for the negligence of said government."

"The District of Columbia, under the form of government existing at the time of the accident which is the subject matter of this suit, is not liable for damages resulting from said accident."

"If the care of the streets of the city of Washington, as a public duty, is imposed by the statutes upon the District of Columbia, the performance of which is for the general benefit, and the District derives no profit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such public duty."

"The present form of government of the District of Columbia, consisting, as it does, of officers who are all appointed and paid by the United States, without any power to levy taxes or expend money except as directed by Congress, is not of such a character as to make the District responsible in damages for any negligence of those officers."

It is contended on behalf of the plaintiff in error that the validity of the authority conferred upon the District Commissioners by Congress is drawn in question in this suit.

We do not agree with counsel in this view. The instructions above quoted involved the acts of Congress creating the District government only as bearing upon the question of the liability of the District for negligence in failing to keep the streets in repair, and by way of construction, and the validity of the acts themselves, or of the authority exercised under them, was not denied. The case of *Baltimore and Potomac Railroad Company* v. *Hopkins*, *ante*, 210, is decisive that jurisdiction cannot be maintained on this ground under such circumstances. The writ of error will therefore be

Dismissed.

DISTRICT OF COLUMBIA *v.* EMERSON, No. 183. In error to the District of Columbia. Argued March 6, 1889. Decided April 1,

Statement of the Case.

1889. MR. CHIEF JUSTICE FULLER said that the same questions were presented upon the record in this case as in the *District of Columbia, Plaintiff in Error* v. *Lawrence E. Gannon*, No. 182, just decided, and that for the reasons there given the writ of error must be *Dismissed.*

Mr. A. G. Riddle for plaintiff in error.

Mr. S. S. Henkle for defendant in error.

STEVENS *v.* NICHOLS.

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

No. 190. Argued March 11, 1889. — Decided April 1, 1889.

A petition for removal which alleges the diverse citizenship of the parties in the present tense is defective, and if it does not appear in the record that such diversity also existed at the commencement of the action, the cause will be remanded to the Circuit Court with directions to send it back to the state court, with costs against the party at whose instance the removal was made.

THE case as stated by the court was as follows:

This action was commenced on the 25th day of July, 1881, in one of the courts of Missouri, by the defendant in error against the Texas and Atlantic Refrigerator Car Company, a corporation of that State, Robert S. Stevens and Henry D. Mirick. Its object was to reach, and have applied in satisfaction of a judgment obtained by the plaintiff against the car company, the several amounts due from Stevens and Mirick on their subscriptions of stock in that company.

Stevens and Mirick filed a joint petition for the removal of the case into the Circuit Court of the United States, upon the ground of the diverse citizenship of the parties. The allegation in the petition was that the plaintiff "*is* a citizen of the State of Missouri," and that the defendants "*are* not citizens

of the State of Missouri, but *are* citizens of the State of New York."

The state court made an order for the removal of the case to the Circuit Court of the United States. In the latter court, the necessary pleadings having been filed, the case was tried, resulting in a verdict and judgment against Stevens for the sum of $5027.33, and against Mirick for the sum of $627.41. The court having overruled a motion for new trial, and also a motion in arrest of judgment, Stevens has brought the case here for review.

No question was made in the court below or in this court as to the right of Stevens and Mirick to remove the case from the state court.

Mr. A. H. Garland and *Mr. James Carr* for plaintiff in error.

Mr. George P. B. Jackson for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

1. It was held in *Robertson* v. *Cease*, 97 U. S. 646, 649, upon writ of error from a Circuit Court of the United States, that "in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record." *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379, 382; *Hancock* v. *Holbrook*, 112 U. S. 229, 231; *Thayer* v. *Life Association*, 112 U. S. 717, 719; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 239.

2. The case was not removable from the state court, unless it appeared affirmatively in the petition for removal, or elsewhere in the record, that at the commencement of the action, as well as when the removal was asked, Stevens and Mirick were citizens of some other State than the one of which the plaintiff was, at those respective dates, a citizen. *Gibson* v.

Bruce, 108 U. S. 561, 562; *Houston & Texas Central Railway* v. *Shirley*, 111 U. S. 358, 360; *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379, 381; *Akers* v. *Akers*, 117 U. S. 197.

3. The petition for removal does not allege the citizenship of the parties except at the date when it was filed, and it is not shown elsewhere in the record that Stevens and Mirick were, at the commencement of the action, citizens of a State other than the one of which the plaintiff was, at that date, a citizen. The court, therefore, cannot consider the merits of the case. *Metcalf* v. *Watertown*, 128 U. S. 586; *Morris* v. *Gilmer*, 129 U. S. 315, 325.

The judgment is reversed upon the ground that it does not appear that the Circuit Court had jurisdiction, and the case is remanded to that court, with directions to send it back to the state court, the plaintiff in error to pay the costs in this court and in the court below. *Mansfield &c. Railway* v. *Swan*, 111 U. S. 379.

Reversed.

BUXTON *v.* TRAVER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 211. Submitted March 18, 1889. — Decided April 1, 1889.

No portion of the public domain, unless it be in special cases, not affecting the general rule, is open to sale until it has been surveyed, and an approved plat of the township embracing the land has been returned to the local land office.

A settler upon public land, in advance of the public surveys, acquires no estate in the land which he can devise by will, or which, in case of his death intestate, will pass to his heirs at law, until, within the specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law.

Section 2269 of the Revised Statutes has no application to the case of a settler who dies before the time arrives when the papers necessary to establish a preëmption right can be filed.

THE case which makes the federal question is stated in the opinion of the court.

Mr. William Craig and *Mr. Douglas Dyrenforth* for plaintiffs in error.

Mr. A. L. Rhodes, Mr. A. T. Britton, Mr. A. B. Browne and *Mr. W. J. Curtis* for defendants in error.

Mr. Justice Field delivered the opinion of the court.

This was a suit to charge the defendant Hattie L. Traver as trustee for the plaintiffs, of an undivided half interest in certain lands in San Bernardino County, California, and was commenced in one of the Superior Courts of the State. To the complaint the defendants demurred; the demurrer was sustained and judgment entered that the suit be dismissed. On appeal to the Supreme Court of the State the judgment was affirmed; and the case is brought to this court on writ of error.

The complaint alleges that on the 2d of February, 1870, one Oscar Traver settled upon a quarter section of land in township two in San Bernardino County, California, and that until his death he lived upon, improved and cultivated the land; that, at the time of his settlement and continuously until the 1st day of July, 1879, it was public property of the United States, and was unoccupied and unsurveyed and subject to the right of preëmption; that no approved plat of the township was received at the United States District Land Office at Los Angeles, which embraced the land in controversy, until July 1st, 1879; that at the time of his settlement, and thereafter until his death, which occurred January 2d, 1877, he was a citizen of the United States, and entitled to the benefit of the preëmption and homestead laws; that he settled upon, improved the land, and erected a building thereon, intending to acquire a title thereto from the United States as soon as he possibly could; that at the time of his settlement he was a single person and remained so until the 13th of December, 1870, when he intermarried with the defendant Hattie L. Traver; that on his death he left surviving him his widow and two daughters, Lizzie and Annie, and the three were his only

heirs at law; that the daughters have since married and are the plaintiffs in this suit; that the deceased died intestate; and that no administrator of his estate has been appointed.

The complaint further alleges that on the 16th of July, 1878, the defendant Hattie L. Traver filed in the United States District Land Office at Los Angeles, a preëmption declaratory statement describing the land, alleging settlement on the 2d of February, 1870, and stating her intention to claim the same under the preëmption laws of the United States; that soon after the death of Oscar Traver she wrote to the plaintiffs at San Francisco, informing them of the death of their father, and representing that he had not left any property; that this representation was made with intent to deceive them and prevent them from filing the necessary papers to complete his preemption and homestead rights; that in December, 1882, they discovered for the first time that she had completed those rights and obtained the patent; that she had lived upon the land and received to her own use its rents and profits since his death, which are stated upon information and belief to be $2500; that the land is of the value of one thousand dollars per acre; that the other defendants named claim to have some interest in the land by purchase from her; that such purchase was made with notice of the plaintiffs' rights; and that she denies that they have any rights in the lands, or in the rents, issues and profits thereof. The prayer of the complaint is that the defendant Hattie L. Traver may be charged, as trustee for plaintiffs of an undivided half interest in the lands, and in the rents, issues and profits thereof, and account for and pay over to them such interest in the rents, issues and profits; that the other defendants be adjudged to have no interest in the land or in any part thereof; and that the plaintiffs may have such other and further relief as to the court may appear to be just.

The entire claim and contention of the plaintiffs rest upon two grounds: 1st, that the deceased acquired by his occupation of unsurveyed lands of the United States a right of preëmption to them under the laws of the United States; and, 2d, that the plaintiffs, as heirs at law of the deceased, were equally

entitled, with his widow, under § 2269 of the Revised Statutes, to the benefit of the patent obtained by her. That section is as follows:

"Where a party entitled to claim the benefits of the preemption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased preemptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."

Neither of these grounds is well taken. No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office. A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of preemption to the land, that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to preëmpt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him — if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any

unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. If those steps are from any cause not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated. The title to the land remains unaffected, and subject to the control and disposition of the government, as before his occupancy. This doctrine has been long established in this court. Thus in *Frisbie* v. *Whitney*, 9 Wall. 187, 193, where the subject was fully considered, it was held that occupation and improvement on the public lands, with a view to preëmption, did not confer a vested right in the land so occupied. Speaking of the settlement in that case, the court, by Mr. Justice Miller, said: "So far as anything done by him is to be considered, his claim rests solely upon his going upon the land and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right, or, indeed, any kind of claim to land, and it is necessary to resort to the preëmption laws to make out any shadow of such right." The same doctrine was affirmed in *The Yosemite Valley Case*, 15 Wall. 77, the court observing that until all the preliminary steps to the acquisition of the title of the United States, prescribed by law, have been complied with, the settler has not acquired any title against the United States. Among these are the entry of the land at the appropriate land office and the payment of its price. "Until such payment and entry," the court added, "the acts of Congress give to the settler only a privilege of preëmption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event, in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them." Nothing was

done in this case by the deceased occupant beyond his occupancy, and therefore nothing to initiate a title in him; not even the privilege of purchasing the land was acquired by him. His death occurred two years before the surveys were made and returned.

Section 2269 of the Revised Statutes, upon which the plaintiffs rely, has no application to the case presented by them. That section was taken from § 2 of the act of March 3d, 1843, 5 Stat. 620, "to authorize the investigation of alleged frauds under the preëmption laws, and for other purposes." At that time no settlement on unsurveyed lands was permitted by the laws of the United States, and the second section was intended to secure to the heirs of the deceased preëmptor a claim to the benefit of the preëmption laws, which he had initiated, but not completed before his death, "by filing in due time all the papers essential to the establishment of the same." His executor or administrator, or one of his heirs, was in that event allowed to file such papers. No claim of the deceased in this case was lost by any failure to file the necessary papers. The time for any papers to be filed did not arrive during his life.

The contention of the plaintiffs in error is, that the section, upon a correct construction, extends to heirs of a deceased occupant of unsurveyed public land of the United States, who during his life did nothing beyond its occupation and improvement, the same rights which are conferred upon heirs of a person entitled at the time of his death to the benefits of the preëmption laws. It is upon the supposed denial of such rights to the plaintiffs by the court below that the jurisdiction of this court is invoked; it is upon that denial alone that the jurisdiction can be maintained. What we have said as to the legal effect of the deceased's occupation and improvement shows that no title was initiated or right of preëmption created by them, and of course nothing was left by the deceased to be completed by his heirs, and hence there was no denial of any rights to them under the statute, as claimed.

Judgment affirmed.

BOTILLER *v.* DOMINGUEZ.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 1370. Submitted January 7, 1889. — Decided April 1, 1889.

If an act of Congress is in conflict with a treaty of the United States with a Foreign Power, this court is bound to follow the statutory enactments of its own government.

No title to land in California, dependent upon Spanish or Mexican grants, can be of any validity, which has not been submitted to, and confirmed by, the board provided for that purpose under the act of March 3, 1851, 9 Stat. 631; or, if rejected by that board, confirmed by the District Court or by the Supreme Court of the United States.

THE case which raised the federal question was stated by the court in its opinion as follows:

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

The action was in the nature of ejectment, brought in the Superior Court of the county of Los Angeles by Dominga Dominguez against Brigido Botiller and others, to recover possession of a tract of land situated in said county, known as Rancho Las Virgenes. The title of the plaintiff was a grant, claimed to have been made by the government of Mexico to Nemecio Dominguez and Domingo Carrillo on the first day of October, 1834; but no claim under this grant had ever been presented for confirmation to the board of land commissioners appointed under the act of Congress of March 3, 1851, 9 Stat. 631, "to ascertain and settle the private land claims in the State of California," and no patent had ever issued from the United States to any one for the land or for any part of it.

It appeared that the defendants, Botiller and others, prior to the commencement of the action, had settled upon and severally were in the occupancy of the respective parcels or tracts of land claimed by them, and had improved and cultivated the same, and were in the possession thereof, with the pur-

pose and intention of holding and improving the several tracts of land so severally held, as preëmption or homestead settlers, claiming the same to be public lands of the United States. It was shown that they were competent and proper persons to make preëmptions or homestead claims, and that the land in controversy was within the territorial limits of the so-called Rancho Las Virgenes.

On this state of facts the judge of the inferior court instructed the jury as follows:

"First. It is made my duty to construe the written instruments received in evidence in this case and to declare their legal effect. I therefore instruct you that the documents, Plaintiff's Exhibits A and B, and the acts evidenced thereby under the Mexican law in force at the time they were made, constituted a perfect grant and operated to vest in the grantees therein named all the right, title and interest of the Mexican government. They vested as much title under the laws of Mexico in the grantee as does a patent from the United States to the patentee under our system of government.

"Second. The title to the land by grant from Mexico, being perfect at the time of the acquisition of California by the United States, the grantee was not compelled to submit the same for confirmation to the board of commissioners established by the act of Congress of March 3d, 1851, nor did the grantee, Nemecio Dominguez, forfeit the land described in the grant by a failure to present his claim for confirmation before said board of commissioners, and the title so acquired by the grantee may be asserted by him or his successor in interest in the courts of this country."

To this ruling and instruction the defendants excepted. Judgment was rendered for plaintiff, which was affirmed by the Supreme Court of the State of California, and to that judgment this writ of error is directed.

Mr. J. M. Gitchell for plaintiffs in error.

Mr. A. L. Rhodes for defendant in error.

The grant of the rancho constituted a perfect Mexican title, and was not required to be presented to the board of commis-

sioners under the act of 1851. This proposition would seem to be fully settled in the Supreme Court of the State in *Minturn* v. *Brower*, 24 Cal. 644. The decision in that case is mentioned with approval in *Stevenson* v. *Bennett*, 35 Cal. 424, 431; *Steinbach* v. *Moore*, 30 Cal. 499, 507; *Seale* v. *Ford*, 29 Cal. 104, 107; *Banks* v. *Moreno*, 39 Cal. 233, 237.

The case of *Minturn* v. *Brower* was very carefully, thoroughly and elaborately considered by the court; and the doctrine there laid down that it was not the intent of the act of March 3d, 1851, for the settlement of private land claims in California, to require persons holding perfect titles to lands in California to present them to the land commission provided for by that act for confirmation; and that the holders of such titles could not be required to present them for confirmation, under the penalty of forfeiture of their titles for failure so to present them, would seem to be sustainable upon well-recognized principles of constitutional law. Those principles have often been stated by this court in cases involving questions of title derived from foreign governments; and have sometimes been applied by the court to cases presenting features similar to those in this case. We will hereafter refer to some of those cases.

We think that there would never have been any doubt upon this question, were it not for certain dicta in *Fremont* v. *United States*, 17 How. 542; *United States* v. *Fossatt*, 21 How. 445; and *More* v. *Steinbach*, 127 U. S. 70, to the effect that the act of 1851 required the holders of all titles derived from the Spanish or Mexican Governments, whether perfect or imperfect, to present them to the land commission for confirmation; that the requirement of the act extended not only to the holders of equitable, inchoate or imperfect titles, but also to the holders of perfect titles.

This court in *United States* v. *Moreno*, 1 Wall. 400, and *Beard* v. *Federy*, 3 Wall. 478, and the Supreme Court of the State in *Estrada* v. *Murphy*, 19 Cal. 248, carefully save perfect titles from the construction given in those cases to the act of 1851, holding only that the act required the presentation to the land commission, of imperfect titles — such titles as were involved in those cases.

Argument for Defendant in Error.

The treaty of Guadalupe Hidalgo preserved the rights of property then held by Mexican citizens in the ceded territory. This placed them on the same footing as citizens of the United States. See *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Clarke*, 8 Pet. 436, 465; *United States* v. *Wiggins*, 14 Pet. 334, 349; *United States* v. *Arredondo*, 6 Pet. 691; *Henderson* v. *Poindexter*, 12 Wheat. 530, 543; *United States* v. *Reynes*, 9 How. 127, 144; *Dent* v. *Emmeger*, 14 Wall. 308, as to titles under the cessions of Florida and Louisiana, where a like doctrine has been held.

Congress had no power, under the Constitution, to require the presentation of perfect titles to the board of land commissioners, under the penalty of forfeiture of the land.

This point was not presented in *Minturn* v. *Brower*, *ubi supra*, at least, not in the form now attempted. The State, upon its admission into the Union, succeeded — as was said of Alabama — to all the rights of sovereignty, jurisdiction and eminent domain. *Pollard* v. *Hagan*, 3 How. 212.

The State has all the powers pertaining to sovereignty, except as limited by the Constitution of the United States. All persons and property were subject to its dominion. It has authority to provide for the acquisition, tenure and transmission of titles to property. It regulates domestic relations, trusts, agencies and the like. It possesses the right of eminent domain, and all escheats vest in the State. The State has the ultimate jurisdiction over persons and things, except as limited by the Constitution of the United States. *New York* v. *Miller*, 11 Pet. 185.

The Colonization Law of 1824, and the Regulations of 1828, were, after their adoption, and until superseded by the treaty of cession, the only laws in force regarding the granting of public lands in California. *United States* v. *Vallejo*, 1 Black, 541; *United States* v. *Workman*, 1 Wall. 745; *United States* v. *Osio*, 23 How. 273.

Those laws provided the means for the acquisition of the *entire and perfect title* by the persons who should petition for grants of lands.

The court will take judicial notice of the laws of Mexico re-

lating to the granting of public lands. *United States* v. *Turner*, 11 How. 663; *Fremont* v. *United States*, 17 How. 542; *United States* v. *Perot*, 98 U. S. 428; *Payne* v. *Treadwell*, 16 Cal. 221. And they will take notice of those laws, as they would of a state law of California for the sale of the public lands of the State, and under which lands have been sold, but which was afterwards repealed, upon the adoption of a new law upon the same subject.

It must be remembered that the United States is and stands, in respect to its lands, as a private proprietor, except that it is not subject to state taxation, or the Statutes of Limitation, or the statutes regarding conveyances, and enjoys perhaps some other immunities. If Congress can forfeit our lands twenty years after our title became perfect, we cannot perceive why it cannot provide for another forfeiture twenty years after the issue of the patent under the act of 1851; that is to say, unless for some undiscovered reason, the title issued by the United States is better entitled to protection than one issued by the predecessor or grantor of the United States. It is said in *Fletcher* v. *Peck*, 6 Cranch, 87, that a State cannot annul her grant of lands. It is equally clear that she cannot annul a grant made by her predecessor. It is also clear that the United States cannot annul a grant, valid when made, whether made by the State or its predecessor. The claim of such a power is repugnant to the Constitution of the United States.

Mr. Justice Miller delivered the opinion of the court.

The principal error assigned, and the only one necessary to be considered here, is in the following language:

"The court erred in holding that under the said act of Congress of March 3d, 1851, it was not necessary for each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, to present such claim to the board of land commissioners under said act."

The question presented is an important one in reference to land titles in the State of California, and is entitled to our

serious consideration. Although it has been generally supposed that nearly all the private claims to any of the lands acquired by the United States from Mexico, by the treaty of peace made at the close of the Mexican war, have been presented to and passed upon by the board of commissioners appointed for that purpose by the act of 1851, yet claims are now often brought forward which have not been so passed upon by that board, and were never presented to it for consideration. And if the proposition on which the Supreme Court of California decided this case is a sound one, namely, that the board constituted under that act had no jurisdiction of, and could not by their decree affect in any manner, a title which had been perfected under the laws of the Mexican government prior to the transfer of the country to the United States, it is impossible to tell to what extent such claims of perfected titles may be presented, even in cases where the property itself has by somebody else been brought before that board and passed upon.

The proposition seems to have been occasionally the subject of comment in the Supreme Court of California in the early days, after the land commission had ceased to exist, and it has also been frequently considered in decisions of this court of the same period. It is urged very forcibly by counsel for the plaintiff in error that this court has fully decided against it in several well considered cases, and that previous to the case of *Minturn* v. *Brower*, 24 Cal. 644, the decisions, or at least the intimations, of the Supreme Court of California were also against the doctrine.

By the treaty of peace, known as that of Guadalupe Hidalgo, of February 2, 1848, 9 Stat. 922, which closed the controversies and the war between the United States and Mexico, a cession was made of a very large territory by the government of Mexico to the government of the United States. This was a transfer of the political dominion and of the proprietary interest in this land, but the government of Mexico caused to be inserted in the instrument certain provisions intended for the protection of private property owned by Mexicans within this territory at the time the treaty was made; and it may be con-

ceded that the obligation of the United States to give such protection, both by this treaty and by the law of nations, was perfect.

That portion of this territory which afterwards became a part of the United States under the designation of the State of California had been taken possession of during the war, in the year 1846. Most of it was in a wild state of nature, with very few resident white persons, and very little land cultivated within its limits. Article 11 of the treaty describes it in the following language:

"Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States, whensoever this may be necessary."

This extract from the treaty shows the character of the country which was acquired by the United States under that instrument.

Very soon after the American army took possession of California in 1846, it was discovered that rich mines of the precious metals were abundant in that country, and a rush of emigration almost unparalleled in history to that region commenced, which was continued from that time on for many years. It was in this condition, as to population, of the territory itself, with a proprietary title in the United States to a vast region of country included within its limits, in which miners, ranchmen, settlers under the Mexican church authorities and claimants under Mexican grants were widely scattered, that the State of California was admitted into the Union, and the necessity was presented for ascertaining by some means the validity of the claims of private individuals within its boundaries, and to establish them as distinct from the lands which belonged to the government. To this end Congress passed a statute on the 3d day of March, 1851, en-

titled "An act to ascertain and settle the private land claims in the State of California." 9 Stat. 631. The first section of that statute reads as follows:

"SEC. 1. That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States."

Several of the succeeding sections are devoted to providing for officers, declaring their duties, directing the mode of taking depositions and regulating the sessions of the commissioners, the administration of oaths, and other matters. The eighth section is as follows:

"SEC. 8. That each and every person claiming lands in California by virtue of *any right or title derived from the Spanish or Mexican government* shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

The ninth and tenth sections provide for appeals by the claimant and by the government from the decisions of this commission, first to the District Court of the United States within that district, and from thence to this court.

The eleventh section, prescribing the rule by which the commissioners shall decide these cases, is as follows:

"SEC. 11. That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity

of any claim brought by them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

Section 13 declares:

"That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, *and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States;* and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same," etc.

"SEC. 15. That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

Two propositions under this statute are presented by counsel in support of the decision of the Supreme Court of California. The first of these is, that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the Constitution and laws of the United States, so far as it may affect titles perfected under Mexico. The second proposition is, that the statute was not intended to apply to claims which were supported by a complete and perfect title

from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate and equitable in their character, without being a strict legal title.

With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Curtis, 454; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195.

The more important question, however, is — does the statute, in its provisions for the establishment and ascertainment of private land claims in that country which was derived from Mexico, apply to such as were perfected according to the processes and laws of Mexico at the time the treaty was entered into? or is it limited to those imperfect and inchoate claims where the initiation of the proceedings necessary to secure a legal right and title to the property had been commenced but had not been completed?

There is nothing in the language of the statute to imply any such exclusion of perfected claims from the jurisdiction of the commission. The title of the act, so far as it can be relied on, repels any such distinction; it is "to ascertain and settle the private land claims in the State of California;" and the first section, above quoted, uses the same terms. "That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted," etc. The eighth section, which prescribes the functions of the court and its duties says: "That *each and every*

person claiming lands in California by virtue of *any right or title derived from the Spanish or Mexican government*, shall present the same to the said commissioners when sitting as a board, . . . and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same," etc.

In all this there is no hint or attempt at any distinction, as to the claims to be presented, between those which are perfect and those which are imperfect in their character. On the contrary, the language of the eighth section is as precise and comprehensive as it could well be made, in that it includes every person claiming lands in California "by virtue of any right or title derived from the Spanish or Mexican government."

The fifteenth section declares that the final decrees rendered in such cases, or any patent issued under the act, "shall be conclusive between the United States and the said claimants only;" that is to say, it shall be conclusive on the United States and on the claimants, but it shall not conclude the rights of anybody else, if in a position to contest the action of the board.

It is not possible, therefore, from the language of this statute, to infer that there was in the minds of its framers any distinction as to the jurisdiction they were conferring upon this board, between claims derived from the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were incipient, imperfect, or inchoate.

Undoubtedly, under the powers which these commissioners had to examine into the existing claims, there would be a difference in the principles of decision which they would apply, as to their validity, between a perfected title under the Mexican government and one which was merely incipient, and which the board might reject as unworthy of confirmation for many reasons. Of this the statute takes no note, except that it provides that the principles on which the commissioners are to act shall be those mentioned in the eleventh section, above quoted.

Nor is there any reason, in the policy upon which the stat-

ute is founded and the purposes it was intended to subserve, why this distinction should be made. Obviously it was not intended to adjust or settle titles between private citizens making claim to the same lands. It is equally clear that the main purpose of the statute was to separate and distinguish the lands which the United States owned as property, which could be sold to others, either absolutely or by permitting them to settle thereon with preëmption rights, or which could be reserved from public sale entirely, from those lands which belonged, either equitably or legally, to private parties under a claim of right derived from the Spanish or Mexican governments.

When this was done the aim of the statute was attained. The order of the commissioners or the decree of the court established as between the United States and the private citizen the validity or the invalidity of such claims, and enabled the government of the United States, out of all its vast domain, to say "this is my property," and also enabled the claimant under the Mexican government who had a just claim, whether legal or equitable, to say "this is mine." This was the purpose of the statute; and it was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected.

The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government had its just influence in the board of commissioners, or in the courts to which their decisions could be carried by appeal. If the title was perfect, it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid; if it was not, then it was the right and the duty of that court to determine whether it was such a claim as the United States was bound to respect, even though it was not perfect as to all the forms and proceedings under which it was derived. So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested.

Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them.

No doubt could exist, and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any. Such suits would have been sustained without hesitation, as being legal, constitutional and according to right. What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the government and to the party, and to arrive at safe and satisfactory conclusions.

The government of the United States, when it came to the consideration of this statute, was not without large experience

in a somewhat similar class of cases arising under the treaties for the purchase of Florida from Spain and of the Territory of Louisiana from France. In the latter case, particularly, a very much larger number of claims by private individuals existed to the soil acquired by the treaty, some of whom resided on the land which they claimed, while others did not; and the titles asserted were as diverse in their nature as those arising under the cession from Mexico. The Territory of Louisiana was held for many years by Spain, then by France, and the mode of acquiring rights, claims and titles to the public lands had been pursued according to the forms prescribed by those two governments, so that, upon its transfer to the United States, Congress was engaged for a long series of years in the business of establishing the valid claims and rejecting those which were invalid. There were in those cases many titles which had been perfected under the Spanish and French laws, as well as those which were in the most incipient stage of the assertion of rights.

It is not profitable perhaps to go into the details of the various acts of Congress passed upon the subject, most of which were enacted in the interest of private claimants, and many of which were designed to remove the bar which had come to exist by reason of delays and failures to comply with the statutes in regard to the presentation of such claims. Congress appointed commissioners to investigate claims, who were to report to that body, and generally reserved the right of rejecting or confirming those reports. They changed the form and the number of these officers, the rules by which they should be guided, and the times limited for the assertion of private land claims; indeed, it is almost safe to say that some legislation may still be wanting, and may still be had, to do justice to unfortunate parties who have thus far not obtained the advantages of establishing their rights.

The wisdom, therefore, of the present act in regard to the land claims in California is manifest by a comparison with those earlier statutes in which Congress undertook to do the same thing which it desired to do in the act of 1851, but which failed for want of a clear, satisfactory and simple mode of

doing it, by bringing all the parties before a tribunal essentially judicial in its character, whose decisions should be final without further reference to Congress. But to have the benefit of the superiority of the plan of 1851 over former modes of establishing private rights to lands acquired by treaty, the later statute must be carried out in accordance with the intention found in its provisions.

This view has, we think, been established and prevailed without limitation or contradiction in the decisions of this court from the earliest period when it could be raised here under the statute. In the case of *Fremont* v. *United States*, 17 How. 542, 553, the Supreme Court, in the opinion delivered by Chief Justice Taney, said:

"It will be seen from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination and to be passed upon by the court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.

"In this respect it differs from the act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court, in these cases, was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the act of 1824, or the subsequent laws extending its provisions."

In the subsequent case of *United States* v. *Fossatt*, 21 How. 445, 447, this proposition is repeated in the most emphatic language, as follows:

"The matter submitted by Congress to the inquiry and determination of the board of commissioners by the act of

the 3d of March, 1851, (9 Stat. 632, § 8,) and to the courts of the United States on appeal, by that act and the act of 31st August, 1852, (10 Stat. 99, § 12,) are the claims 'of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government.' And it will be at once understood that these comprehend all private claims to land in California.

"The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable to the claimant, the land 'shall be deemed, held and considered as a part of the public domain of the United States;' but if favorable, the decrees rendered by the commissioners or the courts 'shall be conclusive between the United States and the claimants.'

"These acts of Congress do not create a voluntary jurisdiction, that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, are treated as non-existent, and the land as belonging to the public domain."

In the case of *United States* v. *Castillero*, 2 Black, 17, 158, it was said:

"Power to decide upon the validity of any claim presented to land in California, by virtue of any right or title derived from the Spanish or Mexican government, as matter of original jurisdiction, is, by the act of the 3d of March, 1851, exclusively conferred upon the commissioners appointed under the first section of that act."

In the case of *Newhall* v. *Sanger*, 92 U. S. 761, 764, it was said, in speaking of the statute of 1851, that "claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected."

We will only refer to one other case, that of *More* v. *Steinbach*, 127 U. S. 70, 81, decided at the last term, where the whole subject was carefully reviewed in the opinion of Mr. Justice Field. In regard to the question now before us the court in that opinion said:

"It follows from what is thus said that it would be a sufficient answer to the contention of the defendants, that the

grant under which they claim to have acquired a perfect title conferred none. The grantees were not invested with such title, and could not be, without an official delivery of possession under the Mexican government, and such delivery was not had, and could not be had, after the cession of the country, except by American authorities acting under a law of Congress. But independently of this consideration, and assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the board of land commissioners for examination. The ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands; and Congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain."

It is said by counsel for defendant in error that there would never have been any doubt upon this question were it not for certain dicta in the cases here referred to. We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, "dicta," for we feel bound to say, that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered; and as they embraced a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered.

A careful examination of the decisions of the Supreme Court of California on this subject will show that if they do not absolutely support this view, they contain nothing contrary to it, until the case of *Minturn* v. *Brower*, 24 Cal. 644. That court, in the case of *Teschemacher* v. *Thompson*, 18 Cal. 11, said:

"By the act of March 3, 1851, the government has afforded the means of protecting all titles, legal or equitable, acquired previous to the cession. Its power to thus provide . . . results from the fact that it is sovereign and supreme as to all mat-

ters connected with the treaty and the enforcement of the obligations incurred thereunder. . . . It must determine for itself what claims to property existed at the date of the treaty."

And so in *Semple* v. *Hagar*, 27 Cal. 163, shortly after the decision of *Minturn* v. *Brower*, *supra*, the court used the following language:

"The court will take judicial notice that, according to the provisions of the act of Congress of March 3, 1851, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, should present his petition for the confirmation of his title to the board of land commissioners, and that such proceedings must be had thereupon, before said board or the District or Supreme Court of the United States, that a final decree confirming the title of the claimant to the land must be entered before the patent for the land could be issued. A patent could not be issued for the land claimed under a Mexican grant, unless such proceedings were first had for the confirmation; and it is not pretended that they were not had in respect to the Jimeno grant. The patent was issued only in pursuance of the decree of confirmation, and for the purpose of carrying it into effect."

These cases show that the doctrine has not been considered as well settled in California against the views herein expressed until the case now before us, or rather until that of *Phelan* v. *Poyoreno*, 74 Cal. 448, was decided, which is referred to by the court as the foundation of its judgment in the present action. That case was argued before a commission of the Supreme Court, whose judgment was adopted by the Supreme Court of the State, under a law of California which prescribes this mode of appellate jurisdiction.

Upon the mere question of authority these decisions of the Supreme Court of the United States, and of the Supreme Court of California, would be decisive against the judgment of the latter court in this case. But we are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any

Counsel for Parties.

validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States.

This proposition requires that the judgment of the Supreme Court of California in the case before us be

Reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

PARLEY'S PARK SILVER MINING COMPANY *v.* KERR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 154. Submitted January 8, 1889. — Decided April 1, 1889.

In Utah a complaint which alleges that the plaintiff is owner and in possession of land, that the defendant claims an adverse interest or estate therein, that such claim is without legal or equitable foundation and is void, and that it is a cloud on the plaintiff's title and embarrasses him in the use and disposition of his property and depreciates his property, and which prays for equitable relief in these respects, is sufficient to require the adverse claim on the part of the defendant to be set up, inquired into and judicially determined, and the question of title finally settled.

The question, under Rev. Stat. § 2319, as to what customs and rules of miners in a mining district not inconsistent with the laws of the United States are in force in the district when an application is made for a patent of mineral land, is one of fact determinable by the Commissioner of the Land Office.

Rule 4 of the rules of the Blue Ledge mining district in Utah, adopted May 17, 1870, limiting the width of a mining location to 200 feet, was so modified May 4, 1872, that thereafter the surface width was to be governed by the laws of the United States.

THE case is stated in the opinion.

Mr. J. G. Sutherland and *Mr. J. R. McBride* for appellant.

Mr. Charles W. Bennett for appellee.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

This action was brought in a District Court of the Territory of Utah on the 14th of September, 1880, by the appellant, Parley's Park Silver Mining Company, to establish the validity of its title to certain mining property in Utah, and to have annulled the adverse claim of the appellee, John W. Kerr, to an estate or interest in said property.

The suit was founded upon § 1479, Compiled Laws of Utah, § 254 of the Practice Act, which is as follows: "An action may be brought by any person in possession by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

The complaint sets forth the cause of action in the very terms of this section, alleging, in effect, that the plaintiff is owner, subject only to the paramount title of the United States, and in possession of the lands in question; that the defendant claims an adverse interest or estate therein; that the said claim is without legal or equitable foundation and void; and that it is a cloud on plaintiff's title, embarrasses him in the use and disposition of the property, and depreciates its value. Therefore, he prays (1) That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of the court. (2) That by said decree it be adjudged that the defendant has no interest or estate whatever in said land, and that the title of the plaintiff is valid and good. (3) That the defendant be enjoined against asserting any adverse title to said land or premises.

The defendant in his answer denies the plaintiff's ownership and possession, and sets up a paramount title in himself based upon a patent to him from the United States embracing the land in question.

The facts agreed upon by the parties and adopted by the court as findings are substantially as follows: Two mining claims in the Blue Ledge mining district of Utah, known as the Central mining claim and the Lady of the Lake mining

claim, together with all the estate and interest therein, were conveyed to the plaintiff by the original locators and their grantees. At the time of the commencement of the suit there was no actual possession of the premises in question, but the plaintiff had, according to the mining laws of the district, possession of parts of those two mining claims, and, according to those laws, such possession is also possession of the disputed premises, provided they are rightfully a part of the Central and Lady of the Lake claims, and not the property of the defendant under his patent for the Clara mining claim. This mining claim patented to the defendant is overlapped by the two claims of the plaintiff, and this overlapped portion constitutes the premises in controversy. The plaintiff and its grantors had done the work required by law on its mining claims, but had not at the time obtained a patent for either.

The Lady of the Lake mining claim was located July 25, 1875, and was surveyed for patent July 8, 1876.

The Central mining claim was located August 19, 1876, was surveyed for application for patent August 2, 1880, and application for patent was made by the plaintiff or its grantors soon thereafter.

The Clara mining claim was located July 28, 1872, was surveyed for patent March 31, 1876, was entered and paid for February 20, 1879, and the patent itself was issued February 6, 1880, to the defendant, and held by him at the commencement of the suit.

It is also agreed that "during the 60 days' publication of the notice of application for patent for the Clara mining claim and mill site, the owners of the Lady of the Lake mining claim filed in the United States Land Office an adverse claim against said application for patent, and thereby made an adverse claim to the areas in conflict between the Lady of the Lake mining claim and the Clara mining claim and Clara mill site. On the 25th day of July, 1876, agreements in writing were made between the owners of the Lady of the Lake mining claim and the applicants for patent for the Clara mining claim and mill site, as follows: An agreement whereby the owners of the Clara mill site relinquished their application for patent for so

much thereof as conflicted with the Lady of the Lake mining claim, and the owners of the Lady of the Lake mining claim agreed, in consideration thereof, to prosecute their application for patent for said claim with diligence and when patent was obtained to convey to the owners of said mill site or their assignees the area in conflict between said mill site and said Lady of the Lake mining claim, excepting and reserving, however, to the owners of the Lady of the Lake mining claim any mineral vein under the surface of said conflict area, and also the right to mine and extract any minerals therein. And the owners of the Clara mining claim agreed not to protest the application for patent for the Lady of the Lake mining claim, and at the same time the owners of the Lady of the Lake mining claim, as part of the same agreement, made and delivered to the applicants for patent for the Clara mining claim, and also filed in said United States Land Office, a written withdrawal relinquishing their said protest and adverse claim against the application for patent for the Clara mining claim, and released to the United States and their grantees the lands and premises in conflict between the said Clara and the Lady of the Lake mining claims, the said conflict area containing forty one hundredths of an acre, more or less."

A copy of the mineral laws of the Blue Ledge mining district was by agreement filed with the stipulation, and it was agreed they formed a part of the application for patent for the Clara mining claim. The defendant reserved the right to object to the admissibility of any facts offered with a view to attack or impeach the validity of the patent.

The case was submitted to the court on the pleadings, stipulations and exhibits of the parties. The court rendered judgment in favor of the defendant as the owner of the premises in dispute, and entitled to the possession thereof, and dismissed the plaintiff's action on the merits. This judgment, on appeal to the Supreme Court of Utah, was affirmed. We think it clear that the appellant has no title, color of title, or right of any kind to the area in conflict between the Lady of the Lake mining claim and the Clara mining claim. The facts show that whilst the application for patent for the Clara mining

claim was pending, and during the sixty days' period of publication of notice, the owners of the Lady of the Lake claim, (grantors of the appellant,) filed their protest and adverse claim against the same, but afterwards, and within the sixty days, filed in the local land office a relinquishment of such adverse claim, and a withdrawal of the protest against the said application for the Clara mining claim.

As to the disputed premises within the Central mining claim, the defendant relies upon his patent, which is admitted to include the land in controversy, and was free from any conflict with the central mining claim at the date of its issue. He claims this patent to be conclusive of the legal title, and that it justifies the presumption that all the prerequisite facts and acts prescribed by law were complied with. The appellant contends that the patent is void, because it was issued in violation of the mining laws of the Blue Ledge mining district in which the location was made, in that those mining laws, which have the force of a public statute, fixed the width of mining locations within that district at 200 feet. The patent was for a location of 600 feet.

The first issue to be determined is, whether the complaint is sufficient to authorize the admission of evidence impeaching the validity of a patent, or to sustain a judgment annulling it. This question was directly presented in the case of *Ely* v. *New Mexico and Arizona Railroad Co.*, recently decided by this court. 129 U. S. 291. That was an action commenced in a territorial court under the statutes of that Territory, almost literally the same as the statutes of Utah under which this action arose, and the prayer for relief was precisely the same in both complaints. The court held, in that case, that the rule enforced in the Circuit and District Courts of the United States, that a bill in equity to quiet title or remove clouds must show a legal and equitable title in the plaintiff, and set forth the facts and circumstances on which he relies for relief, does not apply to an action in the territorial court founded upon territorial statutes, which unite legal and equitable remedies in one form of action. The complaint in the present case, in compliance with the requirements of the Practice Act of Utah

Territory, states in concise language the two ultimate facts, upon which the claim for relief depends, that the plaintiff is in possession of the property, and that the defendant claims an interest or an estate therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled.

The only question, therefore, which remains for consideration, is, whether the proofs in the agreed statement of facts, which are incorporated in the findings of fact, show that the patent should have embraced a width of only 200 feet. By § 2319, Rev. Stat., mineral lands are open to purchase under regulations prescribed by law, and according to the local custom and rules of miners in the several mining districts, not inconsistent with the laws of the United States. Counsel for appellant cites the rules adopted in the Blue Ledge mining district, May 17, 1870, to sustain his position. One of these rules, § 4, provides that "the surface width of any mining location shall not exceed 100 feet in width on each side of the wall-rocks of said lode." Had that regulation remained in existence and been in operation at the time the Clara mining claim was located, its effect upon the legality and validity of that location, at least as to all the land in excess of 200 feet, could not be doubted; but we find that the miners of Blue Ledge mining district frequently changed their rules in several important particulars, among them those relating to the width of mining locations. We find in the record the "minutes of a miners' meeting, held on May 4, 1872, to alter and amend the laws of the Blue Ledge mining district." It is an agreed fact that, on the day of that meeting, it was known to those miners that an act of Congress, relating to the location and extent of mining claims upon mineral lands of the United States, had passed, or was about to be passed. Among the other alterations adopted at that meeting, and, as seems to be agreed, in anticipation of the act of Congress, they provided in § 14 that "the surface width shall be governed by laws of the United States of America." And in § 19 they add the

general repealing clause. The act of Congress, which was passed May 10, 1872, provides as follows:

"A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. . . . No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary." Rev. Stat. § 2320.

The Clara mining claim, it is conceded, was located under the by-law and the act of Congress just quoted. It was located, officially surveyed for application for patent, and formally presented to the Land Office for patent, before the Central mine was located. It is admitted that these by-laws were before the Commissioner of the General Land Office and formed a part of the application. The question as to which of these provisions was in force, was one of fact, determinable by the Commissioner, whose duty it was also to take official notice of the statute upon the subject. He decided as a fact, that the local laws of the district as to the width of the location had not been exceeded in this instance.

Whether this decision of the Commissioner as to a fact within his jurisdiction goes to the full extent claimed, we need not decide. In every view, we think it was correct, and that the patent issued by him was according to law, and, therefore, valid.

The judgment of the court below is

Affirmed.

UNITED STATES *v.* INSLEY.

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

No. 221. Argued March 21, 1889. — Decided April 8, 1889.

In a suit in equity, brought by the United States to redeem a parcel of land in Kansas, from a mortgage, the defence of laches cannot be set up, although the bill was filed more than twelve years after the defendant obtained title to the land by purchasing it on a foreclosure sale under the mortgage, and more than thirteen years after the United States purchased the land on a sale on execution on a judgment obtained by it, after the mortgage was given, against the mortgagor, who still owned the land, the United States not having been a party to the foreclosure suit.

The United States holds the title to the land for public purposes and not for private purposes, and holds in like manner the incidental right of redemption.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for appellant.

No appearance for appellee.

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 District of Kansas, by the United States against the heirs-at-law of Polly Palmer and the heirs-at-law and administratrix of Moses McElroy, seeking to redeem a parcel of land known as lot 1 in block 104, in the city of Fort Scott, in the State of Kansas, from a claim made thereto by the Palmer heirs under a mortgage. The bill was originally filed November 28, 1884. After a demurrer had been put in to it by two of the defendants, an amended bill was filed, on July 22, 1885. Some of the defendants interposed a general demurrer to the amended bill, and on a hearing the demurrer was, on December 14, 1885, sustained, and the bill was dismissed. From that decree the United States has appealed.

The material facts set forth in the amended bill are these: On the 16th of October, 1869, the United States recovered a judgment at law, in the District Court of the United States for the District of Kansas, for $2000, against Moses McElroy and Charles Bull. Two executions were issued thereon, and were returned unsatisfied. On the 7th of August, 1869, McElroy and his wife executed a mortgage for $3500 to Polly Palmer, on lots 1 and 3 in said block No. 104. On the 30th of May, 1871, Polly Palmer commenced a suit in a state court of Kansas against McElroy and his wife to foreclose the mortgage, and, on October 4, 1871, obtained a judgment of foreclosure for $3764.16, which ordered that the property be sold to satisfy the mortgage. It was sold, and purchased by Polly Palmer. The sale was confirmed by the court, and, on January 4, 1872, a sheriff's deed for the property was made to her, which was duly recorded. At the time the foreclosure suit was commenced, the United States marshal had made a levy on said property, under an execution issued on the judgment of the United States, and the said lots 1 and 3 had been advertised to be sold on June 6, 1871. On that day, lot 1 was sold to the United States; and on October 16, 1871, the District Court of the United States confirmed the sale, and ordered a deed to be made to the United States. In the foreclosure suit, the United States was not made a party, and did not appear. At the time that suit was commenced, the judgment of the United States was a lien on lots 1 and 3. Polly Palmer died in November, 1872, and McElroy died in 1881. On October 30, 1883, the United States received a deed for lot 1, from the marshal of the district, based on the sale of June 6, 1871, in accordance with the order of October 16, 1871, and has been ever since June 6, 1871, the owner of lot 1, with full right of possession thereof, subject only to the right of the heirs-at-law of Polly Palmer. The amount due to the estate of Polly Palmer on the mortgage of August 7, 1869, and on the judgment of foreclosure has been paid.

The bill alleges that the United States offers to pay the amount, if any, due on the mortgage, in order to redeem the property, waives an answer on oath, and prays that an account

be taken of the amount due; that lot 3 be first subjected to its payment; that an account be taken of the rents and profits of lot 1, and if they have been more than sufficient to satisfy the mortgage debt, the defendants be decreed to pay the excess to the United States; and that the United States be permitted to redeem lot 1, and the defendants be adjudged to deliver up its possession to the United States.

The decision of the Circuit Court, reported in 25 Fed. Rep. 804, proceeded upon the ground that, as the government in this case came into a court of equity claiming the same rights as a private individual, and the case did not involve any question of governmental right or duty, the ordinary rules controlling courts of equity as to laches should be enforced; and that, as the bill was filed more than twelve years after the sheriff's deed had been made to Polly Palmer, and more than thirteen years after the sale on execution to the United States, the claim of the government was barred by its laches.

This decision of the Circuit Court was made in December, 1885, prior to the decisions of this court in the cases of *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *United States* v. *Nashville Railway Co.*, 118 U. S. 120; and *United States* v. *Beebe*, 127 U. S. 338. These cases determine that the decree in the present case must be reversed.

In *Van Brocklin* v. *State of Tennessee*, p. 158, this court said: "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defence and general welfare of the United States.'"

In the present case, the United States holds the title to the property in question, as it holds all other property, for public purposes and not for private purposes. So holding the title and the right of possession under their deed, it holds in the same manner, and for public purposes, the incidental right of redemption. In this view, the doctrine often laid down, and again enforced in *United States* v. *Nashville Railway Co.*, applies to this case. It was there said, p. 125: "It is settled

beyond doubt or controversy — upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided — that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. *Lindsey* v. *Miller*, 6 Pet. 666; *United States* v. *Knight*, 14 Pet. 301, 315; *Gibson* v. *Chouteau*, 13 Wall. 92; *United States* v. *Thompson*, 98 U. S. 486; *Fink* v. *O'Neil*, 106 U. S. 272, 281."

This doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity. In *United States* v. *Beebe*, p. 344, it was said: "The principle that the United States are not bound by any statute of limitations nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest, is established past all controversy or doubt." These views entirely cover the present case.

It was suggested in the decision of the court below, as a ground for applying to the United States the doctrine of laches, that the government was not made a party to the foreclosure suit because it could not have been made such party except at its own will, and that it would be a hardship to the other parties to this suit to allow the government to lie by for so many years, and then come into a court of equity to assert the rights sought to be maintained in this suit. It is a sufficient answer to this view to say, that the principle we have announced has long been understood to be the rule applicable to the government, and that it rests with Congress, and not with the courts, to modify or change the rule.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to take such further proceedings as may be according to law and not inconsistent with this opinion.

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

Citations for Plaintiff in Error.

MANHATTAN BANK OF MEMPHIS *v.* WALKER.

WALKER *v.* MANHATTAN BANK OF MEMPHIS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Nos. 205, 682. Argued March 14, 15, 1889. — Decided April 8, 1889.

A state bank gave a receipt or certificate, stating that J., agent for W., had placed with it, on special deposit, $5200 of railroad mortgage bonds, and a note for $5000. The receipt was sent by the bank by mail directly to W., on the request of J. At the same time the bank entered the note and the bonds in its special deposit book as deposited by J., agent for W. Afterwards, with the concurrence of J., but without authority from W., the bank discounted the note and applied its avails to pay a debt due to it from a firm whose business J. managed, and delivered up the bonds to J., knowing that he intended to pledge them as security to another bank for a loan of money to the same firm. The bank also knew that J. held the note and bonds as investments for W., and that it was not a safe investment to lend their avails to the firm: *Held*, that the bank was liable to W. for the amount of the note and the value of the bonds.

A suit in equity by W. against the bank for the return of the property or the payment of its value, would lie, as it was a suit to charge the bank, as a trustee, for a breach of trust in regard to a special deposit.

In equity. The case is stated in the opinion.

Mr. S. P. Walker, *Mr. C. W. Metcalf* and *Mr. L. Lehman*, for Walker, cited: *National Bank* v. *Graham*, 100 U. S. 699; *Foster* v. *Essex Bank*, 17 Mass. 479; *S. C.* 9 Am. Dec. 168; *Stewart* v. *Frazier*, 5 Alabama, 114; *James* v. *Greenwood*, 20 La. Ann. 297; *Honig* v. *Pacific Bank*, 73 California, 464; *Chattahoochee Bank* v. *Schley*, 58 Georgia, 369; *Loring* v. *Brodie*, 134 Mass. 453; *Duncan* v. *Jaudon*, 15 Wall. 165; *Smith* v. *Ayer*, 101 U. S. 320; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Shaw* v. *Spencer*, 100 Mass. 382; *Alexander* v. *Alderson*, 7 Baxter, 403; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Parker* v. *Gilliam*, 10 Yerger, 394.

Mr. T. B. Turley, for the bank, cited: *Jones* v. *Smith*, 1 Phillips Ch. 244, 256; *Potter* v. *Gardner*, 12 Wheat.

503; *Wormley* v. *Wormley*, 8 Wheat. 447; *Clyde* v. *Simpson*, 4 Ohio St. 445; *Champlin* v. *Haight*, 10 Paige, 274; *Foster* v. *Essex Bank*, 17 Mass. 479; *S. C.* 9 Am. Dec. 168; *Giblin* v. *McMullen*, L. R. 2 P. C. 317; *Chattahoochee Bank* v. *Schley*, 58 Georgia, 369; *Ray* v. *Bank of Kentucky*, 10 Bush, 344; *Lloyd* v. *West Branch Bank*, 15 Penn. St. 172; *S. C.* 53 Am. Dec. 581; *Scott* v. *National Bank of Chester Valley*, 72 Penn. St. 471; *First Nat. Bank of Carlisle* v. *Graham*, 79 Penn. St. 106; *Tompkins* v. *Saltmarsh*, 14 S. & R. 275; *Smith* v. *First National Bank*, 99 Mass. 605; *S. C.* 97 Am. Dec. 59; *Lancaster County Bank* v. *Smith*, 62 Penn. St. 47; *Wiley* v. *First Nat. Bank*, 47 Vt. 546; *First Nat. Bank* v. *Ocean Nat. Bank*, 60 N. Y. 284, 294, 5; *Haynie* v. *Warring*, 29 Alabama, 263; *Lampley* v. *Scott*, 24 Mississippi, 528.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit originally brought in the Chancery Court of Shelby County, Tennessee, by Eliza Walker against the Manhattan Bank of Memphis, a Tennessee banking corporation. The suit was removed by the plaintiff into the Circuit Court of the United States for the Western District of Tennessee. The bill of complaint and the answer were both of them put in before, and the replication was filed after, the removal of the cause.

The bill prays for a decree for the return to the plaintiff of $3000 of the second-mortgage bonds of the Memphis and Charleston Railroad Company, and $2200 of the second-mortgage bonds of the Mississippi Central Railroad Company, and of a promissory note for $5000, made by Edward Goldsmith, and of certain shares of the capital stock of the defendant, amounting to $6000, attached to the said promissory note as security therefor. The bill alleges that the defendant, in the course of its business, and on the 27th of November, 1880, received on special deposit the above-named bonds, promissory note and shares of stock, belonging to the plaintiff, together with a certificate of the stock of the People's Insurance Company, for $1100, and four promissory notes for $325 in the aggregate; that the said bonds had coupons attached thereto

for the interest payable thereon at certain stated periods; that the defendant gave its obligation in writing, as evidence of the receipt on special deposit, from the plaintiff, of the said securities, and was bound to deliver them to the plaintiff on demand; and that the stock of the People's Insurance Company, and the $325 of notes, were returned to her, but the bonds and the coupons attached thereto, and the note of Goldsmith, and the bank stock were never returned to her, although she made demand upon the defendant for them. The bill prays for a decree for the return of the property, and for the amount of the decline in its value from the time when she demanded it until the time when it shall be restored; and, if not restored, then for a personal decree against the defendant for the highest value of it at any time since she first made demand for it to the date of the decree, with interest.

The answer sets up in defence, that, for some time prior to November, 1880, Mr. G. H. Judah, a brother-in-law of the plaintiff, kept an account and had transactions with the defendant, in which he styled himself sometimes agent, and sometimes guardian, but without disclosing for whom he was agent or guardian; that he made deposits and drew checks in that way on his account, as the other depositors with the defendant did, and, at different times, prior to November, 1880, bought the bonds and insurance company's stock named in the bill, and paid for them by checks on his account with the defendant; that, as he would buy those securities, he would leave them on deposit with the defendant, without taking any receipt for them; that, in the fall of 1880, he left with the defendant the Goldsmith note and the collateral therefor, and the four other notes mentioned in the bill; that those notes were payable to the said G. H. Judah as agent simply, without saying for whom he was agent; that, prior to November 27, 1880, he had never told the defendant whether he had any principal or not, or who his principal was, or for whom he was guardian, if for any one; that on or about that date, he asked the defendant to give to him, as agent for the plaintiff, a receipt for the bonds, stocks and notes, telling it at the time that he was the plaintiff's general agent for the management and control of

those securities and notes; that the defendant gave to him a receipt as such agent; that, after the receipt was given, some of the notes described in it were paid while they were on deposit with the defendant, and the said Judah, as agent of the plaintiff, drew out the money in the ordinary way, and from time to time, as agent of the plaintiff, withdrew from the custody of the defendant the items mentioned in the receipt, until he had withdrawn them all, when he gave to the defendant a receipt for them, in which he acknowledged having received them as agent for the plaintiff; that, if the plaintiff owned the items, Judah had authority from her to control and manage them, as fully as she could have done as owner, if they had been in her actual possession, instead of in his possession as her agent; that he was her general agent with reference to them, and had power not only to deposit them, but also to withdraw them from deposit, if he saw fit; that, when he demanded them from the defendant, his agency was still in force, and the defendant could not legally have refused to give them up to him as the agent of the plaintiff; that, upon returning them to Judah, as such agent, all liability of the defendant with reference to them ceased; and that the defendant is not indebted to the plaintiff on account of said securities.

Proofs were taken on both sides, and the cause was heard; and the court made a decree adjudging to the plaintiff a recovery against the defendant of $5000, being the amount of the Goldsmith note, with $1175 interest thereon from the date of its maturity, November 1, 1881, on the ground that the defendant had collected the amount of that note and appropriated the same to its own use, and further decreeing that the defendant was not liable to the plaintiff for any of the other items mentioned in the bill, and that neither party should recover costs from the other. Each party has taken a separate appeal to this court.

The answer does not set up, as a defence, that the defendant was not authorized to receive the property in question as a special deposit, or to give the receipt therefor. It was stipulated between the parties that the defendant received no compensation, as bailee, for the custody of the property sued for;

that the Memphis and Charleston Railroad bonds bore seven per cent interest, payable semi-annually, and evidenced by interest coupons maturing January 1 and July 1 in each year, the bonds maturing on the 1st of January, 1885; and that the Mississippi Central Railroad bonds bore eight per cent interest, payable semi-annually, and evidenced by coupons maturing February 1 and August 1 in each year, the bonds maturing on the 1st of February, 1885.

The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust in regard to a special deposit.

The opinion of the Circuit Court, reported in 25 Fed. Rep. 247, contains so full and accurate a statement, in the main, of the facts of the case, developed by the proofs, that we repeat and adopt it, as follows: "The firm of Walker Bros. & Co., composed of the plaintiff's husband, his brother and G. H. Judah, was a large mercantile house in Memphis that disastrously failed and made an assignment. The plaintiff and the wife of the other brother, being creditors of the firm for large amounts due them for loans to the firm, owned the book accounts, which were bought for their use by Judah in the name of Maas, the book-keeper, at the assignee's sale, the husband of plaintiff paying for her share. These books, with the knowledge and consent of plaintiff and her husband, who afterwards died — but it seems without any specific instructions of any kind — were left with Judah to collect the debts and manage the fund for the two beneficiaries, who resided in other cities. His control over the funds was of the most plenary character. He married a sister of the two brothers, and had been the most active member of the firm and was best acquainted with its business. The collections were deposited with the defendant bank in his name as 'guardian,' or in the name of Maas, the former book-keeper of the firm, who became the book-keeper and assistant cashier of the defendant bank. Prior to November 27, 1880, Judah had purchased certain securities with the funds, which he kept on special deposit with the bank or in the name of Maas. On that day he came to the bank and asked Maas for a receipt,

showing the special deposit, to send to the plaintiff. The bank was not in the habit of giving receipts or certificates for these special deposits, but kept them noted by numbers in a book used for that purpose. Maas wrote a receipt on a sheet of the bank's letter-paper, and according to his and Judah's testimony, placed it in one of the bank's envelopes addressed to the plaintiff, and put it with the bank's mail. The plaintiff and her daughter swear that it was accompanied by a letter from Maas. What was in the letter does not appear, and, not being preserved, it has not been produced, but is supposed to have been burned as useless. The routine of the bank was that Goldsmith, the cashier, personally signed and inspected every letter and himself enveloped and addressed them. This letter he did not see or sign, and it was never copied into the letter-press. The receipt was as follows:

'Manhattan Bank of Memphis.

'L. Levy, president; L. Hanauer, vice-president; E. Goldsmith, cashier; M. Maas, ass't cashier.

'Memphis, Tenn., *November* 27, 1880.

'G. H. Judah, Esq., agent for Mrs. Eliza Walker, of Philadelphia, has placed with us on special deposit:

'$3000, Memph. & Charl. R. R. 2d-m'tg. bonds.

'$2200, Miss. Central " " "

'$1100, People's Insurance Co. stock.

'$5000, note E. G., and collateral attached, $6000 M. Bank stock.

'$325, interest notes (4 @ $81.25).

'Maurice Maas,
'*Ass't Cashier.*'

"Some time in 1880 the son of the plaintiff and a son of the other Walker, both young men, commenced business at Memphis as Walker Sons & Co. This firm kept an account with the defendant bank, and later with the Bank of Commerce. It was 'never very strong' financially, and its business was cotton factorage. Judah was thought by Goldsmith to be a partner, and the plaintiff at one time swore he was a silent

partner, but afterwards stated she was informed he was not. He says he was only a salaried manager. The members of the firm were inexperienced, and Judah was, in fact, the almost sole manager of all its affairs — the master spirit of the concern. It is not shown that the young men took any part, except one of them kept the books after Maas had opened them.

"The plaintiff in October, 1880, lent to her son, the firm being also responsible, $10,000, as his capital in the concern, derived from the life insurance of her husband. Judah also appropriated or lent to the firm, from time to time, sums amounting to over $9000, from his collections in behalf of plaintiff on the old books. The interest on these sums and on the special deposit funds were remitted by the firm — not always promptly — to the plaintiff at Philadelphia, by exchange or checks; and sometimes the coupons were sent by express to her. When remittances were delayed she wrote or telegraphed the firm. She never communicated with the bank in any way. The remittances were nearly always in letters by her son, and they contained apologies and explanations for delays.

"The defendant bank made large advances to the firm, generally by discounts on the security of the firm's 'country paper' due from its customers. Judah promised the bank to always protect it as far as in his power, and the relation was very confidential. The bank began to urge him for a reduction of the account, and, not being willing to accommodate him fully, he opened an account with the Bank of Commerce. The Goldsmith note maturing November 1, 1881, he" [Goldsmith] "notified Judah that he should not longer need the loan. Maas and Judah say that 'a few days' before the note matured, Judah, being unable to continue the loan to Goldsmith, determined to lend the money to Walker Sons & Co.; and to accomplish that purpose the note of Goldsmith was discounted by the bank, and the proceeds placed to the credit of Walker Sons & Co. . . . At the same time, Judah urged a loan on the other securities of plaintiff on special deposit, but the bank declined this on the ground that cotton factors' ac-

counts were not desirable to a bank with so small a capital. . . . The bank did not make the loan, because Judah was unwilling to pay the money on the old account. He could get the money at the Bank of Commerce. He told the officers of the defendant bank so, and they delivered the securities to him, fully knowing that he was going to make that use of them. Maas consulted the president and the attorney whether he should deliver the securities to Judah, and they directed him to do so. He had forgotten, however, giving him the receipt and sending it to plaintiff, and neither the president nor the attorney knew that fact. Goldsmith, the regular cashier, was absent in New York, but he never knew that fact. Maas never mentioned it, because, he says, he deemed it unimportant at the time and forgot it afterwards. The securities were pledged to the Bank of Commerce, except the People's Insurance stock, which was on the books in plaintiff's name and could not be used by Judah. They were sold by that bank to satisfy the loan, and are lost to plaintiff. The firm of Walker Sons & Co. soon after failed disastrously, owing defendant bank a balance of over $5000, notwithstanding Judah, according to his promise, appropriated to the debt certain stocks of his own, and his diamonds. After the failure, Kramer, a son-in-law of plaintiff and a lawyer, came to Memphis and presented the receipt, and then the plaintiff learned, for the first time, that the securities had been so used by Judah and the bank. Kramer secured the delivery to himself of certain 'country paper' and mortgages to secure notes that were then first taken for $20,000 lent by plaintiff to the firm, not including, however, the securities in controversy here. An angry lawsuit grew out of this transaction, in this family, in the courts of Arkansas. A New York gentleman, nephew of the other young Walker, filed a bill stating that the securities belonged to him to secure his guaranty of a loan by the Importers and Traders' Bank of New York to the firm for some $26,000, and that he had sent them to the firm for collection, and that they were, by the plaintiff's son, and without consent of the other Walker or Judah, turned over to his own mother; all of which was denied, and the averment made that this

scheme was trumped up to defeat plaintiff of her advantage and enable Judah to continue business on the assets at Indian Bay, Arkansas."

The Circuit Court held that the defendant was liable for the amount of the Goldsmith note and interest from the date of its collection, because it had collected the money and never paid it to the plaintiff, but had, without due authority, appropriated it to its own use, on account of the debt due to it from Walker Sons & Co. As to the $5200 of bonds, the court held that knowledge by the defendant of the intended breach of trust by Judah did not make the defendant privy to it and liable for it, as the defendant did not participate in the profits of the fraud; that the receipt given by the defendant did not change the relation of Judah to the property and to the defendant, as it was not a receipt to the plaintiff but one to Judah; and that it did not satisfactorily appear that the defendant received any part of the money advanced on the bonds.

We are of opinion that the plaintiff is entitled to recover, not only in respect to the Goldsmith note, but in respect to the $5200 of bonds.

In regard to the Goldsmith note, shortly before it matured, in November, 1881, Judah indorsed it over to the defendant as collateral security for a note of larger amount, made by Walker Sons & Co., which the defendant then discounted at the instance of Judah. The proceeds of that discount were, to the extent of $6000, applied by the defendant upon a debt antecedently existing from Walker Sons & Co. to it. When the Goldsmith note became due, in November, 1881, the defendant, claiming to be the owner of it, collected it and retained the proceeds. Thus a note which confessedly, and to the knowledge of the defendant, belonged to the plaintiff, was diverted to the use of the defendant by the co-operation of it and of Judah. Judah, if not a partner in the firm of Walker Sons & Co., was, to the knowledge of the officers of the defendant, the active and controlling manager, both in its business with the defendant and otherwise, of the affairs of that firm. Maas, the assistant cashier of the defendant, and

who was its acting cashier during the period of the transactions in question, was, before his connection with the defendant, the confidential book-keeper of the prior firm of Walker Bros. & Co., of which Judah was a member, and had a close personal intimacy with Judah. When the book accounts of Walker Bros. & Co. were sold, Maas bought them, on behalf of the plaintiff and her sister, and the funds realized from that purchase were in part deposited in the name of Maas, with the defendant; and Maas, on the request of Judah, opened the books of Walker Sons & Co., when that firm was formed. Judah promised Maas that he would certainly protect the defendant in case of disaster to the firm of Walker Sons & Co.

At the time the Goldsmith note was thus converted, the condition of Walker Sons & Co. was precarious, if the firm was not insolvent. Before the conversion of the railroad bonds, Judah pledged to the defendant certain stocks belonging to himself, for the debt due to it by Walker Sons & Co.; and it is apparent that Judah was constantly being pressed by the defendant to make payments on the firm's debt to it, and that Maas, being the acting cashier of the defendant, knew, from the state of the account which the firm kept with the defendant, that it was substantially without available funds. In none of the transactions between the defendant and Judah in regard to the Goldsmith note and the bonds, was the receipt or certificate which had been sent to the plaintiff redelivered to the defendant; and the defendant knew that it had gone into the hands of the plaintiff, because it had been sent to her by mail directly from the defendant.

In *National Bank* v. *Graham*, 100 U. S. 699, one Graham had deposited in a national bank certain bonds of the United States for safe-keeping, and had received from the cashier a receipt setting forth that fact, and that the bonds were to be redelivered on the return of the receipt. Before and after that time, the officers of the bank were accustomed to receive such deposits from others, and they were entered in a book kept by the bank. The bonds were stolen from the custody of the bank, through its gross negligence. On this state of

facts, this court said, (p. 702:) "If a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter." In support of this proposition, the court cited the cases of *Foster* v. *Essex Bank*, 17 Mass. 479; *Lancaster Co. Bank* v. *Smith*, 62 Penn. St. 47; *Scott* v. *Bank of Chester Valley*, 72 Penn. St. 471; *Bank of Carlisle* v. *Graham*, 79 Penn. St. 106; *Turner* v. *Bank of Keokuk*, 26 Iowa, 562; *Smith* v. *Bank of Westfield*, 99 Mass. 605; *Chattahoochee Bank* v. *Schley*, 58 Georgia, 369.

We are of opinion that the execution of the receipt or certificate in question, and its transmission by mail directly by the defendant to the plaintiff, created the relation of bailor and bailee between her and the defendant, and made it an act of gross negligence for the defendant to deliver, or dispose of, or appropriate the securities in question, on the sole request of Judah, and without her direct authority. Under the circumstances of the case, the receipt having been made out by Maas, the assistant cashier, and sent by him to the plaintiff, on the request of Judah made on her behalf, the statement in the receipt that Judah, agent for the plaintiff, had placed the securities with the defendant on special deposit, must be regarded as virtually a statement that the plaintiff, by Judah as her agent, had placed the securities with it on special deposit.

Maas's statement, in his testimony, is, that Judah came to him, while he was in the discharge of his duties in the bank, "and said he wanted a receipt, or a statement rather, of what securities he had there on special deposit, to send to Mrs. Walker in Philadelphia. . . . He said Mrs. Walker wanted to know what she held. . . . About that time, on our special deposit book, these bonds and note and stock, mentioned in said receipt, were entered as deposited by G. H. Judah, ag't Mrs. Eliza Walker." Maas further states that Judah never exhibited any authority to him or to the bank, to dispose of the note and the bonds and securities mentioned in the certificate which was sent to Mrs. Walker.

Judah testifies that the instructions of the plaintiff to him did not, directly or indirectly, authorize him to pledge any bonds or securities obtained with her money, for his own debts or the debts of others, and that his power was limited to invest her moneys for her exclusive benefit and use.

It is very clear that Judah had no power, either in fact or in law, to pledge the Goldsmith note as security for an existing debt of Walker Sons & Co. to the defendant. Such act was not an investment of the trust fund, and the officers of the defendant knew that it was not. *Duncan* v. *Jaudon*, 15 Wall. 165; *Smith* v. *Ayer*, 101 U. S. 320; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Shaw* v. *Spencer*, 100 Mass. 382; *Loring* v. *Brodie*, 134 Mass. 453.

It is urged on the part of the defendant, that Judah, as agent of the plaintiff, collected the book accounts of Walker Bros. & Co.; that he deposited the moneys collected with the defendant, to his credit as guardian; that out of those funds he made loans to Walker Sons & Co., to which the plaintiff did not object; and that he bought the securities in question with moneys belonging to the same fund. But, from the fact that the plaintiff had lent to the firm of Walker Sons & Co. other moneys, it does not follow that, after the giving of the receipt in question, authority from her to dispose of the securities so placed with the defendant on special deposit, is to be inferred. Her demand upon the defendant, through Judah, for the receipt showing the special deposit, and the sending of such receipt directly to her by the defendant, changed the relations of herself and Judah and the defendant, to the securities deposited. The defendant knew, as well as did Judah, that an investment of the proceeds of any of the securities in a loan to Walker Sons & Co., was not a safe investment. It also knew that the appropriation of the proceeds of the Goldsmith note towards paying a debt due to it by Walker Sons & Co., was an unlawful appropriation; and that the securities covered by the receipt were held as investments, and were the property of the plaintiff. So far as the collection of the interest on the Goldsmith note and on the bonds was concerned, when the moneys collected in fact reached the plaintiff, the transactions

were completed; and no argument can be drawn from them in support of any implied authority to Judah or to the defendant to divert or appropriate the principal of the securities.

The views above stated, as applicable to the Goldsmith note, apply also, very largely, to the $5200 of bonds. Under the terms of the receipt, the plaintiff was the bailor and the defendant was the bailee, in respect of the bonds, equally with the note. The defendant was not the bailee of Judah, so as to be authorized to deliver the bonds to Judah without the authority of the plaintiff. The defendant had no right to deliver the bonds to Judah, when it knew that Judah intended to deliver them to the Bank of Commerce as collateral security for a loan of money to be made by that bank to Walker Sons & Co.; and this, without regard to the question whether or not the defendant was to receive, or did receive, any part of the money borrowed from the Bank of Commerce. Judah applied to the defendant for a loan of money for Walker Sons & Co. on the bonds. Maas, representing the defendant, declined to make the loan. On receiving such refusal, Judah stated to Maas that he could probably get the money at the Bank of Commerce. Afterwards, he called upon Maas for the bonds, and told him he had got the money at the Bank of Commerce; and Maas knew, when he handed the bonds to Judah, that Judah received them with a view to a loan to be made by that bank to Walker Sons & Co., and Maas also knew at that time that Judah was the agent of Walker Sons & Co. By the face of the receipt, the defendant recognized the plaintiff as the true owner of the bonds, her name being mentioned in it; and it was capable of no other construction than that the plaintiff owned the securities mentioned. Knowing, from what passed between Maas and Judah, that the bonds were to be used to raise money for the benefit of Walker Sons & Co., and knowing that such use was an improper disposition of the bonds, unless the transaction were affirmatively and directly sanctioned by the plaintiff, the defendant became a party to the misappropriation of the bonds. It is immaterial, in this view, whether or not the defendant received any portion of the money loaned by the Bank of Commerce on the security of the bonds.

It results from these views that

The decree of the Circuit Court must be reversed, and the case be remanded to that court with a direction to enter a decree in favor of the plaintiff, not only for the amount of the Goldsmith note, namely, $5000, with interest from November 1, 1881, but also for the proper value of the $5200 of bonds, with proper interest, such value and interest to be ascertained by the Circuit Court, and the plaintiff to recover costs in this court on both appeals, and costs in the Circuit Court.

UNITED STATES *v.* PILE.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 206. Argued and submitted March 15, 1889. — Decided April 8, 1889.

The suspension of the execution of a judgment in a criminal case until the next term of court, unaccompanied by any pending motion for a rehearing or modification of the judgment or other proceeding taken at the term of court when the judgment was rendered, leaves the judgment in full force, and the court without further jurisdiction of the case.

A certificate of division in opinion upon a matter over which the court below has no jurisdiction brings nothing before this court for review.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. Solicitor General for the motion.

Mr. John P. Murray, opposing, submitted on his brief.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant below, who is the defendant here, was tried in the Circuit Court of the United States for the Middle District of Tennessee upon an indictment charging him with falsely making and forging an affidavit of John Frogge and others in relation to a claim for a pension. The jury by their verdict found him guilty. His counsel then entered a motion

in arrest of judgment upon the alleged insufficiency of the indictment, which motion was overruled by the court. Thereupon the defendant moved for a new trial, which was refused, and judgment rendered, sentencing the defendant to be confined in the jail of Davidson County for three months, and to forfeit and pay to the United States a fine of $250, and the costs, for which execution should issue, and the defendant be confined until said fine and costs were paid, or he was otherwise discharged by due course of law.

All this appears by the record to have been done on the 29th day of October, 1884, and on the 31st day of the same month the following order was made:

"UNITED STATES
v. } No. 3690.
S. H. PILE.

"Came the U. S. att'y and the deft. in proper person, and upon application of the deft., the execution of the judgment heretofore entered herein is suspended until the fourth Monday in November next, upon defendant entering into recognizance for his appearance at that date. And thereupon came John C. Wright, who, with defendant, acknowledged himself indebted to the United States in the sum of $2000, conditioned upon the appearance of defendant on the 4th Monday of November to abide by and perform the judgment of the court, and that he shall not depart without leave of the court.

"On Nov. 24th, 1884, on motion of defendant, the execution of the judgment herein was suspended until the next term of the court."

At the subsequent term, April 23, 1885, the following proceedings were had:

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"Upon sufficient grounds appearing to the court, the judgment of fine and imprisonment pronounced in this cause at the last term, and the judgment rendered at the last term of this

court on the motion in arrest of judgment overruling the same, are hereby set aside and for nothing held. And thereupon comes the defendant, by his counsel, before the Circuit and District Judges, and moved that the judgment in this case be arrested, and for causes sets forth the following:

"1. The indictment does not aver any specific intent to defraud the United States or other party.

"2. The indictment is delusive, uncertain, repugnant, or inconsistent.

"And the motion coming on for argument before the honorable the judges aforesaid, and they being unable to agree as to whether the said motion is well taken or not, but having divided in opinion touching the same, at the request of the counsel of the defendant, a certificate of division is filed by the said judges, which is ordered to be made part of the record in this case. And no further steps will be taken in this case till the Supreme Court shall have adjudicated the question in said certificate set forth. The district attorney excepted to the order of the court setting aside the judgment of the court rendered at the last term, overruling the motion of defendant to arrest the judgment, and to the signing of division of opinion at this term of the court.

"It is ordered that the clerk certify the entire record of this cause to the Supreme Court.

"It is further ordered that defendant enter into bond with good security in the penal sum of two thousand dollars, conditioned that he make his personal appearance at the Federal court-room in Nashville on the first day of April term of said Circuit Court, 1886, then and there to abide the further order of said Circuit Court. The defendant objects to the copying of any part of the record not authorized by law or the rules of the Supreme Court."

The judges thereupon certified to this court that they were divided in opinion upon the question of whether the motion in arrest of judgment should be allowed.

We are of opinion that the case here must be dismissed. When the Circuit Court had entered its judgment against the

defendant for an imprisonment of three months and a fine of $250, and had overruled the motion in arrest of judgment and for a new trial, it had finally disposed of the case. No new motion was made at that term of the court for any farther consideration of the matter, and the judgment thus entered was final. It is true that the court made an order, upon the application of the defendant, by which the execution of that judgment was suspended until the fourth Monday in November, which was during the same term, and that on the 24th of November another order was entered still farther suspending its execution until the next term of the court. But we do not consider that this order for the suspension of such execution set the judgment aside or was founded on any further motion to reconsider that judgment. Although the mere execution of it was suspended until the next term of the court the judgment remained in full force, with no proceeding pending to rehear, reconsider, or modify it. At the succeeding April term the court entered the order above quoted, that the judgment of fine and imprisonment, and that upon overruling the motion in arrest of judgment, be set aside and for nothing held; whereupon the questions above stated were argued upon the motion in arrest of judgment and the certificate of division made by the two judges on the question of granting the motion.

We do not understand that the court at that time had any farther jurisdiction of the case. There was no motion continued from the last term; there was no application or proceeding pending from the last term, nor anything coming over from it, except the suspension of execution. This did not leave the power of the court to reconsider the whole case still open. As it was not a case, therefore, for a division of opinion, in which either the court or the circuit judge (who did not sit upon the trial) had any power to act, we consider that there is nothing before this court, and the case must be dismissed here. The certificate of division related to a matter in which they had no right to act or to make such a certificate. It therefore brings nothing before this court for review, and

The case is dismissed for want of jurisdiction.

DAVIES *v.* MILLER.

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

No. 1279. Argued January 14, 15, 1889.— Decided April 1, 1889.

The notice of dissatisfaction with the decision of the collector of customs as to the rate and amount of duties on imported goods, required by the act of June 30, 1864, c. 171, § 14 (Rev. Stat. § 2931), to be given "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs," may be given at any time after the entry of the goods and the collector's original estimate of the amount of duties, and before the final ascertainment and liquidation of the duties as stamped upon the entry.

THE case is stated in the opinion.

Mr. Stephen G. Clarke for plaintiffs in error. *Mr. Edwin B. Smith* was with him on the brief.

Mr. Solicitor General for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action against the executors of a late collector of the port of New York to recover back duties exacted on goods imported by the plaintiffs in July, August and September, 1873.

At the trial, the plaintiffs introduced evidence tending to show that the duties exacted and paid were excessive; that appeals to the Secretary of the Treasury were taken and this action brought in due time; and that the protest as to each entry was filed after the collector's decision on the rate and amount of duties, but before the date of the final ascertainment and liquidation of the duties, as stamped upon the entry.

The court directed a verdict for the defendants, on the ground that the protest was filed "before the liquidation of the entry to which it referred, and not within ten days thereafter, as required by law." The plaintiffs duly excepted to

the ruling, and, after judgment for the defendants, sued out this writ of error.

The customs acts in force at the time of the importation of these goods contained the following provisions:

The collector and the naval officer are required to make and to indorse upon the importer's entry a gross estimate of the amount of the duties on the merchandise to which the entry relates, and the merchandise cannot be lawfully landed until the amount of the estimated duties has been first paid, or secured to be paid, and a permit granted. Act of March 2, 1799, c. 22, § 49, 1 Stat. 664; Rev. Stat. § 2869.

The merchandise must be appraised, or bonds given by the importer in double its estimated value, before it is delivered from the custody of the officers of the customs. If the collector deems any appraisement too low, he may order a new appraisement, and may cause the duties to be charged accordingly. If the importer is dissatisfied with the appraisement, the collector must order another appraisement by two appraisers of a specified class, and, if they disagree, decide between them, and the appraisement thus determined shall be final and duties levied accordingly. Acts of May 28, 1830, c. 147, §§ 2, 4, 4 Stat. 409, 410; August 30, 1842, c. 270, § 17, 5 Stat. 564; March 3, 1851, c. 38, § 3, 9 Stat. 630; Rev. Stat. §§ 2899, 2929, 2930.

On the entry of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on such merchandise, shall be final and conclusive against all persons interested therein, unless the owner, importer, agent or consignee of the merchandise "shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury." Act of June 30, 1864, c. 171, § 14, 13 Stat. 214; Rev. Stat. § 2931.

The question is whether the period allowed for filing the protest or notice of dissatisfaction with the decision made by the collector at the time of the entry upon the rate and amount of duties extends from the time of that decision, or only from the date of the final ascertainment and liquidation of the duties as stamped upon the entry, until ten days after that date; or, in other words, whether this period, which is admitted to expire ten days after the ascertainment and liquidation of the duties as so stamped, begins at the date of the stamp, or at the earlier date of the collector's original decision upon the estimated rate and amount of duties.

The determination of this question will be aided by a brief consideration of the history of the law before the passage of the act of 1864.

Under the earlier acts of Congress, which contained no provision on this subject, an importer who had paid unauthorized duties, under protest, and in order to obtain possession of his goods, might recover them back from the collector in an action of assumpsit for money had and received. *Elliott* v. *Swartwout*, 10 Pet. 137.

The act of March 3, 1839, c. 82, § 2, requiring the collector to pay the money into the Treasury, notwithstanding the protest of the importer, and giving the importer a right of appeal to the Secretary of the Treasury, was held by this court, at January term, 1845, to take away the importer's right to bring an action of assumpsit. 5 Stat. 348; *Cary* v. *Curtis*, 3 How. 236.

Then came the act of February 26, 1845, c. 22, providing that nothing in the act of 1839 should have that effect; "nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." 5 Stat. 727.

Under that act, Chief Justice Taney, sitting in the Circuit Court, held that a protest might be made prospectively, so as to cover subsequent similar importations, because, said the

Chief Justice, "The protest is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due; and that the claimant means to assert his rights in a court of justice." *Brune* v. *Marriott*, Taney, 132, 144. And his decision was affirmed by the judgment of this court. *Marriott* v. *Brune*, 9 How. 619.

That judgment, though criticised in *Warren* v. *Peaslee*, 2 Curtis, 231, was generally regarded and acted on as laying down a general rule establishing the validity of prospective protests. *Steegman* v. *Maxwell*, 3 Blatchford, 365; *Hutton* v. *Schell*, 6 Blatchford, 48, 55, and *Fowler* v. *Redfield*, there cited; *Wetter* v. *Schell*, 11 Blatchford, 193, 196, and *Chouteau* v. *Redfield*, there cited.

None of these cases were brought up to this court; and in some of them the rule was applied under the act of March 3, 1857, c. 98, § 5, which provided that, on the entry of any merchandise, the decision of the collector of customs at the port of importation, as to its liability to duty or exemption therefrom, should be final and conclusive against the owner, importer, consignee or agent of such merchandise, unless he should, "within ten days after such entry, give notice to the collector in writing of his dissatisfaction with such decision, setting forth therein distinctly and specifically his grounds of objection thereto," and should, "within thirty days after the date of such decision, appeal therefrom to the Secretary of the Treasury." 11 Stat. 195.

The phrase "within ten days after such entry" was thus treated as fixing a *terminus ad quem* and not a *terminus a quo*, or, in other words, as limiting the time after which a protest should not be made, but permitting it to be made as early as it could have been made under the previous law.

The act of 1857 applied only to cases where the question was whether the goods imported were or were not subject to duty at all, and left the case of goods admitted to be dutiable,

the rate and amount of duties being alone in question, to be governed by the act of 1845, requiring the protest to be filed at or before the time of paying the duties. *Barney* v. *Watson*, 92 U. S. 449.

We are then brought to the act of 1864, which, as already stated, provides that, on the entry of any merchandise, the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless the importer shall, "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision."

This act requires the notice of dissatisfaction with the collector's decision to be filed "within ten days after the ascertainment and liquidation of the duties," (instead of within ten days after the entry of the goods, as in the act of 1857,) evidently for the reason stated by Mr. Justice Bradley, in *Barney* v. *Watson*, above cited: "In most cases the amount, and in many cases the rate, could not be ascertained until after examination and appraisement; and hence a limitation to ten days from the time of entry would often, perhaps generally, deprive the party of any remedy at all." 92 U. S. 453.

The act of 1864, by requiring the notice of dissatisfaction to be given on each entry, necessarily prevents such a notice as to any goods from being given before the entry thereof, and precludes a prospective protest, covering future entries or importations. *Ullman* v. *Murphy*, 11 Blatchford, 354.

But the matter to which the notice of dissatisfaction applies is the decision of the collector on the rate and amount of the duties; the whole purpose of the notice is to give the collector opportunity to revise that decision; and that purpose is as well accomplished by giving the notice as soon as the goods have been entered and the duties estimated by the collector, as by postponing the giving of the notice until after the final ascertainment and liquidation of the duties has been made and stamped upon the entry.

The clause requiring the importer to give such notice "within ten days after the ascertainment and liquidation of the duties" must therefore, according to the fair and reasonable interpre-

tation of the words as applied to the subject matter, be held to fix only the *terminus ad quem*, the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the *terminus a quo*, or the first point of time at which the notice may be given.

In the case at bar, the result is that the notice on each entry, having been given after the collector's decision and before the expiration of ten days from the date of finally stamping upon the entry the ascertainment and liquidation of the duties, was seasonable.

This conclusion is in accordance with a judgment of Judge Shipman in the Circuit Court for the Southern District of New York, in October, 1878, in the case of *Keyser* v. *Arthur*, not reported, but mentioned in a circular of the Treasury Department of July 8, 1879, and shown by minutes produced at the argument of the present case to have been as follows: Two distinct entries of goods for immediate consumption were made, the one September 15, and the other October 10, 1873, and the duties were estimated by the collector and paid forthwith. The notice of dissatisfaction with the collector's decision was given as to the first entry October 1, and as to the second entry October 24, 1873, and each entry was stamped as finally liquidated November 6, 1873. Judge Shipman held the protests or notices of dissatisfaction with the collector's decisions to be seasonable, saying: "When the collector had officially and in writing upon the entry ascertained and liquidated the duties upon the goods named in such entry at a certain rate of duty, a protest within ten days after such ascertainment and liquidation and an appeal within thirty days thereafter are good and valid as to time, although subsequently to the date of such ascertainment, liquidation, appeal and protest the collector revises the amount of such liquidation and makes a final ascertainment and liquidation at the same rate of duty. The first ascertainment and liquidation is in fact a final one as to rate. A protest and appeal within the statutory time after the final liquidation are also good and valid. The uniform practice in this port for many years, as to time of protest and appeal, in conformity with this rule, which practice has been

sanctioned by all the officers of the government, is of much importance in the decision of this question."

Our conclusion also accords with decisions of state courts, expounding similar words in other statutes. *Young* v. *The Orpheus*, 119 Mass. 179; *Atherton* v. *Corliss*, 101 Mass. 40; *Levert* v. *Read*, 54 Alabama, 529.

Some expressions of judges of this court, not having this point before them, might seem to support the opposite conclusion, especially the language of Chief Justice Waite in *Watt* v. *United States*, 15 Blatchford, 29, decided July 1, 1878, and that of Mr. Justice Strong in *Westray* v. *United States*, 18 Wall. 322. But in *Watt's case*, the only question of time presented or considered related not to giving the collector notice of dissatisfaction with his decision, but to taking an appeal to the Secretary of the Treasury; and the adjudication of the Chief Justice that the collector's decision upon the rate and amount of duties, if not duly appealed from, was final and conclusive in a case where the duties had not been paid to obtain possession of the goods, but were sued for by the United States, was overruled, with his concurrence, in *United States* v. *Schlesinger*, 120 U. S. 109. And in *Westray's case*, the importer never gave any notice of dissatisfaction with the collector's decision, or took any appeal to the Secretary of the Treasury; and the only point adjudged was that the importer was not entitled to notice from the collector of his decision, before being bound thereby or required to give a notice of dissatisfaction or take an appeal.

It was insisted by the Solicitor General that "the views of the Department, legally expressed, so far as they appear in the record, recognize the true interpretation of the statutes to be that the protest must be filed after the final ascertainment and liquidation of the duties."

But the orders and circulars of the Treasury Department, given in evidence at the trial, either merely repeat the words of the act of 1864, without giving them any construction; or else clearly show that, from the time of the passage of that act until long after the entries now in question, the practical construction was to allow the notice of dissatisfaction to be

given at any time after the collector's decision estimating the rate and amount of duty at the time of the entry of the goods, provided it was not given after ten days from the final ascertainment and liquidation of the duties as stamped upon the entry.

The circular of the Treasury Department of September 30, 1878, and the opinion of the Attorney General to the Secretary of the Treasury of October 31, 1878, (16 Opinions of Attorneys General, 197,) requiring notices of dissatisfaction, under § 2931 of the Revised Statutes, to be filed after the final liquidation of the duties, were based on a misconception of the scope and effect of the decision in *Watt's case*, above cited. The circular of the Treasury Department of July 8, 1879, reëstablished the practice which, as therein stated, had prevailed before that decision at the port of New York "and all the other prominent ports of the United States, under which protests and appeals had been recognized, both by the customs officers and by this department, as valid if filed at any time before the expiration of the time mentioned in the section of law cited." And the old practice appears to have been since constantly recognized and acted on until 1886, when the Treasury Department again undertook to establish the opposite rule.

Judgment reversed, and the case remanded to the Circuit Court with directions to set aside the verdict and order a new trial.

HAMMER *v.* GARFIELD MINING AND MILLING COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 207. Submitted March 15, 1889. — Decided April 8, 1889.

The modes of procedure in Montana being substantially the same at law and in equity, if the trial court there calls a jury in a case where the remedy sought is equitable, and the trial is conducted in the same manner as a trial of an issue at law, and there is a general finding by the jury, and the

case is brought here by writ of error, the finding will be treated here as if made by the court, and as covering all the issues; and the only questions which can be considered here are those arising from the rulings in the admission or rejection of evidence, and those respecting the inferences deducible from the proofs made.

In the absence of a provision of statute in Montana respecting the manner of authenticating a copy of the certificate of incorporation of a corporation of a State, filed in the records of a county of Montana, the certificate of the original custodian in the State of origin, under his seal of office, is a sufficient authentication.

The provision in Rev. Stat. § 2324, that records of mining claims shall contain such "reference to some natural object or permanent monument as will identify the claim," means only that this is to be done when such reference can be made; and when it cannot be made, stakes driven into the ground are sufficient for identification, or a reference to a neighboring mine, with distance and date of location, which will be presumed to be a well-known natural object in the absence of contradictory proof.

The oath of one of the locators of a mining claim, accompanying the recorded notice of the location is, in the absence of contradiction, *prima facie* evidence of the fact of the citizenship of all the locators.

It being established, in an action to quiet a mining title in Montana, that the plaintiff was in quiet and undisputed possession of the premises, the validity of his location not being questioned in the pleadings, and that the boundary of his claim was so marked on the surface as to be readily traced, this constitutes a *prima facie* case which can only be overcome by proof of abandonment, or forfeiture, or other divestiture, and the acquisition of a better right or title by the defendant.

A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.

THE case is stated in the opinion of the court.

Mr. Edwin W. Toole and *Mr. Joseph K. Toole* for plaintiff in error.

Mr. Eppa Hunton for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was a suit to quiet the title of the plaintiff below, the Garfield Mining and Milling Company, to a lode mining claim in Montana. It was brought under an act of the Territory providing for an action by any person in possession, by himself or his tenant, of real property, against any person who

claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest. Comp. Stats. 1887, § 366. The complaint alleges that the plaintiff is a corporation organized and existing under the laws of the State of New York for the purpose of carrying on the business of mining and milling ores bearing gold, silver, and other precious metals in Montana, and that it has complied with all the laws of the Territory relative to foreign corporations; that it is the owner of a certain quartz lode in the county of Lewis and Clark, in the Territory, known as the Garfield lode or mining claim, which has been surveyed, and is designated upon the records of the office of the United States surveyor general of the Territory, and contains an area of twenty acres and $\frac{62}{100}$ of an acre, the metes and bounds of which are given; that the plaintiff and its predecessors in interest have been in the possession of and entitled to the lode ever since its discovery and location; that, notwithstanding its right to the possession, the defendant below, the plaintiff in error here, Auge O. Hammer, on or about the first of January, 1883, assumed to enter upon the premises and re-locate the same, and caused the re-location to be recorded in the records of the county under the name of the Kinna lode; that he pretends to claim an interest or estate therein adversely to the plaintiff, and has made application to the United States Land Office at Helena, in the Territory, for a patent therefor; that the plaintiff has duly filed in that office its adverse claim to the premises, setting forth its nature and origin; and that the proceedings in the Land Office have been stayed until the final determination by the court of the right of possession to the premises.

Two other persons, by the names of Kinna and Bliss, are also made defendants, who, it is averred, assert some claim to the premises by a re-location at the same time with the defendant Hammer. The complaint alleges that the claims of all the defendants are without right, and that no one of them has any estate or interest in the mining ground nor in any part thereof.

The prayer of the complaint is:

1. That the defendants may be required to set forth the nature of their respective claims, and that all adverse claims be determined by a decree of the court;

2. That by such decree it be declared and adjudged that the defendants have not, nor has any of them, any interest or estate in or right to the possession of the premises or any part thereof, and that the title of the plaintiff to the same is good and valid, and that it is entitled to their possession; and,

3. That the defendants be forever debarred from asserting any claim whatever to the premises or any part thereof.

All the defendants filed demurrers to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The defendant Hammer withdrew his demurrer and filed an answer. It does not appear from the record what disposition was made of the demurrer of the defendants Kinna and Bliss, but as they do not appear to have taken any further part in the defence of the action and are not mentioned in the judgment, or in the appeal taken to the Supreme Court of the Territory, it may be presumed that the action was discontinued as to them.

The answer of Hammer denies that the plaintiff is the owner of the lode described in the complaint or of any part of it, or that it is now or has been for a long time in possession thereof, or of any part thereof, or that it or its predecessors in interest have ever since the discovery and location thereof been in possession of it or of any part thereof, or entitled to the possession thereof, or that the defendant at any time assumed to re-locate the premises, and to cause the re-location to be recorded in the records of the county, or that his claim is without right. The answer also sets up, that on the first of January, 1883, one Iner Wolf entered upon the premises described, the same being then vacant mineral land of the United States, and discovered thereon a vein or lode of quartz bearing silver and other precious metals, and named the same the Kinna lode, which he then located in accordance with the requirements of the law, and had a notice of the location filed for record with the county recorder; that afterwards the defendant became the purchaser of the premises from Wolf, and has ever since

been their owner and entitled to their possession; and that whatever claim the plaintiff ever had to them became forfeited before the first of January, 1883, since which time it has not had any estate, title or interest therein or possession thereof.

A replication to the answer having been filed, the issues raised were tried by a jury, which found a general verdict for the plaintiff; upon which the court entered judgment in the following form, after stating the pleadings, trial and verdict:

"Wherefore, by virtue of the law and by reason of the premises, it is ordered, adjudged and decreed that the plaintiff have judgment as prayed for in its complaint herein against the defendant, Auge O. Hammer, and that all adverse claim of the said defendant and of all persons claiming or to claim the premises in said complaint described, or any part thereof, through or under said defendant, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff is, and it is hereby declared and adjudged to be, the true and lawful owner of the land described in the complaint and every part and parcel thereof, and that the title thereto is adjudged to be quieted against all claims, demands or pretensions of the said defendant; and said defendant is hereby perpetually estopped from setting up any claim thereto or any part thereof."

Then follows a description of the premises and an order that plaintiff recover costs. On appeal to the Supreme Court of the Territory, the judgment was affirmed, and to review the latter judgment the case is brought to this court.

As seen by this statement the suit is brought for special relief, and the judgment entered is such as a court exercising jurisdiction in equity alone could render. The courts of Montana, under a law of the Territory, exercise both common law and equity jurisdiction. The modes of procedure in suits, both at law and in equity, are the same until the trial or hearing. As we said in *Basey* v. *Gallagher*, 20 Wall. 670, 679: "The suitor, whatever relief he may ask, is required to state, 'in ordinary and concise language,' the facts of his case upon which he invokes the judgment of the court. But the consid-

eration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others." The court might therefore have heard this case and disposed of the issues without the intervention of a jury. But, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the Territory. *Ely* v. *New Mexico & Arizona Railroad Co.*, 129 U. S. 291; *Parley's Park Silver Mining Co.* v. *Kerr*, *ante*, 256. The finding of the jury being accepted as satisfactory must be treated as if made by the court, and, being general, as covering all the issues. The only questions, therefore, we can consider on this writ of error are those arising from the rulings in the admission and rejection of evidence, and those respecting the inferences deducible from the proofs made. These rulings, so far as we deem them of sufficient importance to be noticed, relate to the evidence of the plaintiff's incorporation; to the evidence of the location of the plaintiff's mining claim; to the evidence of the citizenship of the locators; and to the inferences to be drawn from the evidence of the plaintiff's prior possession of the premises.

1st. As to the evidence of the incorporation of the plaintiff. That consisted of certain records of the county of Lewis and Clarke, purporting to be a certificate of its incorporation in New York on the 11th day of October, 1881, duly acknowledged before a notary public of the city and county of New York, and authenticated by the certificate of the secretary of State of New York, under his official seal, as being a correct copy of the duplicate original on file in his office, and also by

a certificate under seal of a commissioner of the Territory of Montana in New York as being found by him to be a correct copy after comparison of the same with the original. The introduction of these records was objected to on the ground that the papers were not properly acknowledged or authenticated. The objection is not tenable. The acknowledgment attached to the certificate is in due form, and the authentication of the copy filed, by the Secretary of State of New York, the public officer charged with the custody of the original, or of one of the duplicate originals, under his official seal, is sufficient to entitle the copy to be placed on file for record in the office of the recorder of the county, and with the secretary of the Territory. The law of the Territory in force at the time with reference to foreign corporations provided that, before they proceeded to do business under their charter or certificate of incorporation in the Territory, they should "file for record with the secretary of the Territory, and also with the recorder of the county in which they are carrying on business, the charter or certificate of incorporation, duly authenticated, or a copy of said charter or certificate of incorporation." The law does not specify in what way the copy filed shall be authenticated, and, in the absence of any provision on that subject, the certificate of the official custodian, under the seal of his office, must be deemed sufficient. It does not appear that a copy of the certificate of incorporation was filed with the secretary of the Territory, but no objection to the introduction of the county records having been taken on that ground, it will be presumed that such filing existed, and, if required, it could have been readily shown. There was no error, therefore, in the ruling of the court admitting the records of the county showing the incorporation of the plaintiff in the State of New York.

2d. As to the evidence of the location of the mining claim of the plaintiff. That consisted of the record of the notice of location. To its introduction objection was taken that it did not contain such a description of the property as was required by law, and did not refer to such natural objects or permanent monuments as would identify the claim. The record is as follows:

"*Garfield Lode. Notice of location.*

"Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations, has located fifteen hundred (1500) linear feet on the above-named lode, situated in Vaughan mining district, Lewis and Clarke county, Montana Territory, and described as follows: Commencing at discovery stake, running fifty feet east to centre stake; then three hundred feet north to stake 'A;' thence fifteen hundred feet west to stake 'B;' thence six hundred feet south to stake 'C,' and fifteen hundred feet east to stake 'D,' and three hundred feet north to place of commencement. This lode is located about fifteen hundred feet south of Vaughan's Little Jennie mine and described and located on the 4th day of July, 1880.

"JULIUS HORST.
"E. F. HARDIN.

"TERRITORY OF MONTANA, }
County of Lewis and Clarke, } *ss:*

"Julius Horst, being first duly sworn, says that he and his co-locator are citizens of the United States, over the age of twenty-one years; that said location is made in good faith, and matters as stated in the foregoing notice of location by him subscribed are true.

"JULIUS HORST.

"Subscribed and sworn to before me this 26th day of August 1880.

"[County Seal.] O. B. TOTTEN,
County Clerk."

Section 2324 of the Revised Statutes, which went into effect on the 1st of December, 1873, provides that records of mining claims subsequently made "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim."

These provisions as appears on their face, are designed to secure a definite description — one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course the section means, when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Such stakes were placed here with a description of the premises by metes; and to comply with the requirements of the statute, as far as possible, the location of the lode is also indicated by stating its distance south of "Vaughan's Little Jennie mine," probably the best known and most easily defined object in the vicinity. We agree with the court below that the Little Jennie mine will be presumed to be a well-known natural object or permanent monument until the contrary appears, where a location is described as in this notice, and is further described "as being 1500 feet south from a well-known quartz location, and there is nothing in the evidence to contradict such a description, distance and direction."

3d. As to the citizenship of the locators of the mining claim. The Revised Statutes open the mineral lands of the public domain to exploration and occupation and purchase, by citizens of the United States and persons who have declared their intention to become citizens. It is therefore objected here that there is no evidence of the citizenship of the original locators, but the objection is not tenable. The oath of one of the locators, accompanying the recorded notice of location, as to their citizenship, is *prima facie* evidence of the fact, and it will be deemed sufficient until doubt is thrown upon the accuracy of his statement.

4th. As to the inferences deducible from the plaintiff's prior possession of the premises. The ruling of the court on that head is contained in its instructions to the jury. Though addressed to that body in an action seeking equitable relief, they indicate the judgment of the court as to the legal conclusions which should follow from the prior possession estab-

lished. The evidence showed that the parties through whom the plaintiff derives its title had located the lode mining claim in due form of law, and had within proper time recorded the notice of location, and also tended to show that each year since the location, the original locators, or the plaintiff their successor, had caused work to be done upon the mine sufficient to retain its ownership and possession. Upon this evidence the court instructed the jury as follows:

"If you believe from the evidence in the case that prior to the 31st day of December, A.D. 1882, the plaintiff was in the quiet and undisputed possession of the premises designated in the complaint as the Garfield lode, the validity of the original location of which is not questioned in the pleadings or testimony, claimed by the defendant as the 'Kinna lode,' that the boundaries of said claim were so marked upon the surface as to be readily traced, and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiff, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture or other divestiture and the acquisition of a better right or title by the defendant."

The Supreme Court of the Territory was of opinion that this instruction was erroneous so far as it states that the validity of the original location of the Garfield lode is not questioned in the pleadings, but considered that the error in this particular was not prejudicial to the defendants. We do not think that the statement mentioned was erroneous. The answer does not distinctly put in issue the validity of the original location; it confines its traverse to the existing right and ownership of the plaintiff in the whole of the mining claim, to its long possession of the premises, and to the possession of the plaintiff and its predecessors since the discovery and location of the mining claim, and then sets up the alleged forfeiture of the claim by the plaintiff and the defendant's relocation of it. Under these circumstances we are of opinion that the instruction was right in all particulars. But we also

agree that if error intervened it was not prejudicial to the defendant. The Supreme Court of the Territory treated the instructions precisely as though given in an action at law, trials of issues in suits in equity there being, as already stated, generally governed by the same incidents as trials of issues in actions at law. In that view, the instructions are not, in our judgment, open to any criticism. It is only as showing the ruling of the court respecting the inferences deducible from the prior possession of the plaintiff that we examine them, and on that subject they express the law correctly. If the trial were treated as of a feigned issue directed by the court, different considerations would arise. An erroneous ruling in that case would not necessarily lead to a disturbance of the verdict. *Barker* v. *Ray*, 2 Russ. 63, 75; *Johnson* v. *Harmon*, 94 U. S. 371; *Watt* v. *Starke*, 101 U. S. 247, 250, 252; *Wilson* v. *Riddle*, 123 U. S. 608, 615.

As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretence of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk* v. *Meagher*, 104 U. S. 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.

Judgment affirmed.

AMY *v.* WATERTOWN. (No. 1.)

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

No. 196. Argued March 12, 13, 1889. — Decided April 8, 1889.

Between the time when the Process Act of May 8, 1792, 1 Stat. 275, went into effect, and the passage of the act of June 1, 1872, 17 Stat. 196, (Rev. Stat. § 914,) it was always in the power of the Federal courts, by general

rules, to adapt their practice to the exigencies and conditions of the times; but since the passage of the latter act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject, and prescribed a rule.

When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations.

In the construction of a state statute in a matter purely domestic this court is always strongly disposed to give great weight to the decisions of the highest tribunal of the State.

The provisions of the Revised Statutes of Wisconsin which require service of process generally on cities to be "by delivering a copy thereof to the mayor and city clerk," and the provision of the charter of the city of Watertown which requires such service to be made by leaving a copy with the mayor, have been held by the highest court of the State to be peremptory and to exclude all other officers, and it has also held that the fact that there is a vacancy in the office of mayor does not authorize service to be made upon some other substituted officer: and this court concurs with that court in this construction.

Broughton v. *Pensacola*, 93 U. S. 266, and *Mobile* v. *Watson*, 116 U. S. 289, differ essentially from this case.

A motion to set aside a judgment if made, and service thereof made at the term at which the judgment is rendered, may be heard and decided at the next term of the court if properly continued by order of court.

THIS was an action in contract to recover on bonds issued by the municipality of Watertown, in Wisconsin. Judgment for the defendant. The plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. George P. Miller for plaintiffs in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The principal question in this case is, whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it. In order to understand the bearing of the facts of the case, it will be necessary to give a brief abstract of the laws of Wisconsin which relate to it, and these are mostly to be found in the

charter of the city of Watertown and the acts supplementary thereto. The state laws are referred to because they govern the practice of the Federal courts in the matter under consideration. By the 5th section of the act of June 1st, 1872, Rev. Stat. § 914, it is declared that "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." Were it not for this statute, the Circuit Courts themselves could prescribe, by general rule, the mode of serving process on corporations as well as on other persons.

By the temporary Process Act of September 29th, 1789, 1 Stat. 93, if not otherwise provided, the forms of writs and executions, (except their style,) and modes of process in the Circuit and District Courts, in suits at common law, were directed to be the same as in the Supreme Courts of the States respectively. By the permanent Process Act of May 8, 1792, 1 Stat. 275, it was enacted that the forms of writs, executions and other process, and the forms and modes of proceeding, in suits at common law, should be the same as directed by the act of 1789, subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the Supreme Court of the United States should think proper by rule to prescribe to any Circuit or District Court. So that the practice in United States courts, in the old States, was made to conform to the state practice, as it was in 1789, subject to alteration by rule of court. In 1828 a law was passed adopting for the Federal courts in the new States, admitted since 1789, the forms of process, and forms and modes of proceeding of the highest courts of those States respectively, as then existing, subject to alteration by the courts themselves or the Supreme Court of the United States. 4 Stat. 278. By the act of August 1, 1842, the provisions of the act of 1828 were extended to the States admitted in the intermediate time.

This review of the statutes shows that after 1792 it was

always in the power of the courts, by general rules, to adapt their practice to the exigencies and conditions of the times.

But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit.

Assuming, therefore, that the question is one to be governed by the local or state law, we proceed to give an abstract of the charter of Watertown, and such other laws of Wisconsin as bear upon the subject. We find this mostly made to our hand in the brief of the plaintiffs in error, taken from the consolidated charter of 1865, and it is as follows:

Chapter 1, § 3. "The said city shall be divided into seven wards."

Section 4. "The corporate authority of said city shall be vested in one principal officer, styled the mayor, in one board of aldermen, consisting of two members from each ward, who, with the mayor, shall be denominated the common council. . . ."

Section 5. "The annual election for ward and city officers shall be held on the first Tuesday of April of each year. . . ."

Section 6. ". . . All elective officers, except . . . aldermen, shall, unless otherwise provided, hold their respective offices for one year and until their successors are elected and qualified. . . ."

Section 7. "In the event of a vacancy in the office of mayor, alderman, . . . the common council shall order a new election. . . ."

Chapter 2, § 2. "The mayor, when present, shall preside over

the meetings of the common council, and shall take care that the laws of the State and the ordinances of the city within the corporation are duly enforced and observed, and that all officers of the city discharge their respective duties. He shall appoint the police force. . . . He shall have a vote in case of a tie only. . . ."

Section 3. "At the first meeting of the common council in each year, or as soon thereafter as may be, they shall proceed to elect, by ballot, one of their number president; and in the absence of the mayor the said president shall preside over the meeting of the common council, and during the absence of the mayor from the city, or his inability from any cause to discharge the duties of his office, the president shall execute all the powers and discharge all the duties of mayor. In case the mayor and president shall be absent from any meeting of the common council, they shall proceed to elect a temporary presiding officer, who, for the time being, shall discharge the duties of mayor. The president, or temporary presiding officer, while presiding over the council, or performing the duties of mayor, shall be styled 'acting mayor,' and acts performed by them shall have the same force and validity as if performed by the mayor."

Chapter 3, § 3. "The common council shall have the management and control of the finances and of all the property of the city, and shall likewise, in addition to the powers herein vested in them, have full power to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and immorality, for the prevention of crime, and for the benefit of trade, commerce and health. . . ."

The common council is then given in twenty-six sections, the usual powers which are commonly vested in the common councils of cities.

Chapter 5, § 1. ". . . All funds in the treasury . . . shall be under the control of the common council, and shall be drawn out upon the order of mayor and clerk, duly authorized by a vote of the common council. . . ."

Chapter 7, § 2. "The common council shall by resolution levy such sum or sums of money as may be sufficient for the several purposes for which taxes are herein authorized to be levied. . . ."

Chapter 9, § 8. "When any suit or action shall be commenced against said city the service thereof may be made by leaving a copy of the process with the mayor."

Chapter 61 of the Private and Local laws of Wisconsin for 1867 provides:

Section 1. "Section seven of the first chapter of said act (an act to incorporate the city of Watertown, and the several acts amendatory thereof, chapter 233 of the General Laws of 1865) is hereby amended so that it shall read as follows:

"In the event of a vacancy in the office of mayor . . . by death, removal, or other disability, the common council shall order a new election. . . . In case of a vacancy in the office of alderman the mayor may order a new election. . . ."

". . . Any city officer who shall resign his office shall file with the city clerk his resignation in writing, directed to the mayor, and such resignation shall take effect from the time of filing the same."

Chapter 204 of the Private and Local laws of Wisconsin for 1871 provides:

Section 1. "The senior aldermen of each ward of the city of Watertown shall constitute a board of street commissioners, who are hereby authorized, subject to the regulation and control of the common council, to audit and allow accounts against the city, . . . and when allowed, orders on the treasury shall issue therefor, and in case of vacancy in the office of mayor, and there is no president of the common council to act, said orders may be signed by the chairman of said board and the city clerk. The city clerk shall be the clerk of said board, and shall keep record of its proceedings. The mayor may preside at the meetings of said board, and they may elect a chairman who shall preside in his absence. . . . Said board shall have all the powers conferred upon the common council by the city charter in relation to streets

and bridges and sidewalks. . . . Said board are also authorized to canvass the returns of all votes polled at the election for city or ward officers, and determine and declare the result of such election."

Section 2. "In case of vacancy in the office of alderman in any of the wards, the aldermen remaining in office shall have and exercise all the powers of street commissioners of the ward. The resignation of the mayor shall be in writing, directed to the common council or city clerk, and filed with the city clerk, and shall take effect at the time of filing the same."

Ch. 2, Priv. & Loc. 1872, amended said chapter as follows:

Section 1. "The board of street commissioners of the city of Watertown shall have all the powers conferred by law upon the common council of said city, in relation to public schools, the police, fire department, nuisances, the regulation of slaughter-houses, and the public health, subject to the regulation and control of said common council. Provided that said board of street commissioners shall have no power of levying taxes for any purpose whatever."

Chapter 46, of Laws of Wisconsin for 1879, provides:

Section 2. "The board of street commissioners of said city, and the chairman of said board, shall have concurrent power with the mayor and common council of said city, in the appointment of inspectors and clerks of election, and shall have all other powers conferred, by law, upon said mayor and common council, subject to the control of said common council, except the power of levying taxes, which they shall not have in any case whatever."

Section 3. "The common council of said city may, in its discretion, in any year, reduce the amount of city taxes levied under section three of chapter two hundred and four of the private and local laws of 1871, and cause a less sum than is levied under said section to be placed in the tax list for collection, for that year, for the several funds of the city."

By the Revised Statutes of Wisconsin of 1878, § 2637, the manner prescribed by law for service of process on cities generally is, "by delivering a copy thereof to the mayor and city

clerk." As there was a special law with regard to the city of Watertown contained in its charter, requiring a copy to be left with the mayor, the general law probably did not supersede it. But as the mayor must be served with process according to both laws, it can make no difference in the disposition of the case which is assumed to prevail.

We have given these quotations more fully because the plaintiffs in error seemed to regard them as having some importance in the consideration of the case.

The facts as disclosed by the record are briefly as follows:

On the 3d of March, 1873, the plaintiffs, by their attorneys, sued out a summons against the defendant to answer a complaint for a certain money demand within twenty days after service of the summons. On the 6th of March, 1873, the marshal returned that he had that day served the summons on the city by delivering a copy of it to the city clerk and city treasurer. The defendant appeared specially by its attorney, and moved to set aside the said service on two grounds:

1st. That the summons was not served on the mayor of the city, as required by its charter.

2d. That it was not served on three residents and freeholders of the city, as provided by the rules of the court.

Thereupon the plaintiff filed an affidavit of the marshal, stating that at the time of service of the summons there was no mayor or acting mayor of said city, and had been none since the 14th day of February, 1873 (the writ being dated and issued the third day of March, 1873). The defendant filed a counter affidavit of the city clerk, stating that he had examined the records of the city and the proceedings of the board of street commissioners for the months of January, February, March and April, 1873, and from these it appeared that F. Kusel, mayor of the city, resigned the office of mayor on the 30th of January; that from thence to the 24th of February, Street Commissioner Maak was the chairman of the board of street commissioners and acting mayor of the city; that from the 24th of February to the 17th of March, Street Commissioner Prentice was temporary chairman of said board, and acting mayor; and that on the 6th and 8th of March, 1873, said Prentice was acting mayor.

Opinion of the Court.

Upon these affidavits the court on the 8th of April, 1873, being of opinion that the summons had not been served upon the defendant in the manner prescribed by law, so as to give the court jurisdiction of the defendant, or so as to entertain any motion or proceedings in the case as against the defendant or on its behalf, unless it appeared, made an order authorizing the clerk to return the summons to the marshal, to be served on the defendant according to law, or for such further action as the defendant (meaning the plaintiffs) might direct conformably to law.

It does not appear from the record that anything further was done for nearly ten years. On the 23d of December, 1882, the marshal made return of service of said summons as follows:

"Served on the within-named The City of Watertown by delivering to Wm. H. Rohr, last mayor of said city; Henry Bieber, city clerk; Chas. H. Gardner, city attorney, and Thomas Baxter, last presiding officer (or president or ch'm'n) of the board of street commissioners of said city of Watertown, each personally a copy of the within summons and by showing each of them this original summons this 23d day of December, 1882, the office of mayor of said city being vacant and there being no president of the common council or presiding officer thereof in office."

Thereupon, on June 19, 1883, plaintiffs filed their complaint setting out four bonds of $1000 each, dated June 1, 1856, issued by the defendant to aid in the construction of the Watertown and Madison Railroad, and payable January 1, 1877, with eight per cent interest, payable semi-annually, upon presentation and surrender of the interest warrants or coupons attached to the bond; and setting forth, also, eighty-four of such coupons of $40 each, and demanding judgment for the amount of said coupons, $3360, together with interest at seven per cent on the amount of each coupon from the time it became due.

On the same day, June 19, 1883, plaintiffs filed an affidavit of no answer or appearance, caused the amount due on the eighty-four coupons to be computed by the clerk, and there-

upon the court rendered judgment against the defendant by default for the amount so found due, to wit, $7762.44 damages and $49.70 costs.

On the 27th day of July, 1883, the defendant appeared specially for the purpose, and served notice of motion to set aside the judgment and service on the ground that there had been no service of summons and the court had no jurisdiction of defendant. The motion was based upon the affidavits of Henry Bieber, Thomas Baxter, and William H. Rohr, showing the following facts:

1. That William H. Rohr, designated in the marshal's return as the "last mayor of said city," was elected mayor at the annual municipal election, April 4, 1882, duly qualified and entered upon the duties of the office, and thereafter, on April 10, 1882, duly resigned the office in writing directed to the common council and filed his resignation with the city clerk, and had not since been mayor or acting mayor or president of the common council.

2. That Charles H. Gardner, named in the return, was never attorney for defendant in this action, or authorized to appear or to accept, admit or receive service for it therein.

3. That Thomas Baxter designated in the return as "last presiding officer (or president or ch'm'n) of the board of street commissioners of said city," was the senior alderman of the 3d ward, and as such a member of the board of street commissioners of the city, from April 10, 1882, to April 7, 1883.

That but one meeting of said board was held in November, 1882, and that was on November 11, 1882; that no mayor and no chairman elected by the board to preside at its meeting in the mayor's absence, being present, William F. Voss, senior alderman of the 6th ward, and a member of the board, was chosen by a *viva voce* vote of the members present chairman *pro tem.*, to preside at that particular meeting, which, after the transaction of its business, adjourned on said 11th day of November, 1882.

That there were only three meetings of said board in December, 1882, to wit, regular meetings December 4th and 18th, and a special meeting December 27th; that there being

no mayor nor chairman elected by the board to preside at its meetings in the mayor's absence, present at either of said meetings of December 4th or 27th, said Baxter was chosen at each said meeting by a *viva voce* vote of the members present chairman *pro tem.* to preside at that particular meeting, and that said meetings adjourned *sine die* respectively on December 4th and 27th, after the transaction of their business, and that said Baxter ceased to be such temporary chairman after the adjournment of said meetings. That the meeting of December 18th, being without a quorum, adjourned without the transaction of any business. And that no meeting of said board was held after December 27th until January 15th, 1883.

That besides said two meetings in December, said Baxter had alternated with other members of said board in being chosen in like manner and under like circumstances temporary chairman to preside at particular meetings of said board, but not at said meeting of December 18th, and that said board never elected, chose or appointed him chairman thereof, or chairman to preside at its meetings in the mayor's absence, and that he never was such chairman or presiding officer, or anything more than merely chairman *pro tempore* of particular meetings as above.

4. That no copy of the summons had ever been delivered to the mayor of the city, and no summons in the action served on the city or mayor, or anything done towards service, except the delivery, December 23, 1882, of four copies, one each to the clerk, said Baxter, Gardner and Rohr, and delivery March 6, 1873, of a copy to Tauck and Meyer, neither of whom was mayor, acting mayor, or president of the common council.

The plaintiff submitted two affidavits of Mr. Winkler, by which it appears:

1. That the book in the city clerk's office containing the record of the proceedings of the common council and of the board of street commissioners for about five years before January, 1884, contains a record of the meeting of the common council, April 11, 1882, the last entry of which is

"the common council adjourned *sine die*," and that there is no further record of a common council meeting thereafter until after the municipal election in April, 1883, and that immediately following said record commences the record of a meeting of the board of street commissioners, April 11, 1882, which is followed by the record of other meetings of the board up to December 27, 1882, at each of which meetings some member of the board, either Com. Stacey, Com. Baxter or Com. Voss was chosen chairman *pro tem.*, and the record of the adjournment of each meeting is, "On motion the board adjourned," and at one of such meetings a resolution was passed retaining Mr. Daniel Hill "to assist the city attorney in the suits commenced by E. Mariner."

2. That accounts were audited at said meetings and orders upon the city treasurer drawn therefor on a subsequent day and signed by the commissioner who had been chosen chairman *pro tem.* at the meeting auditing the accounts, and that the common practice had been to hold meetings of the board evenings, prepare the orders on a subsequent day, but bearing the date of the meeting, and they were then signed by the city clerk and chairman *pro tem.* chosen at such meeting.

3. That the city clerk said that every alternate Monday had always, for a series of years, been the regular time for meetings of the common council, if there was one, and of the board of street commissioners if there was none.

4. The affiant states further, upon information and belief, that for some years prior to 1879 and since, it has been the constant practice for the common council to hold one meeting after the election of aldermen, in April each year, and then all but the senior aldermen constituting the board of street commissioners, would resign, and the mayor would also resign at the same time.

On the hearing of the motion, May 16, 1884, the court made an order setting aside the judgment "on the ground that the summons herein was not properly served on said defendant, and the court had no jurisdiction thereof." To review the decision of the court in making that order the plaintiffs in error have sued out the present writ of error.

The errors assigned are:

1. That the court had no jurisdiction or power to vacate the judgment at a subsequent term.

2. That the return of the marshal showed a valid service which was not changed by the affidavits.

We have no difficulty with regard to the first question raised by the plaintiffs in error. It is clear from the record that the application to set aside the judgment was made at the same term it was rendered. The judgment was entered on the 19th day of June, 1883. During the same term, as we infer, (and it is not disputed,) namely, on the 27th of July, 1883, the defendant's attorneys gave notice of a motion to set aside the judgment, to be heard on the 28th of August, and annexed to the notice the affidavits on which they relied. Service of this notice and of the affidavits was acknowledged by the attorneys of the plaintiffs without objection. Why the motion was not argued on the 28th of August is not shown. It was probably postponed by agreement of the parties, or at the suggestion of the court. It did not actually take place until May, 1884, during the continuance of the December special term of 1883. The district judge certifies that by agreement of counsel and the consent of the court, it was then heard, together with a similar motion in the case of *Worts and others* v. *The City of Watertown*, some of the affidavits being used in both cases. From what appears on the face of the record it is to be presumed that the hearing of the motion was continued by consent, or by direction of the court, from the 28th of August until the following term, which was the December special term. The objection, therefore, of want of jurisdiction to set aside the judgment on account of lapse of time is without foundation in fact.

As we have stated, the main question is, whether there was legal service of process on the city. We may dismiss the attempt at service in March, 1873. It was set aside by the court as not made in the manner prescribed by law so as to give the court jurisdiction; and the prosecution was dropped by the plaintiffs. No further steps were taken until after the lapse of nine years and nine months, when a second effort was made

to serve the writ, upon which the present proceedings arose. It cannot be pretended that the action was pending during that long period, without further effort to procure a service of process. The common law provided a remedy in such cases, by a return of *non est inventus*, (or what was equivalent thereto,) and a reissue of the writ from term to term, until a service could be made, or by process of outlawry. The issue of successive writs kept the suit alive so as to prevent the running of the statute of limitations. But the making of one spasmodic and unsuccessful effort, and then abandoning the case for ten years, cannot be regarded as having any such effect, unless aided by some statutory provision. No such provision has been cited. There is a provision in the Revised Statutes of Wisconsin, § 4240, which was evidently intended to meet such a case; but no attempt was made to comply with it. The section referred to is substantially as follows: "An attempt to commence an action shall be deemed equivalent to commencement thereof . . . when the summons is delivered with the intent that it shall be actually served; . . . if a corporation organized under the laws of this State be defendant, to the sheriff or proper officer of the county in which it shall be established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or where any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; or if such corporation has no such place of business or any officer or other person upon whom the summons may by law be served, known to the plaintiff, . . . to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days."

As the attempted service of the summons in 1873 can have no effect upon the solution of the present controversy, the question then arises whether the attempted service in December, 1882, was a sufficient and legal service. The court below held that it was not. We have already quoted the return of the marshal on that occasion. It appears from this return

that he made the attempted service by delivering a copy of the summons to Wm. H. Rohr, the last mayor of the city, a copy to Henry Bieber, city clerk, a copy to Chas. H. Gardner, city attorney, and a copy to Thomas Baxter, the last presiding officer of the board of street commissioners of the city of Watertown, the office of mayor being vacant and there being no president of the common council nor presiding officer thereof in office. Was this such a service upon the city as the law requires? It clearly was not, unless, by the law of Wisconsin, the circumstances of the case were such as to dispense with a literal compliance with the charter. The charter requires service on the mayor of the city. No such service was made. There was no mayor in office at the time. The last mayor had resigned, and his resignation had taken effect. Service on him was of no more avail than service on an entire stranger. The case is different from those in which we have held that a resignation of an officer did not take effect until it was accepted or until another was appointed. In those cases either the common law prevailed or the local law provided for the case and prevented a vacancy. Such were the cases of *Badger* v. *Bolles*, 93 U. S. 599; *Edwards* v. *United States*, 103 U. S. 471; *Salamanca* v. *Wilson*, 109 U. S. 627. In *Badger* v. *Bolles* the law of Illinois was in question, and it appeared that by the constitution of that State the officers elected were to hold their offices until their successors were elected and qualified. In *Edwards* v. *United States* the case arose in Michigan, and it was held that the common-law rule prevailed there, by which the resignation of a public officer is not complete until the proper authority accepts it or does something tantamount thereto, such as appointing a successor. In *Salamanca* v. *Wilson*, a case arising in Kansas, the treasurer of a township moved across the township line into another township. By the constitution of Kansas, township officers were to hold their offices one year from their election and until their successors were qualified, and nothing was said either in the constitution or laws about residence or non-residence. We held that the removal did not necessarily vacate the office and that service of summons on the treasurer was good.

In the present case, it is true, the consolidated charter of the city of Watertown provides (chap. 1, sec. 6) that "all elective officers except aldermen shall, unless otherwise provided, hold their respective offices for one year, and until their successors are elected and qualified." But that provision has respect to ordinary cases. It cannot apply in a case of death; and does not apply in case of resignation; for by chapter 61 of the Private and Local laws of 1867, relating to Watertown (sec. 1), it is declared that "any city officer who shall resign his office shall file with the city clerk his resignation in writing, directed to the mayor, and such resignation shall take effect from the time of filing the same." And by chapter 204 of the Private and Local laws of 1871, relating to Watertown, it is declared (sec. 2) that "the resignation of the mayor shall be in writing, directed to the common council or city clerk, and filed with the city clerk, and shall take effect at the time of filing the same." These provisions of the statute law are decisive, and preclude the operation of any such rule as was recognized in *Badger* v. *Bolles* and *Edwards* v. *United States*. The service upon Rohr, the last mayor, therefore, was of no force, and had no effect whatever. The same thing may be said of the service on Baxter, the last presiding officer of the board of street commissioners.

The question then is reduced to this, whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners, (a body which seems to take the place of the common council of the city for many purposes,) service of process on the city clerk, and on a conspicuous member of the board, is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is espe-

cially exacting in reference to corporations. *Kibbe* v. *Benson*, 17 Wall. 624; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Settlemier* v. *Sullivan*, 97 U. S. 444; *Evans* v. *Dublin &c. Railway*, 14 M. & W. 142; *Walton* v. *Universal Salvage Co.*, 16 M. & W. 438; *Brydolf* v. *Wolf, Carpenter & Co.*, 32 Iowa, 509; *Hoen* v. *Atlantic and Pacific Railway Co.*, 64 Missouri, 561; *Lehigh Valley Ins. Co.* v. *Fuller*, 81 Penn. St. 398. The courts of Wisconsin strictly adhere to this rule. *Congar* v. *Railroad Co.*, 17 Wisconsin, 477, 485; *City of Watertown* v. *Robinson*, 59 Wisconsin, 513; *City of Watertown* v. *Robinson*, 69 Wisconsin, 230. The two cases last cited related to the charter now under consideration. In the first case, service was made upon the city clerk and upon the chairman of the board of street commissioners whilst the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the Revised Statutes on the subject, say: "The question whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor, but no service was made upon that officer as appears by the return of the sheriff. The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law." In the last case (decided in 1887) service was made in the same manner as in the previous one, and the court say: "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. . . . When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer

in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute."

It is unnecessary to look farther to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void.

The counsel for the plaintiff in error endeavor to avoid this conclusion by referring to the act of 1879, which declares that "the board of street commissioners of said city, and the chairman of said board, shall have concurrent power with the mayor and common council of said city, in the appointment of inspectors and clerks of election, and shall have all other powers conferred, by law, upon said mayor and common council, subject to the control of said common council, except the power of levying taxes." It is contended that this act gives to the chairman of the board of street commissioners the same power as the mayor has to receive service of process against the city. But the Supreme Court of Wisconsin, as we have seen, has expressly decided otherwise. And the language of the act of 1879 is not that the chairman of the board shall have the power of the mayor, but that the board and the chairman shall have concurrent power with the mayor and common council, — evidently referring to the power of the body, not to the separate power of the officers. Besides, if it were conceded that the chairman of the board had the same power as the mayor, Baxter, who was served with process as chairman of the board, was not permanent chairman, but was only temporary chairman of the particular meeting, and ceased to have any official position as such after the meeting adjourned. He was in no sense chairman of the board at the time when he was served with process. This fact, however, does not seem material in the view of the Supreme Court of Wisconsin; for in the cases before it, the chairman of the board was served with process during its actual session and whilst he was presiding. In the construction of a state statute, in a matter purely domestic, (as this is,) we always feel strongly disposed to give great weight to the decisions of the highest tribunal of the State. *Burgess* v. *Seligman*, 107 U. S. 20.

Opinion of the Court.

There is a question entirely outside of the one which we have been discussing; it is, whether the state law, as thus ascertained, is objectionable on the score of being repugnant to the Constitution of the United States. Does it impose embarrassments in the way of the creditor in pursuit of his claim, which did not exist when his debt was created? The point is not distinctly made by the counsel of the plaintiffs in error, although it is hinted at in their brief. But no statute has been pointed out to us, showing any change in the law of the State in this regard. As the record stands, we have no sufficient ground for discussing the question in the present case.

With motives we have nothing to do. Certainly, improper motives cannot be attributed to a state legislature in the passage of any laws for the government of the State. Individuals may be actuated by improper motives, and may take advantage of defects and imperfections of the law for the purpose of defeating justice. The mayor of Watertown may have been actuated by such a motive in resigning his office immediately after being inducted into it. But he had a legal right to resign; and if the plaintiffs are prejudiced by his action, it is *damnum absque injuria*. The plaintiffs are in no worse case than were the creditors of the city of Memphis after the repeal of its charter and the establishment of a taxing district in its stead. The State has plenary power over its municipal corporations, to change their organization, to modify their method of internal government, or to abolish them altogether. Contracts entered into with them by private parties cannot deprive the State of this paramount authority. See *Meriwether* v. *Garrett*, 102 U. S. 472.

The cases of *Broughton* v. *Pensacola*, 93 U. S. 266, and *Mobile* v. *Watson*, 116 U. S. 289, cannot aid the plaintiffs in this case. Those were cases in which a new name was given to an old corporation, or a new corporation was made out of an old one, — that was the substance of it — and the question was whether the new corporation, or the old corporation by its new name, was liable for the old debts; and we held that it was. That was a question of liability, not a question of procedure. There the way was open for looking into the actual

relations of the old and new corporations, and deciding according to the justice of the case. Here we are bound by statute; and not by the state statute alone, but by the act of Congress, which obliges us to follow the state statute and state practice. The Federal courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the state law; and according to this law the judgment of the Circuit Court was correct and is, therefore,

Affirmed.

AMY *v.* WATERTOWN. (No. 2.)

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

No. 197. Argued March 13, 1889. — Decided April 8, 1889.

The general rule respecting statutes of limitation is that the language of the act must prevail, and that no reason based on apparent inconvenience or hardship will justify a departure from it.

Cases considered in which courts of equity and some courts of law have held that the running of the statute was suspended on the ground of fraud.

Cases considered in which courts of law have held the operation of the statute suspended for want of parties, or because the law prohibits the bringing of an action.

Inability to serve process upon a defendant, caused by his designed elusion of it, is no excuse for not commencing an action within the prescribed period.

This was an action to recover upon bonds issued by a municipal corporation. Judgment that the cause of action was barred by the statute of limitations. The plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. George P. Miller for plaintiffs in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This is an action for a money demand brought by the plaintiffs in error against the defendant, the city of Watertown.

A summons was sued out against the city on the 19th of June, 1883, and served by the marshal on the 26th of the same month by delivering a copy to the city clerk, the city attorney, and to the last elected chairman of the board of street commissioners. Appearance to the action was entered by the attorneys of the city, and a copy of the complaint was demanded. The complaint was duly filed, and set forth the issue by the city, of three bonds for one thousand dollars each, bearing date respectively the first day of June, 1856, and payable on the first day of January, 1877, with interest thereon at the rate of eight per cent per annum, payable semi-annually, and with coupons annexed, to represent the successive instalments of interest. The plaintiffs prayed judgment for the amount of said bonds and of the last ten coupons on each. The defendant, in its answer, set up as a defence that the several causes of action did not, nor did either of them, accrue within six years next before the commencement of the action; that being the time within which actions upon bonds and coupons must be commenced in the State of Wisconsin. To this answer the plaintiffs replied (by way of an amendment to their complaint) as follows:

"Said plaintiffs allege, on information and belief, that the said defendant, the city of Watertown, and the officers, agents, and citizens and residents of said city did, subsequent to the first day of March, A.D. 1873, conspire together, and with each other, and ever since have conspired together, and with each other, for the purpose and with the preconceived intent and design to defraud these plaintiffs and all other owners and holders of the bonds and coupons to such bonds issued by said city, and to prevent these plaintiffs and other holders and owners of said bonds and coupons from obtaining the service of process on said city.

"Said plaintiffs further allege, on information and belief, that each year since the first day of March, 1873, a mayor of said city was elected, as required by law, but said mayor each year, with the intent and design as aforesaid, qualified as hereinafter mentioned and immediately thereafter placed his resignation in the hands of the city clerk of said city, to

be filed by him in case of emergency, and to take effect accordingly.

"Said plaintiffs further allege, on information and belief, that each year since the first day of March, 1873, after the mayor and members of the common council had been elected, they and each of them failed to qualify until they had assembled together in a secret place with locked doors, unknown to the people at large and to these plaintiffs, and with persons on watch to inform them of the approach of any person or persons, and then and there, if unmolested, the mayor and the members of the common council, qualified as required by law, transacted for said defendant city certain necessary business, and thereafter immediately filed with the city clerk of said city their respective resignations, to take effect immediately, and which resignations went immediately into effect.

"Said plaintiffs further allege that since the first day of March, 1873, they have employed attorneys and agents for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners and for the purpose of having process served on said city; but owing to said conspiracy, as these plaintiffs are informed and believe, since the first day of March, 1873, there has been no mayor of said city except each year for a few hours at such secret and concealed meetings, and the common council of said city, with the said fraudulent intent and design, has failed each year to elect a chairman of said common council, and since said last-mentioned date there has been no person who was acting mayor and no chairman of the board of street commissioners.

"Said plaintiffs further allege that, notwithstanding they have used due diligence and have hired attorneys and agents for the purpose of having process served on said city, they have been unable to this date to serve or have served the summons in this action on the mayor of said city or on that person who by law should exercise the functions of mayor of said city."

The defendants thereupon filed an amended answer, again setting up the statute of limitations, and averring that the

plaintiffs did not commence, or attempt to commence, said action, or use any diligence whatever to commence the same, before the 19th of June, 1883.

To this answer the plaintiffs demurred, and the court below overruled the demurrer and allowed the plaintiffs twenty days to file such further pleadings as they might deem proper. As the plaintiffs failed to plead further, judgment was entered for the defendant. To this judgment the present writ of error is brought.

It will be observed that the plaintiffs do not pretend that they commenced the action within the legal period of six years after the several causes of action accrued; and their excuse for not doing so is, that it would have been of no use, on account of the alleged conspiracy of the officials and residents of Watertown to prevent a service of process, by the resignation of the mayor, and by the secret meeting of the common council before qualifying and organizing, and by their immediately resigning their offices after the transaction of some necessary business.

The question is, whether such proceedings on the part of the city officials furnish an excuse for not commencing the action within the time limited by law? The statute itself specifies several exceptions to its operation, as 1st, when the defendant is out of the State; 2d, when he is an alien subject or a citizen of a country at war with the United States; 3d, when the person entitled to bring the action is insane, or under age, or imprisoned on a criminal charge; 4th, when the commencement of an action has been stayed by injunction or statutory prohibition; 5th, where the action is for relief on the ground of fraud, the statute does not begin to run until the discovery by the party aggrieved of the facts constituting the fraud. The question, therefore, is, whether the courts can create another exception, not made by the statute, where the party designedly eludes the service of process? Have the courts the power thus to add to the exceptions created by the statute? That is the precise question in this case.

It is said by Mr. Justice Strong, in *Braun* v. *Sauerwein*, 10 Wall. 218, 223, "It seems, therefore, to be established, that

the running of a statute of limitation may be suspended by causes not mentioned in the statute itself." The observation is undoubtedly correct; but the cases in which it applies are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it. The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it.

The courts of equity, however, from an early day, held that where one person has been injured by the fraud of another, and the facts constituting such fraud do not come to the knowledge of the person injured until some time afterward, the statute will not commence to run until the discovery of those facts, or until by reasonable diligence they might have been discovered. *Booth* v. *Warrington*, 4 Bro. P. C. ed. Toml. 163; *South Sea Co.* v. *Wymondsell*, 3 P. Wms. 143; *Hoveden* v. *Ld. Annesley*, 2 Sch. & Lef. 607, 631, etc.; *Blennerhassett* v. *Day*, 2 Ball & Beatty, 104, 129; Mitf. Ch. Pl. ed. Jeremy, 269; Blanshard on Limitations, 81; Wood on Limitations, § 58, p. 114, § 274, p. 586; Angell on Limitations, c. 18, 2d ed. p. 188. A *dictum* of Lord Mansfield in *Bree* v. *Holbech*, 2 Doug. 654, 656, that "there may be cases which fraud will take out of the statute of limitations," raised the question whether undiscovered fraud might not be set up by way of replication to a plea of the statute in actions at law. Wilkinson on Limitations, 115. But this suggestion never obtained the force of law in the English courts. *Brown* v. *Howard*, 2 Brod. & Bing. 73; *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39, 42, 45; *Hunter* v. *Gibbons*, 1 H. & N. 459, 464. Vice-Chancellor Wigram granted relief in equity in the case of *Blair* v. *Bromley*, 5 Hare, 542, (*S. C.* 2 Phillips, 354,) on the express ground that the acts of fraud were not discovered till within six years of bringing the suit, and that the remedy at law was gone; and his decree was affirmed by Lord Cottenham.

In this country, however, in many of the States, especially in those States which never had a separate system of equity, the statute has been held not to run, in cases of fraud, until

the discovery of the facts constituting the fraud; whilst in other States, in the absence of a statutory provision on the subject, the English doctrine has been adhered to. See Angell on Limitations, c. 18, and Wood on Limitations, § 58. In most of the States, however, statutes have finally been passed, suspending the statute in cases of fraud until the facts have been discovered, or might have been discovered by reasonable diligence. See the various statutes referred to in Wood on Limitations, c. 22.

From this brief review it appears that concealment of fraud has by many courts been considered good ground for suspending the statute of limitations, even in actions at law. But this is a very different thing from attempting to avoid service of process, and cannot be cited as aiding in any way the adoption of such a rule in the latter case. Concealment of fraud prevents a party from knowing that he has been injured and has a cause of action. He cannot take any steps to obtain redress. But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it.

There is one class of cases which is excluded from the operation of the statute by act of law itself, of which the case in which Mr. Justice Strong made the remark referred to is one. This class embraces those cases in which no action can be brought at all, either for want of parties capable of suing, or because the law prohibits the bringing of an action. In such cases the general law operates as a qualification, or tacit condition of the particular statute. Thus, if a man dies after commencing an action, and it abates by his death, and the limitation of time for bringing another action expires before the appointment of an executor or administrator, — the courts have held, that as there is no person to bring suit, the statute is suspended for a reasonable period, in order to give an opportunity to those interested to have the proper representative appointed. Blanshard on Limitations, pp. 104–112; Wood on Limitations, 11, n. 4. So where a citizen of one country has a cause of action against a person who resides in another country

at war with his own, the law of nations forbids any intercourse between them, and suspends all suits and actions by the one against the other: and, therefore, the time, during which the right to sue is thus suspended, is not reckoned as any part of the time given by the statute of limitations for bringing an action. *Hanger* v. *Abbott*, 6 Wall. 532; *The Protector*, 9 Wall. 687; Wood on Limitations, 9, 10. Besides this general exception created by act of law, it is difficult to find any other ground or cause for suspending the operation of the statute not specified in the act itself.

The answer made by the plaintiffs to the plea of the statute amounts to nothing more than an allegation that the defendant, the city of Watertown, by the acts of its officers, seeks to evade the service of process. Their language is, that the officers and people have conspired together for the purpose of defrauding the plaintiffs, and to prevent them from obtaining service of process. Is it fraud in a debtor to endeavor to evade the service of process? Is it any more fraudulent than it is not to pay the debt? Fraud is not the proper term to apply to such conduct. It may be morally wrong. It may be dishonest; but it is not fraudulent in the legal sense of the term.

Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in case where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. Wilkinson on Limitation, 40; *Hall* v. *Wyborn*, 1 Shower, 98. This difficulty was remedied by the act of 4 and 5 Anne, c. 16, § 19, which declares that if any person against whom there shall be any cause of action be at the time of such action accrued beyond the seas, the action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of

inability to serve process occasioned by the defendant's absence from the State. It has provided for no other case of inability to make service. If this is an omission, the courts cannot supply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive.

The judgment of the Circuit Court must be affirmed.

Spalding v. *Watertown*, No. 201. Error to the Circuit Court of the United States for the Western District of Wisconsin. Argued March 13, 1889. Decided April 8, 1889. Mr. Justice Bradley. This case is precisely like the one just considered, and judgment of affirmance must be rendered in this also.

Affirmed.

Mr. George P. Miller for plaintiffs in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

KNOWLTON *v.* WATERTOWN.

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

No. 198. Argued March 13, 1889. — Decided April 8, 1889.

Amy v. *Watertown*, *No.* 2, *ante*, 320, affirmed and applied to this case.
In Wisconsin an action is not commenced for the purpose of stopping the running of the statute of limitations until service of process had been effected, or until service had been attempted and followed up by actual service within sixty days or publication within that time.

This was an action in contract to recover on bonds issued by the municipality of Watertown, in Wisconsin. Judgment for the defendant. The plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. George P. Miller for plaintiffs in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This suit was brought to recover the amount of 6 bonds payable August 1st, 1863; 71 half-yearly coupons due from February 1, 1858, to August 1, 1863; 31 half-yearly coupons for $40 each, due from January 1, 1858, to January 1, 1873; and 31 other half-yearly coupons for $40 each, due from January 1, 1858, to January 1, 1873. A summons at the suit of Elijah W. Carpenter and Edwin F. Knowlton was issued on the 29th of March, 1873, and served by the marshal on the 2d day of April, 1873, upon the city clerk and the city treasurer, and upon Chris. Mayer, an alderman of the city who was elected mayor at the city election April 1, 1873, but not yet inducted into the office. The court, on motion, declared that the summons was not lawfully served, and made an order authorizing the clerk to return the summons to the marshal to be served on the defendant according to law or for such further action as the plaintiffs might direct.

Nothing more was done until the 9th of January, 1878, when the said Carpenter and Knowlton sued out an *alias* summons (so called), which was served by the marshal on the 23d of December, 1882, upon Rohr, the last mayor (but not then mayor); Bieber, city clerk; Gardner, city attorney; and Baxter, the last (but not then) president or chairman of the board of street commissioners. As Carpenter had died on the 1st of September, 1881, no further proceedings were had on this last attempt at service; but on the 19th of June, 1883, an order was applied for and made by the court that the cause be revived in favor of Edwin F. Knowlton as executor of Carpenter and said Knowlton individually. Thereupon the new plaintiffs filed their complaint and issued a new summons, tested 29th March, 1873, which was served by the marshal on the 26th of June, 1883, upon the city clerk, the city attorney,

and the last-elected chairman of the board of street commissioners. On the 14th of July, 1883, the defendant's attorneys entered an appearance to the action, and subsequently filed an answer, containing a general denial and a plea of the statute of limitations. The plaintiffs replied to this latter plea by amending their complaint, and setting up, as in the case of *Amy et al.* v. *Watertown*, No. 2, just decided, a conspiracy on the part of the officials and people of Watertown to prevent a service of process on the city, specifying the conduct of the mayor and aldermen in resigning their offices and meeting in secret for the transaction of business, etc. (See the report of the case referred to, *ante*, 320.) They added the following averment:

"Said plaintiffs further allege that in the above-entitled action said plaintiffs, on the 29th day of March, 1873, filed a præcipe for a summons and an undertaking for costs, and a summons was issued in due conformity to law and placed in the hands of the United States marshal for service, and that on April 2, 1873, the said marshal, after due and diligent search and inquiry, served the said summons on those persons whom, according to the best information he could derive, he had ascertained to be the mayor and city clerk of said city of Watertown, and on the same day returned the said summons as served according to law; that on April 22d, 1873, the said city of Watertown appeared specially in said action for the purpose of moving to set aside the service of said summons on the ground that the persons on whom the said summons had been served were not, in fact, the mayor and city clerk of said city; that on June 19, 1873, the said motion came on to be heard, and this court ordered that the service of said summons be set aside for the reason that the persons so served were not the mayor and city clerk of said city, and ordered that the said summons be returned to the marshal to be served according to law; that since said date the said marshal has not been able to ascertain who were the mayor and city clerk or mayor or city clerk of said city or the persons on whom process could be served.

"Said plaintiffs further allege that, notwithstanding they have exercised due diligence and hired attorneys and agents

for the purpose of having process served on said city, they have been unable to this date to serve or have served the summons in this action on the mayor of said city, or on that person who, by law, should exercise the functions of mayor of said city."

The defendant filed an answer and an amended answer to this amended complaint. The amended answer contains the following special rejoinder to the averment respecting the issuing and service of process in 1873:

"Fourth. And, further answering said amended complaint, this the said defendant alleges, that on or about the 29th day of March, 1873, the Elijah W. Carpenter and Edwin F. Knowlton named in said complaint filed with the clerk of this court a præcipe for a summons, wherein they were named as plaintiffs and this defendant was named defendant, and an undertaking for costs, and a summons, issued pursuant to said præcipe, was then placed in the hands of the United States marshal for said district for service, and that on or about the 2d day of April, 1873, said marshal returned said summons to this court with the following return of service thereon indorsed, to wit: 'Served on the within-named The City of Watertown by delivering to August Tauck, city clerk, and Fred Meyer, city treasurer, of said city, and Chris. Meyer, an alderman from the first ward of said city and an acting member of the board of aldermen thereof, and mayor elect of said city at the city election held April 1, 1873, each a copy of the within summons this April 2, 1873, there being no other person acting as mayor of said city;' that on or about June 19, 1873, on motion of defendant, appearing specially for that purpose, the said pretended service of said summons was decided and held to be illegal and void by this court on the ground that said summons had not been served in the manner prescribed by law, and the same was then ordered to be returned to said marshal to be served according to law; and that said summons was not served upon this defendant at any time within sixty days after it was so as aforesaid placed in the hands of the said marshal for service, nor within sixty days after the said pretended service thereof was so decided and held by said

court to be illegal and void, and that the said summons was not and never has been at any time served upon said defendant, and no copy thereof has ever been delivered to or left with the mayor of said city, and that no action attempted to be commenced by the said summons or said pretended service thereof was at or before or since the time of the alleged decease of said Carpenter pending or existing in said court; that no other summons against this defendant, wherein said Carpenter and Knowlton were made plaintiffs, was ever issued out of said court or attempted to be issued on this defendant in or about the year 1873, and that the said summons is the identical and only summons against this defendant wherein said Carpenter and Knowlton were named as plaintiffs, mentioned or referred to in the said amended complaint. And this defendant, further answering, avers and alleges that this the first above-entitled action against this defendant was first commenced on or about and not before the 19th day of June, 1883, by said plaintiffs herein then or soon thereafter delivering the summons, wherein they are named as plaintiffs, in the above-entitled action, to the United States marshal of said district to be served, and that on or about the 26th day of June, 1883, the said marshal made the delivery of the copies thereof of which he made his return, indorsed upon said summons and which is now on file in this action, and that on the 16th day of July, 1883, this defendant duly appeared herein and thereafter submitted itself fully to the jurisdiction of this court, and, as this defendant is informed and believes, the said plaintiffs never attempted to commence this said action nor used any diligence to commence the same before said 19th day of June, 1883.

"Fifth. And this the said defendant, for a further and separate defence, which it will insist upon herein to this said action and to the whole thereof and to each and every cause of action set forth in said amended complaint, avers and alleges, that neither this said action nor any of the causes of action averred or set forth in said amended complaint accrued within the six years next before the 19th day of June, 1883, nor on nor since the day and year last aforesaid, and that on or after

and not before the said 19th day of June, 1883, the summons last above mentioned was first delivered to the United States marshal for service and to be served on this defendant, and that the same never was or had been delivered to such marshal nor to any officer or person for service or to be served on this defendant or otherwise before said 19th day of June, 1883; and this said defendant further avers and alleges that neither this said action nor any of the causes of action in the said amended complaint stated nor any part thereof accrued within six years before the commencement of this the above-entitled action, and that the said action was not commenced before the said 19th day of June, 1883, nor was it commenced within the six years limited by law for the commencement thereof after the same accrued, and is barred, the whole thereof, by the statute of limitations of the State of Wisconsin; that as to all the bonds, interest warrants, and coupons described in said complaint and as to each and every one of said bonds, interest warrants, and coupons the said defendant saith and avers that each and all of said several causes of action in said complaint stated did not nor did any or either of them accrue thereon within the six years next before the commencement of this action, and that this said action and the whole thereof and each and every part thereof is barred by the statute of limitations of the State of Wisconsin."

The plaintiff demurred to this amended answer, but the demurrer was overruled, and the plaintiffs having declined to plead further, judgment was given for the defendant.

It is plain from the description in the complaint of the securities sued on, that most of them had become barred by the statute of limitations before the first summons was sued out in March, 1873. Only the last six years of coupons, being two sets of $40 each, and amounting to $960, were not barred at that time. Of course all the bonds and coupons were barred in June, 1883, when the last summons was issued, unless some cause existed for suspending or avoiding the operation of the statute. The plaintiffs relied on two grounds for this purpose: *first*, the impediments thrown in the way of the service of process by the defendant and its officers; *secondly*, the

actual commencement of an action in 1873 and keeping it on foot until the final service of process in 1883.

The first of these grounds was considered and held to be insufficient in the case of *Amy* v. *Watertown*, (No. 2,) just decided, *ante*, 320. The second does not require an elaborate examination. Without stopping to inquire whether the process issued in 1873 could be kept on foot for five or ten years without any legal service, and without complying with the statute provided for in such cases, it is enough to say, that, by the laws of Wisconsin, an action is not commenced for the purpose of stopping the running of the statute of limitations until service of process has been effected, or until service has been attempted and followed up by actual service within sixty days or publication within that time. The text of the law on this subject is found in §§ 4239 and 4240 of the Revised Statutes of Wisconsin, published in 1878. The prior edition of 1858 contained substantially the same provisions. See Rev. Stat. Wis. 1858, 822. The sections referred to are as follows:

"Section 4239. An action shall be deemed commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him.

"Section 4240. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law, which limits the time for the commencement of an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation organized under the laws of this State be defendant, to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; or if such corporation has no such place of

business, or any officer or other person upon whom the summons may by law be served, known to the plaintiff, or if such defendant be a non-resident, or a non-resident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days. If the action be in a court not of record, the service thereof must be made with due diligence."

Now, it is clear from what was said in the case of *Amy* v. *Watertown*, (No. 1,) *ante*, 301, that there was never any legal service of process upon the defendant in this case. The summons was never served upon the mayor of the city, or upon any person having or exercising the powers of mayor, and there is no pretence that the directions of § 4240 were followed or attempted to be. The action was really not commenced within the meaning of the statute until the attorneys of the defendant voluntarily entered a general appearance. This was done on the 14th of July, 1883. At that time more than ten years and a half had elapsed since the last coupon sued on became due.

We have no hesitation, therefore, in saying, that the court below committed no error in overruling the plaintiffs' demurrer and giving judgment for the defendant. That judgment is

Affirmed.

KNOWLTON *v.* WATERTOWN, No. 199, SPALDING *v.* WATERTOWN, No. 200. Error to the Circuit Court of the United States for the Western District of Wisconsin. Argued March 13, 1889. Decided April 8, 1889.

MR. JUSTICE BRADLEY: These cases are, in all essential respects, the same as that of No. 198, in which the opinion has just been announced, and the same judgment — of affirmance — is therefore rendered therein.

Affirmed.

Mr. George P. Miller for plaintiffs in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

UNITED STATES *v.* AVERILL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 23. Argued April 26, 1888. — Decided April 15, 1889.

Under §§ 823 and 839 of the Revised Statutes, the clerk of a District Court in the Territory of Utah is not entitled, for his personal compensation, over and above office expenses, to more than $3500 a year.

This view is not affected by the provisions of § 7 of the act of June 23, 1874, c. 469, 18 Stat. 253, or those of § 1883 of the Revised Statutes.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for appellants.

No appearance for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought by the United States in the District Court of the Third Judicial District, Territory of Utah, upon the official bond of Oscar J. Averill, as clerk of the Third Judicial District Court of the Territory of Utah, on which the other defendants were sureties, to recover the sum of $5253.33, being an alleged surplus of fees and emoluments received by the said Averill, as clerk, between August 5, 1879, and December 31, 1883, in excess of the amounts which he was entitled to retain for his personal services and the reasonable and necessary expenses of his office during that period, and for which it was claimed he was bound to account to the United States. The cause was heard in the District Court upon a general demurrer to the complaint, on which judgment was rendered for the defendants. The judgment of the District Court was affirmed on appeal by the Supreme Court of the Territory. To reverse that judgment the United States prosecute this appeal.

Section 1 of the act entitled "An Act to regulate the Fees and Costs to be allowed Clerks, Marshals and Attorneys of the

Circuit and District Courts of the United States, and for other Purposes," passed February 26, 1853, c. 80, 10 Stat. 161, provided as follows, as originally enacted: "That in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States Courts, to United States district attorneys, clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers, in the several States, the following and no other compensation shall be taxed and allowed." Then followed a specification of fees to be charged by various officers for various services. Section 3 provided for the rendering of accounts of fees, semi-annually, by district attorneys, clerks of the District and Circuit Courts and marshals, and contained the following enactment: "and no clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the said Secretary," the Secretary of the Interior, "to retain of the fees and emoluments of his said office, or, in case both of the said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year, for any such district clerk, or circuit clerk, or at and after that rate for such time as he shall hold the office." These provisions did not apply to the clerks of the territorial courts.

By § 12 of the act "making appropriations for the civil and diplomatic expenses of government, for the year ending the thirtieth of June, eighteen hundred and fifty-six, and for other purposes," passed March 3d, 1855, c. 175, 10 Stat. 671, it was enacted, "that the provisions of the act of February twenty-sixth, eighteen hundred and fifty-three, 'to regulate the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and District Courts of the United States, and for other purposes,' are hereby extended to the Territories of Minnesota, New Mexico and Utah, as fully, in all particulars, as they would be, had the word 'Territories' been inserted in the sixth line after the word 'States,' and the same had read, 'in the several States and in the Territories of the United States.'

This clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview accordingly." With this amendment § 1 of the act of February 26, 1853, read as follows: "That in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States Courts, to United States district attorneys, clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers, in the several States and in the Territories of the United States, the following and no other compensation shall be taxed and allowed."

When § 1 of the act of 1853, as originally enacted, spoke of the compensation to be "allowed" to the officers named in it, it clearly included the compensation to be allowed to be retained by them for their services. This is also plainly indicated in § 3 of the same act, in the provision as to the amount per year which a clerk of a District or Circuit Court may be "allowed" to retain, out of the fees and emoluments of his office, "for his own personal compensation." So, when, by the amendment made in 1855, to § 1 of the act of 1853, the latter act was made to apply to the compensation to be allowed, in the Territory of Utah, to the clerks of the District Courts there, the provision of § 3 of that act as to compensation allowed to be retained by a clerk of a District Court, was necessarily made applicable to clerks of District Courts in the Territory of Utah. Because, by the act of 1855, the provisions, that is, all the provisions, of the act of 1853, are extended to the Territory of Utah, "as fully, in all particulars, as they would be," had the words "and in the Territories of the United States" been inserted in § 1 of the act of 1853, as originally enacted. This is further shown by the fact that the new clause is, by the act of 1855, made to take effect from and after the date of the act of 1853, and the "accounting officers" are directed to "settle the accounts within its purview accordingly." This can refer only to the "proper accounting officers of the Treasury," who are required, by § 3 of the act of 1853, to audit and allow the compensation accounts of the clerks of courts. The accounts within the purview of the amendment of 1855, which the

accounting officers were required to settle "accordingly," necessarily included accounts for the compensation of the clerks of the District Courts of the Territory of Utah, which were to be settled according to the requirements of § 3 of the act of 1853.

This was the state of legislation in regard to the question under consideration when the Revised Statutes were enacted. Section 823 of those statutes, which is taken from § 1 of the act of 1853, provides as follows: "The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks of the Circuit and District Courts, marshals, commissioners, witnesses, jurors and printers in the several States and Territories, except in cases otherwise expressly provided by law." By the act of June 27, 1866, c. 140, § 2, 14 Stat. 74, the commissioners to revise the statutes were directed to place at the sections of the revision "references to the original text from which each section is compiled." The references opposite § 823 are these: "26 Feb. 1853, c. 80, s. 1, v. 10, p. 161; 3 Mar. 1855, c. 155, s. 12, v. 10, pp. 670, 671." This shows that the provision of the act of 1855 was regarded as being incorporated in § 823. The provision of § 3 of the act of 1853, in regard to the compensation to be retained by clerks, was embodied in § 839 of the Revised Statutes, in these words: "No clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the Attorney General, except as provided in the next section, and in section eight hundred and forty-two, to retain of the fees, and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk, or for any such circuit clerk, or exceeding that rate for any time less than a year." By § 15 of the act of June 22, 1870, c. 150, 16 Stat. 164, the Attorney General had been given the supervisory power over

the accounts of the officers of courts, in place of the Secretary of the Interior. The exceptions contained in § 840 have reference to the clerks of the Circuit and District Courts in California, Oregon and Nevada, who are authorized to retain, for their personal compensation, out of fees received, not exceeding $7000 a year. Section 842 grants additional compensation to clerks and marshals for special services in prize causes.

We think that §§ 823 and 839 must have the same construction that §§ 1 and 3 of the act of 1853 were required to have, after the enactment of the act of 1855, and that they apply to the allowance for compensation to the clerks of District Courts in the Territory of Utah. There is no indication in the language of those sections of the Revised Statutes of any intention to change the meaning of §§ 1 and 3 of the act of 1853, as modified by the act of 1855, as such meaning stood on the 1st of December, 1873. In the absence of such indication, §§ 823 and 839 of the Revised Statutes must be accepted as the law on the subjects which they embrace, as it existed on the 1st of December, 1873. *United States* v. *Bowen*, 100 U. S. 508; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54, 57.

On the 23d of June, 1874, the day after the enactment of the Revised Statutes, Congress passed an act "in relation to courts and judicial officers in the Territory of Utah," (18 Stat. 253, c. 469,) the 7th section of which read as follows: "That the act of the territorial legislature of the Territory of Utah, entitled 'An Act in relation to marshals and attorneys,' approved March third, eighteen hundred and fifty-two, and all laws of said Territory inconsistent with the provisions of this act, are hereby disapproved. The act of Congress of the United States, entitled 'An Act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes,' approved February twenty-sixth, eighteen hundred and fifty-three, is extended over and shall apply to the fees of like officers in said Territory of Utah. But the district attorney shall not by fees and salary together receive more than thirty-five hundred dollars per year; and all fees and moneys received

by him above said amount shall be paid into the Treasury of the United States." We do not perceive that this section changes the law as it then existed, in the particular in question. There is no express repeal of the provision of the act of 1855, nor anything inconsistent with it. The act of 1853, that is, the entire act, is extended over and made to apply to "the fees of like officers in said Territory of Utah," that is, to "the fees and costs to be allowed clerks, marshals and attorneys" in the District Courts in Utah, subject to the special provision of § 7 as to the compensation of the district attorney. The allowance of fees covers the allowance of compensation to be retained out of fees, in the settlement of accounts by the accounting officers of the Treasury. At the most, this legislation was redundant, so far as the compensation of the clerks of the District Courts in Utah was concerned.

It remains only to notice § 1883 of the Revised Statutes, which provides as follows: "The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the Supreme and District Courts, and to jurors, witnesses, commissioners and printers, in the Territories of the United States, shall be the same for similar services by such persons as prescribed in chapter sixteen, title 'The Judiciary,' and no other compensation shall be taxed or allowed." Reference is made in the margin of § 1883, both in the first and the second editions of the Revised Statutes, to the organic and other acts relating to nine Territories, including Utah, and to § 12 of the act of March 3d, 1855, hereinbefore recited, showing that § 1883 was compiled from the statutory provisions thus referred to. This § 1883 must have the same construction above given to §§ 1 and 3 of the act of 1853, as modified by the act of 1855, and to §§ 823 and 839 of the Revised Statutes, as enacted. The fees mentioned in § 1883 as "to be allowed" to clerks of the District Courts in the Territories, cover the fees to be retained by them for compensation for services. Sections 823 and 839 are in chapter 16 of the title mentioned. They prescribe the fees to be allowed to, and retained by, clerks of District Courts; "and no other compensation" can, under § 1883, be allowed

to be retained by clerks of the District Courts in Utah, for personal compensation, than is by the provisions of chapter 16 of the title mentioned prescribed to be allowed to be retained by the clerks of the District Courts named in § 839, for personal compensation. Section 1883 is in the same language in both editions of the Revised Statutes, but, in the 2d edition, a marginal reference is made to § 7 of the act of June 23d, 1874, hereinbefore quoted, passed after the Revised Statutes were enacted.

The judgment of the Supreme Court of the Territory of Utah is reversed, and the case is remanded to that court, with a direction to reverse the judgment of the Third Judicial District Court of the Territory of Utah, dismissing the complaint, and to take such further proceedings as may be conformable to law and not inconsistent with the opinion of this court.

Mr. Chief Justice Fuller was not a member of the court when this case was argued, and took no part in its decision.

BROCK *v.* NORTHWESTERN FUEL COMPANY.

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

No. 210. Argued and submitted March 19, 1889. — Decided April 8, 1889.

When it does not appear, affirmatively, from the record that the Circuit Court had jurisdiction, the judgment below will be reversed and the cause remanded for further proceedings in accordance with law.

The Northwestern Fuel Company, a Minnesota corporation, brought this action, February 18, 1882, to recover from the plaintiffs in error, citizens of Iowa, the sum of $1309.50, alleged to be due under a written contract, made July 21, 1881, between the latter and the What Cheer Land and Coal Company, a corporation alleged to be "doing business in the State of

Iowa;" the benefits of which contract were assigned by that company to the plaintiff. The contract related to coal to be mined by the What Cheer Land and Coal Company at its mine in Iowa, and which Brock & Co. agreed to receive and pay for at certain specified rates. The defendants, Brock and McKenzie, in their answer, asserted a counter claim of $20,000 against the plaintiff. There was a verdict against the defendants for $1402.47. The case was brought here for review in respect to numerous errors of law alleged to have been committed by the court below, to the prejudice of the defendants.

Mr. Charles A. Clark for plaintiffs in error.

Mr. C. D. O'Brien submitted for defendant in error.

Mr. Justice Harlan stated the case as above reported and delivered the opinion of the court.

The act of 1875 declares that no Circuit or District Court shall have "cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470. It does not appear that the What Cheer Land and Coal Company, the plaintiffs' assignor, could have brought suit on the contract in question, if no assignment had been made. The record does not show of what State it is a corporation. The allegation that it was "doing business in the State of Iowa" does not necessarily import that it was created by the laws of that State. But if that allegation were held sufficient to show it was an Iowa corporation, the result would be the same, because, in that case, it would appear that the parties to the original contract were all citizens of Iowa, and consequently that the assignor could not have sued the defendants in the Circuit Court of the United States.

The judgment is reversed upon the ground that it does not

appear, affirmatively, from the record that the Circuit Court had jurisdiction, *Metcalf* v. *Watertown*, 128 U. S. 588, and the cause is remanded for further proceedings in accordance with law.

Reversed.

GON-SHAY-EE, Petitioner.

ORIGINAL.

No. 7. Original. Argued March 18, 1889. — Decided April 15, 1889.

The act of March 3, 1885, 23 Stat. 385, c. 341, § 9, was enacted to transfer to Territorial Courts, established by the United States, the jurisdiction to try the crimes described in it (including the crime of murder), under territorial laws, when sitting as and exercising the functions of a Territorial Court; and not when sitting as or exercising the functions of a Circuit or District Court of the United States under Rev. Stat. § 1910.

Petition for a writ of *habeas corpus*. The case is stated in the opinion of the court.

Mr. W. H. Lamar for the petitioner. *Mr. Samuel Field Phillips* and *Mr. J. G. Zachry* were with him on the brief.

Mr. Solicitor General opposing.

Mr. Justice Miller delivered the opinion of the court.

This is a petition for a writ of *habeas corpus* to be directed to the marshal of the United States for the Territory of Arizona, who, it is alleged, holds the petitioner under a judgment of the District Court of the United States for the Second Judicial District of that Territory, which condemned him to death for the crime of murder. This crime is alleged in the indictment to have been committed by the defendant, an Apache Indian, within said district, naming no county or other location.

The allegation of the petitioner is that the court which tried him had not at that time, and in the mode of trial which was pursued, any jurisdiction of the case against him. It is argued

by counsel and alleged in the petition that the District Courts of the United States in the Territory of Arizona, as in all other Territories, have two distinct jurisdictions: that in the one they sit to exercise the powers and to try the same class of cases that the Circuit Courts of the United States do within the States and in the same manner, while in the other they sit as courts having jurisdiction of the ordinary contests between private parties and of criminal offences arising under the territorial laws.

The controversy in this case seems to turn upon the question whether the offence for which Gon-shay-ee was tried was an offence against the laws of the United States, and was of that character which ought to have been tried by the court sitting to try such cases, or whether it was an offence against the laws of the Territory, and should have been tried under those laws and by the court sitting to administer justice under them. The petitioner alleges that the offence with which he was charged was of the latter class, but that he was tried by the court while it was exercising its functions under the former.

The record of the case commences with the following statement of the finding of the indictment:

"In the District Court of the Second Judicial District, County of Maricopa, Territory of Arizona.

"May Term, A.D. 1888, sitting for the trial of all cases arising under the Constitution and laws of the United States, and having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States, at a term thereof held at the city of Phœnix, in the county of Maricopa, in said district and Territory, on the 29th day of May, A.D. one thousand eight hundred and eighty-eight.

"The United States of America
v.
Gon-shay-ee. } Indictment.

"Second Judicial District, *Territory of Arizona.*

"The grand jurors of the United States of America, within and for the Second Judicial District, Territory of Arizona,

being duly impanelled, sworn, and charged to inquire within and for the body of said district, of all offences committed therein against the United States of America, upon their oath present: That Gon-shay-ee, an Apache Indian, late of the Second Judicial District, Territory of Arizona, with force and arms, in said district and Territory, on or about the 5th day of June, A.D. one thousand eight hundred and eighty-eight, and before the finding of this indictment, did then and there feloniously, wilfully, deliberately, premeditately, and with malice aforethought, make an assault on a human being, to wit, William Deal, in the peace of the United States then and there being, and with a certain gun, which then and there was loaded with gun-powder and a leaden bullet, and by him, the said Gon-shay-ee, had and held in his hands, he, the said Gon-shay-ee, did then and there feloniously, wilfully, deliberately, premeditately, and with malice aforethought, shoot off and discharge at, to, against, and upon the said William Deal, thereby and by thus striking the said William Deal with the said leaden bullet, inflicting on and in the body of him, the said William Deal, one mortal wound, of which mortal wound the said William Deal then and there instantly died.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Gon-shay-ee, an Apache Indian, in the manner and form aforesaid, and at the time and place aforesaid, did him, the said William Deal, feloniously, wilfully, deliberately, premeditately, and with malice aforethought, kill and murder, against the peace of the United States and their dignity, and contrary to the form of the statute in such case made and provided.

"O. T. Rouse,
"*United States Attorney.*"

The record of the final judgment of the court is in the following language:

"UNITED STATES OF AMERICA.

"DISTRICT COURT, SECOND JUDICIAL DISTRICT OF ARIZONA.

Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States.

"Regular May Term, A.D. 1888.

"June 14, A.D. 1888.

"Present: Hon. Wm. W. Porter, District Judge.

"UNITED STATES OF AMERICA, Plaintiff, *v.* GON-SHAY-EE, Defendant.	Convicted of Murder.

"The defendant, being present in open court in person, and by his counsel, H. N. Alexander and L. H. Chalmers; the United States attorneys, O. T. Rouse and Joseph Campbell, present on the part of the United States. And this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant Gon-shay-ee was duly informed by the court of the nature of the indictment found against him for the crime of murder committed on or about the 5th day of June, A.D. 1887; of his arraignment, and plea of 'not guilty as charged in the indictment;' of the trial, and the verdict of the jury on the 4th day of June, A.D. 1888, guilty of murder as charged in the indictment.

"The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that, whereas you, Gon-shay-ee, having been duly convicted in this court of the crime of murder, it is found by the court that you are so guilty of said crime. It is considered and adjudged, and the judgment of the court is, that you, Gon-shay-ee, be removed hence to the county jail of Maricopa County, or some other place of secure confinement, and there be securely kept until Friday, the 10th day of August, A.D. 1888, and on that day you be taken by the United States marshal of the Territory of Arizona, to and within the yard of the jail of said Maricopa County,

Arizona, and between the hours of nine o'clock A.M. and five o'clock P.M. of that day, by said marshal, you be hanged by the neck till you are dead."

It is very clear from these transcripts of the proceedings in the court below that on this trial it proceeded and considered itself as acting as a court for the trial of offences arising under the Constitution and laws of the United States, and as administering them with the same powers as those vested in the Circuit and District Courts of the United States generally. The grand jurors are described as "the grand jurors of the United States of America within and for the Second Judicial District, Territory of Arizona, being duly impanelled, sworn and charged to inquire within and for the body of said district, of all offences committed therein against the United States."

The court was held in the city of Phœnix, in the county of Maricopa, and the offence is described as having been committed within the Second Judicial District of the Territory, without any further reference to the county in which the act was done. In the final judgment of condemnation it is declared to be rendered in the "District Court, Second Judicial District of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States." Both the grand and the petit jurors were summoned by the marshal of the United States, and the execution of the sentence was imposed upon that officer, who now holds the prisoner in custody under it.

If the court which tried the prisoner had been sitting for the trial of offences committed against the territorial law, all this would have been different. The grand jury would have been summoned for the county in which the act was committed, and from the body of that county, by its sheriff, and the case would have been tried by the court sitting in that county, unless for exceptional reasons, which do not appear in this case. The prisoner would, on conviction, have been held by the sheriff, who would have had the execution of the sentence committed to him under a warrant from the court.

All these circumstances are so variant, in the nature of the

jurisdiction and the mode in which it must be exercised, that the conviction of the prisoner under the one mode by the law prescribed for the procedure under the other cannot be held to be within the power of the court which proceeded under the wrong jurisdiction. That there exists this system of a distinct jurisdiction, administered by the same court, in the Territory of Arizona, as it does in nearly all the others, is undoubted. The language of § 1910 of the Revised Statutes points very clearly to this distribution of the functions of the courts of the United States in the Territories. It reads as follows:

"Each of the District Courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and the first six days of every term of the respective District Courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the Supreme Court of each Territory, as in other cases."

It may be safely assumed that the practice of the territorial courts, from their first organization, has been to observe this separation of their functions. The payment of the expenses of the court, while sitting, as it declares in the caption above quoted, to administer the laws of the United States, with the same jurisdiction as is vested in the Circuit and District Courts of the United States, is made by the Federal government, on accounts kept and rendered by its officers; while the same courts, when held within the different counties of the Territories to administer the territorial laws, whether criminal or civil, are paid by the county, or in some other mode prescribed by the legislature of the Territory.

The following language was used by this court in *Ex parte Crow Dog*, 109 U. S. 556, 560:

"The District Court has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the

authority of Circuit and District Courts; so that, in the former character, it may try a prisoner for murder committed in the Territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, Laws of Dakota, 1883, c. 9; and, in the other character, try another for murder committed within the Indian reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death."

Sec. 2145 of the Revised Statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country, and it becomes necessary, therefore, to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

The question in this case is whether the offence charged against Gon-shay-ee was one committed against the laws of the United States, within the meaning of the distinction which we have been taking; or whether it was an offence against the laws of the Territory, to be punished by a court proceeding under its laws. It may be conceded that prior to the statute of 1885, so far as Indians could be punished for offences of this kind in any court, either Federal or territorial, the jurisdiction would belong to the one sitting under the first branch and exercising the judicial functions appropriate thereto. It is clearly otherwise by the act of March 3, 1885, 23 Stat. 385, c. 341, § 9. The only portion necessary for our present consideration is the ninth section, which reads as follows:

"That immediately upon and after the date of the passage of this act, all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the

commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

This is the last section of the Indian appropriation bill for that year, and is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations. This matter was fully commented upon in the case of *Crow Dog*, already referred to, and in *United States* v. *Kagama*, 118 U. S. 375, in which the whole history of the relations between the United States and the Indians was discussed.

The latter case arose under the statute of 1885, now under consideration, which was construed in the opinion of the court, and the distinction clearly pointed out between offences committed against the laws of the United States, within the limits of an organized State of the Union, and those committed within the Territories. It is there declared that the enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes. The first is where the offence is committed within the limits of a territorial government, whether on or off an Indian reservation, and "the second is where the offence is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation."

In that case the offence was charged to have been committed within the boundaries of a State of the Union, and the Indian was tried in the Circuit Court of the United States for the District of California, from which a certificate of a divis-

ion of opinion was made to this court, embracing the question whether a murder committed by an Indian on the reservation of Hoopa Valley in that State could be tried in that court. We held that the statute gave this jurisdiction, and that it was constitutional. Incidentally, however, in remarking upon cases of crime committed by Indians in the Territories, the court said that "in this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject and tried by its courts."

The distinction between the trial in such cases by a court sitting as a Circuit Court of the United States to try offences against the Federal laws, and that in which it sits as a territorial court to punish crimes against the laws of the Territory, was not clearly stated in that opinion. We have already shown that such a distinction exists, and have little hesitation in holding that under the act of 1885 the case of Gon-shay-ee should have been considered as an offence against the laws of the Territory. That statute evidently intended to provide for the punishment of all cases of "murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny," committed by Indians within any Territory of the United States, whether within or without an Indian reservation, and the declaration is clear that they "shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes respectively."

These Indians, then, are subjected by this statute not to the criminal laws of the United States but to the laws of the Territory. The statute does not even define the crimes of murder, manslaughter, etc., but this must be governed by the laws of the Territory, so far as they furnish any definition of the crime. There is no language which declares that they shall be tried in the courts of the United States under the same circumstances as similar offences committed by Indians within the States; but the second provision, which prescribes the punishment of the same offences when committed by Indians if within the boundaries of any State, and within the limits

of any Indian reservation, declares that they "shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

This phrase, "within the exclusive jurisdiction of the United States," is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a State, or even within a Territory, over which the Federal government has by cession, by agreement, or by reservation exclusive jurisdiction. Those cases are tried by Circuit or District Courts of the United States, administering the laws of the United States, and not by the courts of the State or those of the Territory. The framers of this act were very careful, in this part of the statute, where the offence was committed within the territorial limits of a State, to declare that a violation of the laws of the United States in regard to these crimes of murder, etc., should be tried in the courts exercising the jurisdiction of the United States to punish offences against the United States.

With regard to the Territories, however, it is different. The declaration is that the Indians shall be tried by the courts of the Territory, and according to its laws, and shall be subject to the penalties which those laws prescribe. They are to be tried in the same manner and in the same courts as are all other persons charged with the commission of said crimes respectively, and the said courts are given jurisdiction in all such cases. It will be observed also that this part of the statute makes no distinction in regard to whether the crime was committed by the Indian on or off an Indian reservation.

We do not entertain any doubt that this part of the statute was enacted to transfer to the territorial courts established by the general government, as all courts of general jurisdiction are in the Territories, the jurisdiction to try the crimes described in it under the territorial laws, when sitting as and exercising the functions of such territorial court, as pointed out in the case of *Crow Dog*.

Syllabus.

The distinctions incident to this mode of trial have already been indicated. They are important, relating to the jurisdiction, and concerning the life and the liberty of the party, against whom a crime is charged. Whether a man shall be tried in the county where the offence was committed, or carried to some other county, perhaps hundreds of miles distant, is a matter of much consequence; it is of the venue of the trial. Whether he shall be tried by a jury summoned by the marshal of the United States from the whole Territory, or from a section of it, amounting possibly to one-third of its extent, or by a jury of the county in which the act was done by the sheriff of the county, is of much moment to him; so also as to whether he shall be indicted by a grand jury summoned to serve for the county, and residents of the county, or by such a body summoned from the whole Territory.

It is of consequence that in this new departure which Congress has made, of subjecting the Indians, in this limited class of cases, to the same laws which govern the whites within the Territories where they both reside, the Indian shall at least have all the advantages which may accrue from that change, which transfers him, as to the punishment for these crimes, from the jurisdiction of his own tribe to the jurisdiction of the government of the territory in which he lives.

We are of opinion that the writ of habeas corpus should issue as prayed for in this case; and it is so ordered.

CAPTAIN JACK, Petitioner.

ORIGINAL.

No. 8. Original. Argued March 18, 1889. — Decided April 15, 1889.

The facts that the petitioner in this case was sentenced to imprisonment in Ohio, and that the offence was committed within a judicial district instead of an Indian reservation, do not take this case out of the decision in *Gon-shay-ee's Case* just decided, *ante*, 343.

Syllabus.

PETITION for writ of habeas corpus. The case is stated in the opinion.

Mr. W. H. Lamar for petitioner. *Mr. S. F. Phillips* and *Mr. J. G. Zachry* were with him on the brief.

Mr. Solicitor General opposing.

MR. JUSTICE MILLER delivered the opinion of the court.

The only distinctions between this case and that of Gonshay-ee, in which the opinion has just been delivered, are:

First. That Captain Jack was sentenced to imprisonment at hard labor in the penitentiary of Ohio for thirty years, and the writ must, therefore, be directed to the keeper of that institution at Columbus in that State.

Second. That it appears by the record that in the former case the offence was committed on an Indian reservation, while in the case of Captain Jack the act was done within the judicial district, but not upon such a reservation.

We do not consider that these differences have any influence in the decision of the question as to the jurisdiction of the court which tried them both, and that therefore in this case, as in the former, the writ of *habeas corpus* should issue.

Writ granted.

REYNES *v.* DUMONT.

DUMONT *v.* FRY.

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

Nos. 174, 175. Argued January 23, 24, 1889. — Decided April 8, 1889.

The controversy in this case involves the allowance in favor of the trustee in bankruptcy of S. of liens upon certain bonds, owned in fact by C. and D., though ostensibly belonging to C. only, as pledged to secure, by express agreement, the general balance of account of a New Orleans bank,

Statement of the Case.

of which C. was president; and also, by implication from the usage of the banking business in which S. was engaged, C.'s general balance.

The court is of opinion upon the evidence that the bonds were pledged to secure the remittance by the bank to S. of "exchange bought and paid for," that is, bills drawn against shipments and purchased by advances to the shippers, and that they cannot be held to make good a debit balance of the bank created by the non-payment of certain drafts drawn by it directly on Europe and unaccompanied by documents.

A banker's lien rests upon the presumption of credit extended in faith of securities in possession or expectancy, and does not arise in reference to securities in possession of a bank under circumstances, or where there is a particular mode of dealing, inconsistent with such lien.

The pledge of these bonds to guarantee the remittance by the bank as before stated and the circumstances under which they were left in the possession of S., and had been made use of by C., preclude the allowance of the banker's lien claimed on behalf of S. as against the ultimate indebtedness of C.

The receipt by D. and the assignee of C. of the remaining bonds and money realized from bonds or coupons, after the satisfaction of the amounts decreed as liens by the Circuit Court, did not deprive D. and C.'s assignee of the right of appeal. *Embry* v. *Palmer*, 107 U. S. 3, 8, approved.

Where the objection of want of jurisdiction in equity because of adequate remedy at law is not made until the hearing on appeal, and the subject-matter belongs to the class over which a court of equity has jurisdiction, this court is not necessarily obliged to entertain such objection, even though if taken *in limine*, it might have been worthy of attention.

THE case, as stated by the court in its opinion, was as follows:

On the 14th of June, 1877, Frederick Dumont, August Henry Reine, and John David Moekel, who composed the firm of F. Dumont & Co., filed their bill in the Circuit Court of the United States for the Southern District of New York against Charles M. Fry, trustee of Schuchardt & Sons, bankrupts; Francois Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, bankrupts; the Louisiana National Bank of New Orleans, and N. W. Casey, receiver of the New Orleans National Banking Association, claiming to be the owners of two hundred and thirty-two bonds of the city of New Orleans, each for the amount of one thousand dollars, which had been in the possession of Schuchardt & Sons and were then in the

possession of Fry, their trustee in bankruptcy, who also held moneys received from the coupons attached to the said bonds; and by amendment set forth that the bonds were purchased by Cavaroc & Son with the money of Dumont & Co., for their joint account, but not in the name of Dumont & Co., nor in the joint names of Dumont & Co. and Cavaroc & Son; that Fry, trustee, refused to deliver up the bonds, and claimed to hold them as security for sums due him from Cavaroc & Son and Casey, as receiver; and that Fry is not entitled to hold the bonds. The bill prays that he be decreed to deliver them up, with the money received from the sale of coupons cut therefrom, and for further relief.

Fry claimed to hold the bonds upon a banker's lien for a balance of account due Schuchardt & Sons by Cavaroc & Son, and upon a lien by agreement for an unsecured balance due by the New Orleans National Banking Association, to the extent of $100,000. A decree was rendered December 6, 1882, sustaining the liens asserted by the defendant Fry, and directing him to account as to the amount of the same and of certain coupons which he had collected.

March 5, 1884, a final decree was entered, adjudging the amounts due on account of the alleged liens respectively, and directing that so much of the said bonds as might be necessary to pay the same, with interest, should be sold under the direction of the master. This was done, and Fry was paid the amount of said liens, and the balance was turned over to Dumont & Co. and Reynes, surviving assignee, Laborde having died pending the action.

The master's final report was confirmed February 11, 1885, and appeals were prosecuted by Dumont & Co. and Reynes, surviving assignee, to this court.

The following facts appear in evidence:

Schuchardt & Sons were bankers at the city of New York during the period covered by the transactions in question, and correspondents and financial agents of Cavaroc & Son, who were engaged in the commission and banking business in the city of New Orleans. Charles Cavaroc, the senior member of the latter firm, was at the same time president of the New

Statement of the Case.

Orleans National Banking Association, with which Schuchardt & Sons had similar business relations. Two hundred and seventy-five bonds of the city of New Orleans, a large part of them belonging to Dumont & Co., though it is not shown that Schuchardt & Sons had notice of this, were left by Cavaroc & Son with Schuchardt & Sons in September, 1870, the number having been subsequently reduced to two hundred and thirty-two.

The bonds were purchased in 1870, with the proceeds of drafts on Dumont & Co. to the amount of about a million francs, which had been renewed from time to time until after the failure of Cavaroc & Son, when Dumont & Co. paid them to the amount of 484,000 francs. Cavaroc & Son had negotiated drafts for 200,000 francs on Dumont & Co., with Schuchardt & Sons, shortly before the failure, growing out of the original purchase of bonds, and these not having been paid were charged back to Cavaroc & Son by Schuchardt & Sons, thereby contributing to produce a debit balance of $7454.22 on January 12, 1874, although protested drafts on Maxquelier Fils for $6562.23 were also included.

These drafts for 200,000 francs had been accepted by Dumont & Co., and were protested not for non-acceptance but for non-payment; and an action was commenced January 3, 1874, by Schuchardt & Sons against Dumont & Co. on their acceptances in the Supreme Court of New York, and an attachment levied on the bonds in question here, in the hands of Schuchardt & Sons. Satisfaction of recovery in this suit would more than pay the debit balance of Cavaroc & Son as finally stated in these proceedings.

It was stipulated between the attorney for Dumont & Co. and the attorneys for the assignee of Cavaroc & Son, that the balance of the bonds and moneys to be paid over after the liens awarded by the court were satisfied, should be divided in the proportion of seventy-four per cent to Dumont & Co. and twenty-six per cent to Cavaroc & Son.

Both the Cavarocs testify that the bonds were left with Schuchardt & Sons for safe-keeping, Cavaroc, Jr., referring to a particular loan on them in the fall of 1870, which led to their

being sent to New York, where they then remained on account of the heavy express charge, and the fact that New York was a better market in which to dispose of them; but Wells, a member of Schuchardt & Sons, testifies:

"On the 20th of September, 1870, we deposited with M. Morgan's Sons the above $275,000 New Orleans bonds against a loan made by them of $200,000 to the Bank of New Orleans, and $110,000 to C. Cavaroc as part collateral for those loans. On the 21st December, 1870, M. Morgan's Sons returned us the above bonds against the payment of the two loans. On the 6th of March, 1871, we delivered $5000 of the above bonds to Henry Beers by order of C. Cavaroc. On the 1st of April, 1871, we delivered $160,000 of above bonds to Marks & Febre by order of C. Cavaroc. On the 29th of May, 1871, we delivered $110,000 of above bonds to M. Morgan's Sons against a loan of $100,000. On the 30th May, 1871, Marks & Febre returned us above $160,000 bonds, against which we loaned Cavaroc $100,000, falling due 2nd of October, 1871. On the 2nd of October, 1871, M. Morgan's Sons returned us the $110,000 bonds on payment of their loan. On the 27th of February, 1872, we forwarded to Cavaroc, at New Orleans, $8000 of above bonds as per his order. On the 13th of April, 1872, we delivered $160,000 of above bonds to Importers and Traders' National Bank of this city by order of Cavaroc. On the 28th of June, 1872, the Importers and Traders' National Bank returned us the above $160,000 bonds. On the 31st of August, 1872, we delivered $30,000 of above bonds to Spofford Brothers & Co. by order of Cavaroc. On the 27th of May, 1873, we delivered $50,000 of the above bonds to the Importers and Traders' National Bank of New York by order of Cavaroc. On the 3d of September, 1873, the Importers and Traders' National Bank returned the above $50,000 bonds."

He considers that the bonds were held by his firm for any balances that the New Orleans National Banking Association might owe, and says that Schuchardt & Sons held them up to the time they were pledged to the bank as security for "whatever Cavaroc & Son might be indebted for," but that they had no written authority to hold the bonds collaterally for the bank's

indebtedness, that he knew of, other than the letter of Cavaroc, Senior, of February 15, 1873, hereinafter set forth. He testifies, however, that there was "a general understanding to that effect arrived at with (in) conversations with C. Cavaroc, Jr., at different times when he was in New York; among others, in August or September, 1873," although in another portion of his evidence he says: "I think they were alluded to in 1873, during his visit to New York, in the fall of 1873. I feel quite confident they were alluded to in 1873," which is "as positive" as he "can be upon the subject." Any such understanding is specifically denied by Cavaroc, Jr., who asserts that he —

"Never made any agreement, verbal or otherwise, in reference to the bonds, with Mr. Wells or any one else, and never made with Mr. Wells or any one living any agreement or arrangement about the bonds or any other bonds to be held as general security in matters with the New Orleans National Banking Association, or even C. Cavaroc & Son; never had any conversation with Mr. Wells about the bonds in any manner whatever, outside of a remark, as above stated, in the summer of 1873, to know if our trust was all right in their vault, which any merchant would pass upon in conversation to be certain that no accident happened to the trust or deposit for safe-keeping."

The New Orleans National Banking Association dealt largely in foreign bills of exchange, which it negotiated through Schuchardt & Sons. By the course of business the amount of the foreign bills it remitted from time to time to Schuchardt & Sons was credited by the latter to the former, and the latter drew upon the former from time to time as funds were required. According to the custom of business at New Orleans, advances are made by bankers to shippers in anticipation of the actual delivery of drafts with accompanying documents, and the New Orleans Bank consequently advanced funds before it could remit drafts, so as to be credited by Schuchardt & Sons with their amount. For the mutual profit of both concerns the bank had at times been permitted by Schuchardt and Sons to draw in advance of remittances. Cavaroc & Son were not

only bankers but large shippers of cotton abroad, and drew against the proceeds of their bills of exchange, which were accompanied by bills of lading.

On the 4th of December, 1871, Schuchardt & Sons wrote the cashier of the New Orleans National Banking Association the following letter:

"NEW YORK, *Dec. 4th*, 1871.

N. AUGUSTINE, Esq., Cashier New Orleans Banking Association, New Orleans, Louisiana.

"Dear Sir: In reply to your inquiry about drawing in advance against purchases of exchange we beg to say that we granted that facility at a time when your foreign exchange business with us was much more extensive and consequently more remunerative than at present, and when we held as security a deposit of N. O. city bonds. We were, moreover, induced to make these advances (although, as we explained at the time, we could make a much more lucrative use of the money by using it here) on the assurance of Mr. Cavaroc that you would only temporarily require such facilities, and that your business would increase to such an extent that the future would largely compensate us for any present sacrifices. To our regret, however, such has not been the case, and your business, instead of increasing, has greatly diminished. However, in order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw upon us in advance of remittances to the extent of $100,000 (one hundred thousand dollars), with the understanding that such drafts are to represent exchange bought and paid for. We presume also that when the loan of the Trust Co., which falls due on the 21st inst., will be paid the securities will be replaced in our possession."

February 6, 1873, the cashier of the bank wrote Schuchardt & Sons:

Statement of the Case.

"New Orleans, *Feb'y* 6, 1873.

"Mess. F. Schuchardt & Sons, New York:

"Are we still authorized to draw, *à découvert*, $100,000, (one hundred thousand dollars,) against purchases of exchange advised by wire?

H. T. Blache, Cashier."

To which Schuchardt & Sons replied:

"New York, *Feb'y* 11, 1873.

"Henry Blache, Esq., Cashier of the N. O. National Banking Association, New Orleans:

"The credit of $100,000 (one hundred thousand dollars) *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.

F. Schuchardt & Sons."

Whereupon the cashier answered:

"New Orleans, *February 15th*, 1873.

"Messrs. Schuchardt & Sons, New York:

"Your letter of December 4th, 1871, authorized us to draw, in advance of remittance, to the extent of $100,000, (one hundred thousand dollars,) represented by purchases of exchange, advised by telegraph. There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still in force. We now note that it is cancelled, and beg leave to refer you to the private letter of the president on the subject.

H. T. Blache, Cashier."

And on the same day, the president, Cavaroc, wrote Schuchardt & Sons a letter which he gives thus:

"New Orleans, *February 15th*, 1873.

"Mess. Schuchardt & Sons, New York:

"In your letter of the 11th instant you say: 'The credit of $100,000, (one hundred thousand dollars,) *à découvert*, was pred-

icated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.' You know that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered, and it was with view of making our mutual transactions more active that we asked this credit, '*à découvert*,' at the time. In view of your remark I have nothing to say, except to authorize you to consider a portion of the bonds belonging to my firm, which you have in your possession, as collateral security in case you should not be covered (*en cas de découvert*).

C. CAVAROC, *Pres't.*"

On behalf of Fry the following was introduced as the original:

"NEW ORLEANS, *The* 15 *Février*, 1873.

"Messieurs F. SCHUCHARDT & SONS, New York:

"Messieurs & Amis: Dans votre lettre du 11 ct. vous dites: 'The credit of $100 M *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.'

"Vous savez que le change à New Orléans est acheté en faisant des avances jusqu'à ce que les traites soient livrées et c'est afin d'activer nos rapports que nous vous avions demandé, à l'époque, ce découvert.

"Devant votre observation, il n'y a rien à dire si ce n'est de vous autoriser à considérer comme sécurité collatérale une partie des 'bonds' que vous avez à ma maison, en cas de découvert.

"Votre dévoué, C. CAVAROC."

And which is translated by Mr. Wells as follows:

"NEW ORLEANS, 15 *February*, 1873.

"Messrs. F. SCHUCHARDT & SONS, New York:

"Dear Sirs: In your letter of 11th inst. you say 'the credit of $100 | M *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.'

Statement of the Case.

"You are aware that exchange is purchased at New Orleans by making advances until the delivery of the drafts, and it was for the purpose of giving activity to our correspondence that we at the time requested this *découvert.*

"In the face of your observation there is nothing to say except to authorize you to consider a part of my firm's bonds which you have as collateral security in case of (unsecured — uncovered) balance of account.

"Yours truly, C. CAVAROC."

Schuchardt & Sons replied:

"NEW YORK, *Feb.* 27, 1873.

"To the cashier of the New Orleans Banking Association, New Orleans:

"In reply to your worthy president's letter of the 15th inst., we take pleasure in authorizing you, in accordance with the terms therein stated, to value on us '*à découvert*' for a sum not exceeding as maximum $100,000 (one hundred thousand dollars) against exchange purchases.

F. SCHUCHARDT & SONS."

In the summer of 1873, Cavaroc, Jr., had two interviews with Wells, in New York, on his way to and from Europe, at which nothing was said about these bonds "outside of a possible remark, to be positive, that nothing had happened to our trust in their hands," but the subject of the amount of exchange Schuchardt & Sons would be willing to negotiate for the firm or the bank was mentioned, an agreement arrived at to limit certain lines of credit, and a memorandum drawn up by Wells, in French, or partly in French and partly in English, as follows:

"Not more than £10 | M per week on Hambro.

" " " fr. 200 | M on first bankers of Paris.

"As much business paper (in French, *effets de commerce*) as shall be desired, we reserving the right (as much in the interest of the bank as in our own) to limit the amounts on any one house.

"When the bank sends the drafts of the bank on third par-

ties (Havre, Bordeaux, Marseilles, etc., etc.) it must put in the hands of Messrs. C. C. & Son, in trust, a deposit of securities, there to remain until the acceptance or the payment, if we deem proper to await the payment.

"Seignouret's line, fr. 500 | M (for bank and C. C. & Son)."

This must have been, Wells says, the latter part of August or the early part of September, 1873, and this is confirmed by the evidence of Cavaroc, Jr., that he arrived in New Orleans "the first part of September."

Mr. Wells thinks he received a letter from Mr. Cavaroc dated on or about September 15, and that he answered under date of September 19, 1873, and Cavaroc produces a letter, as follows:

"NEW YORK, *Sept.* 19, 1873.

"MY DEAR MR. CAVAROC:

"I have sufficiently explained to you on your last visit here, that we should prefer receiving from the bank only such paper as it should have purchased, and, after mature consideration and consultation with Mr. Schuchardt, who has returned some days since, we have determined to request the bank to limit its exchange business with us to the forwarding of such drafts made by third parties as it shall deem proper to purchase, and we beg you so to inform the bank. . . . We hope that the bank shall give great activity to its operations on the above basis, and, in order to assist it as much as possible, we still authorize it to draw against purchases of exchange, and in advance of the remittances, to the extent of $100,000, on the conditions specified in the letter of Mr. Cavaroc of 15th February last.

"Believe me, my dear sir and friend, yours most devotedly,

"LAWRENCE WELLS.

"Money was loaned until to-morrow @ 1½ per cent; and you will readily understand that it is no fun to be out of money, as we are now. The system which I propose to you above will in a measure remedy this, because we can draw as soon as we shall receive your telegram advising purchases."

An extract from the minute-book of the bank, September 20, 1873, reads as follows:

Statement of the Case.

"CALLED MEETING.

"NEW ORLEANS NAT. BANKING ASS'N,

"NEW ORLEANS, *Sept. 20th*, 1873.

"Present: C. Cavaroc, Pres't.; A. Tertrou, J. Aldige, John Rocchi, H. A. Mouton, P. S. Wiltz, L. Haas, Jr.

"The president stated that the object of the meeting was to inform the board of the unpleasant state of affairs in general, and particularly of the panic then prevailing in New York.

"The suspension of Jay Cooke & Co., which was already announced, and which no doubt would be followed by many others, would surely tend to increase the present uneasiness and render our money market still more stringent. He would therefore ask the board to suggest or adopt such measures as in their judgment they would think expedient to avert the impending crisis; whereupon it was unanimously —

"*Resolved*, That all precautionary measures to be taken be left entirely to the discretion of the president, the board hereby ratifying all that may be done by him. It is further —

"*Resolved*, That with a view of securing the president against any eventual loss of the 232 7 per cent city of New Orleans bonds belonging to the firm of C. Cavaroc & Son, and actually pledged to F. Schuchardt & Sons, agents of the bank at New York, as collateral security for the payment of all foreign exchange bills sent them for negotiation and by them indorsed, that he be, and is hereby, authorized to select as guarantee from the portfolio of the bank such papers as he may think proper, to the extent of ($100,000) one hundred thousand dollars.

"On motion it is further —

"*Resolved*, That the board hereby tender their thanks for the aid he is individually lending by leaving undisturbed a large cash balance, ($80,000) eighty thousand dollars, standing to the credit of C. Cavaroc & Son on the books of the bank.

"And the board adjourned."

October 4, 1873, the bank and Cavaroc & Son failed. N. W. Casey was appointed receiver of the bank, and François Laborde and Edward H. Reynes, assignees of Cavaroc &

Son. Schuchardt & Sons were adjudicated bankrupts February 19, 1876, and Charles M. Fry was appointed their trustee in bankruptcy.

The balance due from the New Orleans Bank to Schuchardt & Sons on October 4, 1873, the date of the failure, adding $3.20 interest, from October 1, was $4125.12, which was increased, by charging back protested drafts or acceptances and some minor items, to $197,501.35, as per the following account:

Dr.		*N. W. Casey, Receiver New Orleans Nat'l Banking Assoc.* Charles M. Fry, trustee.			
1873.					
Oct'r 1.	To balance				$4121 92
4.	" days interest on $4121.92, @ 7 per cent				3 20
7.	" unpaid rem. on Nat'l. Park Bank				353 86
9.	" protest charges on rem. on Phila., $156.75				2 06
14.	" " " " " $100				2 06
24.	" " " " $230.47 & $130				4 12
28.	" protested drafts on G. Honorat & Co. at Marseilles		f'cs 150,000		
	10 per cent damages		15,000		
			f'cs 165,000 — 487½		33,846 15
Nov'r 17.	" unpaid acceptances of S. Frank & Co.				12,500 00
	" protest charges on same				1 31
Dec'r 29.	" protested drafts on Seignouret Frères & Co., Bordeaux, p'ble per Paris		f'cs 250,000		
	10 per cent damages		25,000		
			f'cs 275,000 — 487½		56,410 26
1874.					
Jan'y 12.	" protested drafts on A. Dutfoy & Co. at Paris	f'cs 200,000	29 Nov'r, 73.		
		155,000	10 Dec., "		
		35,000	13 " "		
		10,000	19 " "		
	10 per cent damages	40,000			
		f'cs 440,000 — 487½			90,256 41
					$197,501 35

From this debt, certain amounts collected being deducted, a balance of $180,624.58 was left, making, with $14,691.05 due on gold account, a total indebtedness from the bank to Schu-

chardt & Sons of $195,315.63, for which a certificate was issued by the receiver April 8, 1879.

Schuchardt's cashier testified:

"The drafts on Dutfoy, Seignouret and Honorat were foreign exchange bills known as 'clean' — that is, unaccompanied by documents — drawn by the New Orleans Banking Association on those parties. The one on the National Park Bank was drawn by the New Orleans National Banking Association to settle a collection made. The bills of exchange that figure up on the gold account were mainly cotton shippers' exchange, accompanied by bills of lading."

The debit balance of the bank on the gold account, October 1st, 1873, was $68,231.17, afterwards reduced to $14,691.05.

It appears from the evidence of Casey that Schuchardt & Sons, or Fry their assignee, claimed about $38,000 in the Union Bank of London belonging to the New Orleans Bank, and other funds in the hands of Dutfoy & Co. of Paris, amounting to forty thousand francs, and that at the time of the failure of the bank "certain assets belonging to the bank were in the hands of parties claiming to hold them as collateral security for the indorsement of certain bills of exchange which had been negotiated through Schuchardt & Sons, said bills being drawn by the bank upon Seignouret Frères of Bordeaux, France. Suit was brought for the recovery of these assets, which resulted in my favor, as will appear by the decision of the Supreme Court of the United States in the case of *Casey, Receiver*, v. *F. Schuchardt & Sons*, reported in 6 Otto, [96 U. S.] p. 494."

In that case, Mr. Justice Bradley, delivering the opinion of the court, said:

"Schuchardt & Sons were bankers, in New York, through whom the New Orleans National Banking Association was in the habit of drawing on foreign houses, and who indorsed and disposed of the drafts, or transmitted them for collection, and made advances thereon. They were thus in the habit of indorsing and advancing on bills drawn by the bank on Seignouret Frères, of Bordeaux. In August and September they became uneasy, and required security; and it was agreed

between them and the bank that they would receive and indorse drafts on Seignouret Frères, and accept the drafts of the bank on themselves to a certain limited amount, upon being secured by a pledge of commercial securities, to be deposited in the hands of Charles Cavaroc & Son. In pursuance of this arrangement, on the 17th of September, the bank transmitted to Schuchardt & Sons its drafts on Seignouret Frères to the amount of 250,000 francs, and, at the same time, drew on Schuchardt & Sons against said drafts for the sum of $50,000. On the same day, or the day following, securities of the bank to the amount of $60,000 were selected by the note clerk, by direction of Charles Cavaroc, president of the bank, put into an envelope indorsed with the name of Schuchardt & Sons, and handed to Cavaroc, who handed them to the cashier; and thereafter they were treated in precisely the same manner as the securities which were selected for the Crédit Mobilier and the Park Bank, as shown in the cases which have just been decided."

October 9, 1873, Cavaroc & Son telegraphed Schuchardt & Sons:

"New Orleans, *Oct.* 9, 1873.

"F. Schuchardt & Sons, New York:

"Please deliver to L. Monrose two hundred and thirty bonds, one thousand dollars each, city of New Orleans seven per cent, held in trust for us.

"C. Cavaroc & Son."

Monrose replied:

"New York, *Oct.* 9, 1873.

"C. Cavaroc & Son, New Orleans:

"Schuchardt refuses delivering; says you pledged as security for bank.

"L. Monrose."

And Schuchardt & Sons telegraphed:

"New York, *Oct. 9th*, 1873.

"C. Cavaroc & Son, New Orleans:

"According to your written authority we hold New Orleans city bonds as collateral security against Bank of New Orleans.

We insist on your delivering to Reynes the bills receivable held by you in trust. Answer; also reply about bill lading per Queenstown.

"F. SCHUCHARDT & SONS."

October 11, Cavaroc & Son wrote Schuchardt & Sons:

"NEW ORLEANS, *Oct.* 11, 1873.

"Mess. F. SCHUCHARDT & SONS, New York:

"Gentlemen: 'According to your written authority we hold New Orleans city bonds as collateral security against Bank of New Orleans.'

"By this phrase you seem to imply that our 232 bonds ought to serve as a guarantee to you for the reimbursement of all kinds of debts and of all sums due by the bank.

"In response we refer you to the letter of our senior partner, C. Cavaroc, February 15th last, which you yourselves invoke as the authority on which you base your rights ('according to your written authority').

"Our authority is contained in the following terms: 'In your letter of the 11th inst. you say: "The credit of $100,000 *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled." You know that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered, and it was with a view of making our mutual transactions more active that we asked this credit *à découvert* at the time. In view of your remark, I have nothing to say except to authorize you to consider a portion of the bonds belonging to my firm, which you have in your possession, as collateral security in case you should not be covered.'

"You see that according to the authority which you invoke you have no right to cover yourself by means of these bonds, except those uncovered sums for which you might not have received the paper against which they were drawn at the moment of the demand for the restitution of the bonds.

"According to the books of the bank, which correspond

within a few cents with the account current rendered by you under date of Oct. 1st, it appears that all the drafts which the bank has made on you up to this day have been properly covered, and that is all we guaranteed by the deposit of our bonds.

"These bonds are, then, at this moment released, and we renew the order that you deliver them to L. Monrose, who is requested to receive them.

"Yours, etc., C. Cavaroc & Son."

The following definitions of "*à découvert*," with translations, were furnished by counsel for Dumont & Co.:

"*Crédit à découvert: Avances faites par acceptations ou par débours de caisse, sans être garanties par connaissements des marchandises consignées ou des contre-valeurs.*

"Larousse, Grand Dictionnaire Universel.

"*Translation.* Advances made by acceptances or cash disbursements, which (advances) are not covered by bills of lading, consigned goods or other securities."

So Littré, Dictionnaire de la langue française:

"*À découvert.* Terme de commerce: *Être à découvert, être en avance, n'avoir aucune garantie des avances faites.* (À découvert, commercial expression. To be 'à découvert' is to be in advance, to have no guaranty of the advances made.)"

So in the Dictionnaire de l'Académie:

"*À découvert. Être à découvert*, signifie en terme de commerce, n'avoir aucun gage, 'aucune garantie par sa créance.' (To be *à découvert* signifies to have no pledge, no security, for one's claim.)"

So, too, Bescherelle, Dictionnaire National:

"Commerce. *Être à découvert: N'avoir aucun gage de sa créance.* (Commerce; to be 'à découvert:' to have no security or pledge for one's claim.)"

Mr. Wells gives this as from the French Dictionary of A. Spiers, 19th ed., Bamard Bandry & Co. 12 Rue Bonaparte, Paris, 1866:

"*Découvert*, n. m. 1 (com.) (of accounts), uncovered balance."

Cavaroc, Senior, testifies:

"There is a usage and meaning. The words '*à découvert*'

we use more frequently in French than 'credit.' If I write in French to ask an open credit to a banker I will merely ask him: 'Let me draw on you *à découvert* for one or two hundred thousand dollars.' If I say to the banker, 'I will cover you with exchange to that amount,' as soon as I cover to that amount it is finished. I don't owe a cent to that amount, *à découvert* is closed, and I have a right to go on again. It is a revolving credit. For instance, with Schuchardt, suppose I draw to-day $100,000 on Schuchardt and it was *à découvert*, and the next morning or day after I sent to Schuchardt $100,000 of exchange bought from different houses here, my *à découvert* is finished — it is closed. As soon as I have remitted exchange for the $100,000 draft of the day preceding the *à découvert* is closed. Schuchardt is covered then. On the same day or next morning I have a right to draw $100,000 and cover again. As soon as I have remitted $100,000 exchange I have a right to draw again. Therefore, when the bank remitted exchange to cover what the bank had drawn under that credit, *à découvert*, the guarantee made by me, C. Cavaroc, ceased, and the right to hold these bonds ceased under that guarantee. . . . I desire to say, in explanation of the '*à découvert*' spoken of in my testimony, that it had no relation to guarantee and to payment of the exchange remitted by the bank, nor of the solvency of the drawers or indorsers or acceptors, but merely embraced remittance of exchange by the bank. This is the signification of the words '*à découvert*' here and in France, and in the letters sent and received by me, extracts of which are annexed, the words are so understood."

The balance of account claimed by Schuchardt & Sons as due from Cavaroc & Son, January 12th, 1874, was $7454.22, to which certain costs, disbursements and counsel fees, and a payment in settlement of a judgment on a $20,000 draft drawn on them by Cavaroc & Son, were added, with interest, making the amount December 19, 1882, some $25,715.22. The amount proved up by Schuchardt & Sons against the New Orleans Bank was $195,315.63, as has been stated. Upon this amount dividends had been paid before final decree to the amount of $117,189.38.

The Circuit Court held that the bonds were pledged to secure Schuchardt & Sons for any overdrafts of the bank which might from time to time arise, to the extent of $100,000, and that Schuchardt & Sons were entitled to hold the bonds subject to the pledge to the bank, as security for the indebtedness of Cavaroc & Son, by virtue of a banker's lien, 13 Fed. Rep. 423; and, further, that Cavaroc & Son had pledged the bonds to secure the whole indebtedness of the bank to Schuchardt & Sons, with a limitation on the extent of the liability, and had not pledged them to secure a limited part of the indebtedness, and that therefore the dividends were not to be applied ratably, but the bonds could only receive the benefit of any receipts from dividends after the indebtedness had been paid down to $100,000, 14 Fed. Rep. 293.

The original bill was ordered dismissed by the court *sua sponte* on the ground of want of jurisdiction in equity, *Dumont* v. *Fry*, 12 Fed. Rep. 21, but retained upon amendment. No objection on this ground appears to have been raised by defendants until upon hearing here. As to allowance of interest, see 18 Fed. Rep. 578.

Mr. John E. Parsons, for Reynes, cited: *National Bank* v. *Insurance Co.*, 104 U. S. 54, 71; *Duncan* v. *Brennan*, 83 N. Y. 487; *Neponset Bank* v. *Leland*, 5 Met. 259; *Vanderzee* v. *Willis*, 3 Bro. Ch. 21; *Brandaõ* v. *Barnett*, 3 C. B. 519; *S. C.* 6 Man. & Gr. 630; *S. C.* 12 Cl. & Fin. 787; *Grant* v. *Taylor*, 35 N. Y. Super. Ct. 338; *S. C.* 52 N. Y. 627; *Wyckoff* v. *Anthony*, 9 Daly, 417; *Zelle* v. *German &c. Inst.*, 4 Missouri App. 401; Story Eq. Jur., § 499; *Bardwell* v. *Lydall*, 7 Bing. 489; *S. C.* 5 Moore & Payne, 327; *Hobson* v. *Bass*, 6 Ch. App. 792; *Raikes* v. *Todd*, 8 Ad. & El. 846; *Ellis* v. *Emanuel*, L. R. 1 Ex. 157; *Gee* v. *Pack*, 9 Law Times (N. S.) 290; *Ward* v. *Todd*, 103 U. S. 327; *Town of Mentz* v. *Cook*, 108 N. Y. 504; *Boyce* v. *Grundy*, 3 Pet. 210; *Miller* v. *Stewart*, 9 Wheat. 680.

Mr. James C. Carter for Fry.

I. The defendant and appellee Fry, as trustee in bankruptcy for Schuchardt & Sons, had a lien upon the bonds in

question for the payment of the sum of $25,715.22, being the balance due that firm on the account between it and C. Cavaroc & Son, as adjudged by the decree of the court below.

This lien is what is ordinarily known as a banker's lien. By long established law a banker has a lien upon all funds and securities in his possession for the payment of a balance due to him on his general account with a customer, unless it appear that the funds or securities are held by him for a purpose *inconsistent with such lien*. *Davis* v. *Bowsher*, 5 T. R. 488; *Bolland* v. *Bygrave*, Ry. & Mood. 273; *Brandaõ* v. *Barnett*, 12 Cl. & Fin. 787; *Jones* v. *Peppercorne*, 1 Johns. V. C. 430; *In re European Bank*, L. R. 8 Ch. 41; *In re Gen. Prov. Ass. Co.*, L. R. 14 Eq. 507.

All liens, except statutory liens, are created by contract; but the contract may be, and perhaps in most cases is, an *implied* one. The lien referred to is implied from the nature of the transactions between a banker and his customer, the usual relations between those parties, and the circumstance that such lien is, whenever occasion arises, asserted and enjoyed by the banker without objection from the customer.

A *banker* is one who deals in *money*, and carries on his business at some financial centre. Merchants require the aid of a person who will keep their money in safety while it is awaiting employment, and perhaps pay an interest on it; or lend money to them when needed, or procure loans from others. The banker serves all these purposes. He is the treasurer and the financial agent of his customer.

While the banker may have several accounts with his customer, the *general* or *drawing* account relates solely to *deposits of money* on one side, and *drafts of money* on the other, or their equivalents. Whenever in the course of the transactions, of whatever character, a debt becomes due *to* the customer, the amount is passed to his credit in this general account; and whenever, on the other hand, a debt becomes due *from* him it is passed to his debit in the same account. The *balance* of that account represents a *present debt* due and owing to the customer or the banker, as the case may be. The conditions of the business, the frequent occasions which

the customer has to suddenly call for money, the possibility that discounted bills or notes will be returned unpaid, the necessity of maintaining confidence and credit with the banker so that he may not hesitate in furnishing discounts or paying an occasional over-draft, all lead to the common practice on the part of customers of keeping securities of various kinds with their bankers, which may serve any purpose which the exigencies of business may require. Collateral which has been furnished for loans or discounts is allowed to remain after the loans have been paid; uncollected paper, bonds, stocks and other securities, and sometimes other valuables are left in the possession of the banker.

Inasmuch as in the vast majority of cases such securities and property of the customer found in the possession of the banker have been delivered to or left with him for no other purpose than to secure him generally against loss — the law justly assumes *in all cases* that this is the purpose for which they have been so delivered or left. At the same time it recognizes the fact that the purpose may have been different; and hence the rule defines the banker's lien as a lien on all securities in his possession for the payment of the *balance* of his account, *unless* it appear that the securities were deposited or left for a purpose *inconsistent with such lien.* It should be clearly understood that this lien is not one for *debts and liabilities generally*, but only for the *balance* of the general or drawing account.

These considerations leave no doubt respecting the existence of this lien upon the securities in the hands of the appellee Fry. The relations between his assignors, Schuchardt & Sons, and Cavaroc & Son, were a typical instance of those usually existing between banker and customer. It was open to the complainants, and to the assignees of Cavaroc & Son, to prove that the bonds were held by Schuchardt & Sons for a purpose or under a contract *inconsistent* with the alleged lien. An attempt in this direction was made, but it was quite unsuccessful.

It would be to no purpose for the appellants to urge that a demand was made upon Schuchardt & Sons at the time of the

bankruptcy and that *at that time* there was no adverse balance against Cavaroc & Son, and that Schuchardt & Sons could not retain the bonds as security for a debt not then matured. This suggestion overlooks the material circumstance of the intervening bankruptcy. In the view of a court of equity the occurrence of insolvency which made it impossible that the credit side of the account with Cavaroc & Son should be improved, is a sufficient reason for imposing a stoppage at that point and declaring that the *real* balance is that which it must inevitably turn out to be.

Different views have been expressed by courts as to whether a party owing a debt presently due to an insolvent could *set off* against it, even in equity, a debt not yet due from the insolvent to him. But surely there would seem to be no just ground for doubt that in such cases the party to whom the debt is not due so that it can be set off is entitled to hold as a security where his debtor is insolvent what he might hold as security if the debt were due. 1 Jones on Liens, § 246; *Ford* v. *Thornton*, 3 Leigh, 695; *Fourth Nat. Bank* v. *City Nat. Bank*, 68 Illinois, 398; *Rothschild* v. *Mack*, 42 Hun, 72; 2 Story Eq. Jur., §§ 1431–1444.

II. But Schuchardt & Sons had a direct lien upon the bonds in question to secure the new liabilities incurred by them for Cavaroc & Son, and which, not matured at the time of the bankruptcy of the latter, created subsequently, when mature, the adverse balance of account. Schuchardt and Sons had incurred these heavy liabilities with no security whatever, unless these bonds were such, beyond the personal credit of Cavaroc & Son. The question therefore is, was it or not the understanding between Caravoc & Son and Schuchardt & Sons that for any advances of money which the latter might make to the former, and liabilities incurred in the negotiation of drafts not drawn against merchandise, the bonds in question were to stand as security. Taking into consideration the facts already noticed, this question answers itself. Such must have been the understanding.

There are two general forms of financial transactions which are common between a banker and his customers, both of

which are illustrated by the dealings between Schuchardt & Sons and Cavaroc & Son, and also between the former and the National Banking Association. The one consists in the receipt of financial paper, notes, bills, &c., for collection, discount or negotiation, and results in a legitimate credit to the customer of the amount *advanced in anticipation* of the collections, or of the amount of the *proceeds* of an actual discount or sale. For this form of business no other security is required than the paper received.

The other form consists of drafts *unaccompanied by any such securities*, and without any balance in favor of the customer arising out of prior transactions. Drafts of this latter character are of course not legitimate, unless in consequence of some agreement giving permission so to draw, and such agreement is not given without security that the sums paid out upon such drafts will be repaid. If securities are lodged with the banker to secure him for such advances the lien acquired is something more than the ordinary banker's lien for his balance.

We shall presently see, in the discussion of the lien for the debt due from the National Banking Association, that these *extraordinary* drafts unaccompanied with financial paper qualifying them, and without a balance to draw against, are discredited as drawings "*à découvert*," the substance of the meaning of which phrase is a drawing of money when there is no balance to draw against. Such a drawing to the extent of $100,000 by the National Banking Association was authorized upon the special agreement that the bonds should stand as collateral security. There are quite sufficient grounds for the implication that there was a like agreement, although the amount for which the drawing should be permitted is not indicated, in relation to drafts of this character by Cavaroc & Son.

If, therefore, the ultimate debt to Schuchardt & Sons was created by drafts drawn upon the *latter* of the *à découvert* character above described, the bonds would stand as security for it until it was finally *paid*. The subsequent transmission of foreign bills subsequently dishonored would not pay it and release the security; even if Schuchardt & Sons had negotiated the bills, they would be obliged, having indorsed them, to take

them up. But if the debt was created by naked drafts drawn upon *other parties* by Cavaroc & Son, and cashed by way of discount or otherwise by Schuchardt & Sons, the substance of the transaction would still be the making of a loan to Cavaroc & Son upon the security of the bonds.

III. The questions most seriously contested in the court below were those relating to the further lien asserted by the defendant Fry, as assignee, upon the same bonds for the debt due to Schuchardt & Sons from the New Orleans National Banking Association and the extent or magnitude of it. The facts proved clearly establish the *existence* of the lien.

That it was the intention and agreement of Cavaroc & Son to pledge the bonds to secure *some* obligation of the Banking Association to Schuchardt & Sons is not questioned. The written documents are conclusive upon that point.

To arrive at a just understanding of the real contract of hypothecation, the correspondence which created it should be read in the light of the business and circumstances out of which it arose. It will then clearly appear that the pledge was made to secure to Schuchardt & Sons the payment of any *balance of account* which might arise against the Banking Association in consequence of the payment of drafts drawn by it upon the former when it had no right to draw.

The precise terms of the pledge are stated in the letter of Cavaroc, Sen., of February 15th, 1873, and by this the bonds are to be held as collateral security "*en cas de découvert*," and the object declared by the correspondence, to gain which the pledge was made, was to obtain for the Banking Association the privilege of drawing "*à découvert.*" The literal meaning of these expressions shows that the real intent of the pledge was to secure the payment by the Banking Association of any adverse balance of accounts created by its overdrafts; that is, by drawing when it had no balance to draw against. The phrase "*à découvert*" is, according to the best authorities, a commercial one used in relation to *accounts*, and means an *overdrawn* account. *To draw*, therefore, "*à découvert*," which was the privilege sought and gained by the pledge, is to draw when there is no balance to draw against. The substantive

"*découvert*" means an *uncovered balance of account*, which is, of course, an adverse balance of account. There seems to be no support for the effort of the appellants to limit a drawing "*à découvert*" to the case of a draft unaccompanied by a merchandise bill. If the Banking Association should draw such a draft, and yet had at the time a balance in its favor equal to the amount of the draft the drawing would surely not be "*à découvert;*" but a draft drawn without an existing balance, and which would therefore be "*à découvert*" considered by itself, would, if accompanied by a merchandise bill, cease to be "*à découvert.*" But this would be for the reason that the bill would instantly create a balance in favor of the Banking Association on the general account.

The conclusion is that the pledge was designed to secure the payment of any *balance of account* created by drafts drawn by the Banking Association when it had no balance to draw against; in other words, *overdrafts.* This produced the "*cas de découvert*" against which the pledge was in terms made by Cavaroc's letter of February 15th, 1873.

IV. The total debt due from the National Banking Association to Schuchardt and Gebhardt, as proved in bankruptcy, amounted to $195,315.63, and upon this the appellant Fry, as assignee of that firm, received dividends amounting to 55 per cent from the bankrupt estate. It was insisted upon by the appellants that these dividends should have been apportioned, and a ratable part applied to diminish the debt secured by the pledge. The decree of the court below overruling this claim, and declaring the bonds subject to a lien for the payment of the residue of the debt remaining unpaid after the application of the entire amount of the dividends, was correct.

Subrogation, for that is the substance of the demand which is made by the appellants, is an equity to which the surety is entitled when he pays *the debt for which he became surety.* And, necessarily, in all cases where the right of subrogation would arise if the surety had first paid the debt, and the creditor had afterwards received moneys on account of it from the debtor, the moneys, if received by the creditor before payment by the surety, would go in exoneration of the latter.

Argument for Fry.

The *true description* of the debt for which the bonds were pledged is *that part of the indebtedness of the Banking Association created by its overdrafts which it might not pay.* In other words, as the learned judge in the court below described it, *the unpaid balance.* In case the bonds should pay the *whole* of this unpaid balance, then, indeed, and not until then, would Cavaroc & Son be entitled to be subrogated to Schuchardt & Sons, and to receive any further dividends which might come from the bankrupt estate. Such an engagement, by its very nature, supposes the right of the creditor to receive voluntary payments from the debtor without any exoneration of the surety, and enforced payments as well, for the guaranty applies only to the balance *after* such payments have credited.

There are various modes in which a surety may limit the extent of his liability. Sometimes what the person asked to give credit may desire is *security against ultimate loss;* and the surety may be willing to give him such security. If the dealings are likely to involve a large and *indefinite* liability, prudence dictates to the surety precaution, and he exercises this by limiting his liability, leaving the creditor to allow whatever indebtedness to arise he pleases. Both know that the surety can be called upon only for the specified amount, and both also know that the surety can claim nothing from the debtor's estate until the creditor is fully paid.

This latter form of engagement was evidently what the parties intended. The Banking Association wanted to draw *à découvert*, that is, to *overdraw.* Schuchardt & Sons proposed to give it the *right* to do so, provided security was given to them against ultimate loss. Cavaroc & Son were willing to secure them against such loss, but not to subject themselves to hazard beyond the sum of $100,000.

The authorities upon the question now under discussion are principally English. They proceed, it is believed, upon a full recognition of the above views. The following are the principal: *Ex parte Rushforth*, 10 Ves. 409; *Wright* v. *Morley*, 11 Ves. 12; *Ellis* v. *Emanuel*, L. R. 1 Ex. 157; *Ex parte Hope*, 3 M. DeG. & G. 720; *Midland Banking Co.* v. *Chambers*, 38 L. J. Ch. 478.

Citations for Fry.

Mr. Frederic R. Coudert (with whom was *Mr. Edgar A. Hutchins* on the brief) for Dumont. On the question of the meaning of the term *à découvert*, Mr. Coudert said:

Schuchardt & Sons, by their calling, were presumably judges of the paper in which they were dealing, and considered themselves, as their intention and state of mind is shown by the papers, covered when they received the remittances of drafts. Until drafts were remitted they were *à découvert;* that is, uncovered; the moment the drafts were received they ceased to be *à découvert*, and were covered.

Even if solvent firms afterward became insolvent, this could not change the character of the paper at the time, so far as the judgment of the parties was concerned. Schuchardt was as fully covered when he received the business paper which he had agreed to receive as though he had received any other form of merchandise or security.

Mr. Coudert then cited "from the most approved lexicographers of France" the several definitions of "*à découvert*," which are found in the statement, *ante*, 370, and said:

In the light of these concurring definitions, especially of the first cited (Larousse, Grand Dictionnaire Universel), is it not plain that Schuchardt & Sons were *à decouvert* only so long as they failed to receive the drafts upon the faith or the promise of which they made the advances? Surely they were secured for these advances, which were in fact not cash but simply acceptances, the moment the bills were sent them, which they had agreed to receive, to discount and to collect.

Mr. Coudert also cited *Grant* v. *Taylor*, 35 Superior Court (N. Y.) 338; *S. C.* 52 N. Y. 627; *Petrie* v. *Myers*, 54 How. Pr. (N. Y.) 513; *Duncan* v. *Brennan*, 83 N. Y. 487; *Wyckoff* v. *Anthony*, 9 Daly, 417; *Biebinger* v. *Continental Bank*, 99 U. S. 143; *In re Breslin*, 45 Hun, 210.

Mr. John M. Bowers, for Fry, cited: *Bank of Metropolis* v. *N. E. Bank*, 1 How. 234; *Falkland* v. *St. Nicholas B'k*, 84 N. Y. 145; *Bryce* v. *Brooks*, 26 Wend. 367; *Knapp* v. *Alvord*, 10 Paige, 205; *S. C.* 40 Am. Dec. 241; *Myer* v. *Jacobs*, 1 Daly (N. Y.) 32; *Nagle* v. *McFeeters*, 97 N. Y. 196; *Bell* v.

Bruen, 1 How. 169; *French* v. *Carhart*, 1 N. Y. 96; *Waldron* v. *Willard*, 17 N. Y. 466; *White's Bank* v. *Myles*, 73 N. Y. 335; *Coleman* v. *Beach*, 97 N. Y. 545; *Barney* v. *Worthington*, 37 N. Y. 112; *Hamilton* v. *Van Rensselaer*, 43 N. Y. 244, 245; *Douglass* v. *Reynolds*, 7 Pet. 113; *Lanusse* v. *Barker*, 3 Wheat. 101, 148 (note); *Lee* v. *Dick*, 10 Pet. 482; *Mauran* v. *Bullus*, 16 Pet. 528; *Noonan* v. *Bradley*, 9 Wall. 394; *Hooper* v. *Wells, Fargo & Co.*, 27 Cal. 11; *S. C.* 85 Am. Dec. 211; *St. Louis &c. Railway* v. *Smuck*, 49 Ind. 302; *Menzell* v. *Railway Co.*, 1 Dillon, 531; *Edsall* v. *Camden &c. Railroad Co.*, 50 N. Y. 661; *First National Bank* v. *Wood*, 71 N. Y. 405; *Ætna Life Insurance Co.* v. *Middleport*, 124 U. S. 534; *Foot* v. *Brown*, 2 McLean, 369; *Williams* v. *Sherman*, 7 Wend. 109; *Renns. Glass Factory* v. *Reid*, 5 Cowen, 587; *S. C.* 3 Cowen, 393; *Jarvis* v. *Rogers*, 13 Mass. 105; *Jarvis* v. *Rogers*, 15 Mass. 389; *Brainard* v. *Jones*, 18 N. Y. 35; *Schroeppell* v. *Shaw*, 3 N. Y. 446; *McKecknie* v. *Ward*, 58 N. Y. 541; *Clark* v. *Sickler*, 64 N. Y. 231; *Farwell* v. *Importers &c. National Bank*, 90 N. Y. 483, top page 490; *Gordon* v. *Lewis*, 2 Sumner, 143, 144; *Gibson* v. *Crehore*, 5 Pick. 146; *Jenkins* v. *Eldredge*, 3 Story, 325; *Hogan* v. *Stone*, 1 Alabama, 496; *S. C.* 35 Am. Dec. 39.

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

The Circuit Court held that Cavaroc & Son had pledged the bonds to Schuchardt & Sons as security for any unpaid balance of account due from the New Orleans Bank, with a limitation to $100,000 on the amount for which the bonds should be held liable. The unpaid balance was ultimately placed at $195,315.63. The larger part of this balance resulted from charging back the drafts on Seignouret Frères & Co., Honorat & Co., and Dutfoy & Co., which amounted, damages included, to over $180,000. The inquiry therefore presents itself, on this branch of the case, whether Schuchardt & Sons had a lien upon the bonds to secure these drafts in virtue of an agreement to that effect with Cavaroc & Son.

When Schuchardt & Sons, on the 9th of October, 1873, refused to deliver the bonds on the order of Cavaroc & Son, they placed their refusal upon the ground that "according to your written authority we hold New Orleans city bonds as collateral security against bank of New Orleans," and Wells, a member of the firm, testifies that the only written authority was the letter of Cavaroc of February 15, 1873. The letter thus appealed to as embodying the authority relied on must be examined in the light of the correspondence of which it forms so important a part. As early as December, 1871, Schuchardt & Sons had by letter authorized the bank to draw upon them "in advance of remittances to the extent of $100,000, (one hundred thousand dollars,) with the understanding that such drafts are to represent exchange bought and paid for," and in February, 1873, when the bank asked "are we still authorized to draw *à découvert*, $100,000, (one hundred thousand dollars,) against purchases of exchange advised by wire," the answer was, "the credit of $100,000, (one hundred thousand dollars,) *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled."

This assertion as to the deposit of bonds was denied by the cashier, and he then referred Schuchardt & Sons to a letter from the president, and that letter is the one in question. After quoting from Schuchardt's letter of February 11, their statement that the one hundred thousand dollar credit was predicated on the deposit of New Orleans city bonds, Cavaroc thus proceeds: "You know that exchange at New Orleans is purchased by making advances until the drafts are delivered, and it was in order to accelerate our transactions that we requested that credit of you at that time. In view of your suggestion, there is nothing to be said, except to authorize you, in case you are uncovered, to treat as collateral security a portion of the bonds in your possession belonging to my firm."[1] And

[1] "Vous savez que le change à New Orleans est acheté en faisant des avances jusqu'à ce que les traites soient livrées et c'est afin d'activer nos rapports que nous vous avions demandé à l'époque, ce découvert.

to this Schuchardt & Sons responded to the bank, that, "in accordance with the terms therein stated," (*i.e.*, in Cavaroc's letter,) the bank might value on them "'à découvert,' for a sum not exceeding as maximum $100,000 (one hundred thousand dollars) against exchange purchases." Thus the written authority relied on was in no respect different from the understanding in the beginning, as shown by the letter of 1871, that the drafts to be drawn by the bank on the Schuchardts were "to represent exchange bought and paid for," and the bonds were to be held under the letters of February, 1873, as collateral to advances by the Schuchardts before remittances of the exchange. And as late as September 19th, 1873, Wells wrote that Schuchardt & Sons still authorized the bank "to draw against purchases of exchange, and in advance of the remittances, to the extent of $100,000, on the conditions specified in the letter of Mr. Cavaroc of 15th February last."

"Exchange bought and paid for" meant bills drawn against shipments, and purchased by advances made to the shippers upon the strength of documents to be furnished by them with the bills, to repay the advances so made. It was to enable the bank to make such advances in New Orleans that Schuchardt & Sons on their part advanced to the bank, and, to assist the bank, Cavaroc & Son were willing to and did pledge the bonds as collateral, to a maximum of $100,000. The understanding was that the bonds should be held as collateral while Schuchardt & Sons were uncovered, that is to say, not covered by the remittance of exchange purchased, the bonds thus being used to bridge the interval between making the advances and the receipt of the drafts with bills of lading attached by Schuchardt & Sons.

The transactions between Schuchardt & Sons and the bank were very large, reaching, it is true, only about $700,000, during the month of September, but amounting to millions during the year; in fact, Wells testifies that sometimes the bank sent "over a million in one day."

"Devant votre observation, il n'y a rien à dire si ce n'est de vous autoriser à considérer comme sécurité collatérale une partie des 'bonds' que vous avez à ma maison, en cas de découvert."

The parties were dealing in exchange to their mutual profit, and all that Schuchardt & Sons stipulated for, and all that Cavaroc & Son agreed to, was that the bonds should be held as security while the merchandise was being purchased and shipped, and drafts against the shipments transmitted to Schuchardt & Sons in liquidation of their advances.

We do not understand that Schuchardt & Sons were doing business absolutely without risk, nor that Cavaroc & Son, in view of the course of business, were regarded as called upon to guarantee Schuchardt & Sons at all events. The latter had the drawers, the drawees, the indorsers and the merchandise itself to rely on, and there is nothing in the letters or the testimony to indicate that, in addition to all this, they demanded, as to such drafts, other security. If a draft had gone forward with bill of lading attached, and the drawees refused to receive the consignment and accept the draft, and were otherwise under no obligation to do so, and the proceeds of the shipment sold for less than the amount of the draft, or if the acceptors became insolvent and loss was thereby occasioned, Schuchardt & Sons, though they might, if such was the course of business, charge back the difference to the bank, could not, upon this evidence, claim that these bonds were security to make good a deficiency so created, and, even if they could, no such deficiency is shown to have occurred.

Upon what basis then can it be held that drafts drawn by the bank directly on Seignouret Frères & Co., Bordeaux, Honorat & Co., Marseilles, and Dutfoy & Co., Paris, "unaccompanied by documents," were secured by the bonds of Cavaroc & Son and Dumont & Co. by "written authority."

The drafts on Seignouret Frères & Co. appear to have been drawn September 17th, 1873, for, with damages, $56,410.26, but the dates of the other drafts are not given, and the account between the bank and Schuchardt & Sons, prior to the first of October, 1873, is not before us. The drafts on Dutfoy & Co., amounting, with damages, to $90,256.41, were protested November 29th, December 10th, 13th and 19th. The drafts on Honorat & Co. were protested October 28. No evidence is adduced on behalf of Schuchardt & Sons' trustee in bank-

ruptcy as to the length of time on which these drafts were drawn. We believe we are justified, then, in assuming that it was after the interview between Cavaroc, Jr., and Wells, placed by the latter as transpiring the last of August or first of September, when it was agreed that the amounts of business paper, that is, according to Wells, "bills of exchange drawn against shipments," which they would take, Schuchardt & Sons might limit, and the limitation was directly imposed of "not more than £10 | M per week on Hambro," and "not more than fr. 200 | M on first bankers of Paris;" and, further, that when the bank sent "the drafts of the bank on third parties (Havre, Bordeaux, Marseilles, etc., etc.) it must put in the hands of Messrs. C. C. & Son, in trust, a deposit of securities, there to remain until the acceptance or the payment, if we deem proper to await the payment." This was an arrangement made by Schuchardt & Sons and evidenced by a memorandum prepared, not by Cavaroc, but by Wells. It was not Cavaroc & Son, acting with reference to the bonds, who sought this agreement, but Schuchardt & Sons, acting for their own protection in reference to transactions other than those with which the bonds were connected. The drafts of the bank on third parties were not exchange bought and paid for, nor were drafts drawn by the bank on Schuchardt & Sons against these bills drawn by it directly on Europe, advances made by Schuchardt & Sons against "purchases of exchange advised by telegraph." Schuchardt & Sons could have had no expectation of receiving another set of bills drawn against shipments to repay advances made to the bank on these "clean" bills already in their hands. They must have relied, as to these bills, upon the credit of the bank, the indorsers and the drawees, and other securities deposited in the hands of Cavaroc & Son; and when Schuchardt, who appears to have been out of town, returned, and it was concluded to limit their operations, Wells writes to Cavaroc that they had "determined to request the bank to limit its exchange business with us to the forwarding of such drafts made by third parties as it shall deem proper to purchase." There is no intimation up to the 19th of September that Schuchardt & Sons regarded the

bonds as pledged for anything except the remittance of exchange created by drafts against shipments. The transactions in purchasing such exchange, and transactions in the way of accommodation to the bank, or of the purchase of its own drafts on Europe, were kept perfectly distinct, so far as appears. Cavaroc, Jr., testifies that in his interview with Wells, late in August or the first of September, when it was agreed that if the bank sent its own drafts there must be a deposit of securities to insure their acceptance or payment, no agreement was made, verbal or otherwise, in reference to these bonds, and nothing said about them, other than perhaps a casual remark. Wells does not deny this, although he says he feels "quite confident they were alluded to." But for a resolution purporting to have been passed by the directors of the bank on the 20th of September, there would be absolutely no evidence in this record that the bonds were to be or had ever been held as security for drafts by the bank directly. These bonds did not belong to the bank. They were largely owned by Dumont & Co. They had never been used except upon a direct order from Cavaroc & Son. A distinct agreement with the latter that they should be held for the debts of the bank must be shown in order to the maintenance of a lien upon them. The resolution does say that the bank, in order to secure its president against "any eventual loss" of the bonds "belonging to the firm of C. Cavaroc & Son, and actually pledged to F. Schuchardt & Sons, agents of the bank at New York, as collateral security for the payment of all foreign exchange bills sent them for negotiation, and by them indorsed," thereby authorizes him "to select as guarantee from the portfolio of the bank such papers as he may think proper, to the extent of (100,000) one hundred thousand dollars," and that statement may be inconsistent with the theory that all the bonds were pledged for was simply until remittances of exchange actually bought and paid for were made; but when we consider the circumstances under which Cavaroc was situated, that resolution, under which securities to the amount of $100,000 were to be put into his hands, which might be held to secure drafts drawn by the bank itself, in accordance with

the agreement with Schuchardt & Sons of the last of August or first of September, does not appear to us to overcome the written and other evidence as to the actual transaction.

There is no element of estoppel about it, and it is a mere question whether a resolution of that kind, passed when both Cavaroc & Son and the bank were on the brink of bankruptcy, should be taken as evidence of such cogency as to overthrow all the correspondence and testimony to the contrary. It may go to the credibility of Cavaroc, it is true. He may have told one story on the stand under oath, and may have told his directors another story in the bank, although it does not appear that he drew the resolution or was consulted as to the particular language in which it should be couched. The facts as we hold them to be were, that the bonds had been pledged, to the extent of $100,000, as collateral to the remittance of exchange, and that it had been agreed with Schuchardt & Sons, by Cavaroc, on behalf of the bank, that, in relation to drafts drawn by the bank directly, other securities should be put in the hands of Cavaroc & Son to secure such last-named drafts. Cavaroc therefore needed to have a resolution of the bank that he might take from its portfolio those additional securities, and the fact that the language of the resolution is broader than the terms of the pledge, or that it was inartificially drawn, or that it misrepresented the ownership of the bonds, does not entitle it to the weight attributed to it on the argument. As against third parties, the terms of a resolution of the directors of a national banking association, when the exigencies of a financial crisis are upon them, in the attempt to prefer one of the bank's officers, cannot properly be regarded as decisive upon the question of the facts actually existing in respect to such third parties in a given case, and Dumont & Co. and the general creditors of Cavaroc & Son ought not to be foreclosed by Cavaroc's presence when this resolution was passed. Besides, it is not inconsistent with the terms of the resolution, to confine the reference to foreign bills to all exchange actually purchased, in which view the resolution would simply assert that the pledge was designed to secure, not only the remittance, but the ultimate payment of such exchange,

but could not be stretched to cover "clean" bills drawn by the bank itself.

The learned judge of the Circuit Court says: "In short, it is evident from the relations of the parties, their course of business, the correspondence between them, and the construction placed upon the transactions by Cavaroc himself, that the bonds were pledged to secure Schuchardt & Sons for any overdrafts of the banking association, to the extent of $100,000, which might from time to time arise. Such overdrafts were the credit *à découvert* contemplated by the parties, and constitute the unpaid balance of account due from the banking association to Schuchardt & Sons."

The relations of the parties were that both were dealers in exchange and making money out of it. The course of business was, advances by the bank to shippers, advances by Schuchardt & Sons to the bank to enable it to make those advances to the shippers, the use of the money by the shippers in the purchase of merchandise, and the remittance of drafts drawn against shipments to Schuchardt & Sons, in return for their advances. The correspondence between the parties from the first limited the transactions with which the bonds were concerned to exchange actually bought and paid for. This was the construction placed upon those transactions by both of the parties, unless this resolution of the directors of the bank is to be held as conclusive to the contrary. The indebtedness of the bank was not the result of losses upon any drafts purchased in the regular course of business, but was the result of charging back unpaid drafts, which had been drawn by the bank directly upon parties in Europe, without any accompanying bills of lading. These drafts were discounted by Schuchardt & Sons, apparently in reliance not simply upon the credit of the bank and the credit of Cavaroc & Son, if they indorsed such drafts, but upon the deposit of securities, as against them, in the hands of Cavaroc & Son at New Orleans; and the evidence of Casey shows that Cavaroc did undertake to get and hold securities for Schuchardt & Sons, as against drafts so situated. And this explains the telegram of Schuchardt & Sons to Cavaroc & Son of October 9: "We insist on your delivering to Reynes the bills receivable held by you in trust."

This drawing by the bank directly on Europe was either a recent course of proceeding or it was not. If not, it is clear that the bonds had no relation to such prior action. If of recent occurrence, it is equally clear that it was independent of the regular dealings in exchange, in respect to which the bonds were held as security to the extent and under the circumstances defined in the correspondence.

As the bonds in large part did not belong to Cavaroc & Son, it is due to the latter to suppose that they had no intention of subjecting them to the risks now insisted upon; and the intimacy between Cavaroc & Son and Schuchardt & Sons, and the fact that the bonds were paid for by drafts on Dumont & Co., whose acceptances for a considerable part of the cost were held by Schuchardt & Sons, render the inference a not unreasonable one, that Schuchardt & Sons knew that Cavaroc & Son had peculiar reasons for not treating the bonds with the same freedom as other securities; and this is confirmed by their levy of an attachment against Dumont & Co. upon the bonds, as belonging in whole or in part to the latter.

We do not concur, therefore, in the view that Schuchardt & Sons had, by special agreement, a lien upon these bonds to secure the drafts drawn on Seignouret Frères & Co., Honorat & Co., and Dutfoy & Co.

The bonds were, however, pledged to secure the remittance by the bank of exchange actually bought and paid for. The letter of February 15th authorizes Schuchardt & Sons to treat "a portion" of the bonds as such security, to a maximum of one hundred thousand dollars, but what portion is not defined, and it is evident that Schuchardt & Sons considered all of them as so pledged. There is nothing unreasonable in this, for although the bonds had cost $189,360, yet in the fluctuations of the market all of them might not have represented a reliable guaranty for more than $100,000.

The answer of Fry sets up that they "were deposited with the said Frederick Schuchardt & Sons, as security for any indebtedness or balances of account which at any time might or could arise in the course of their aforesaid dealings in their

aforesaid character with the said Charles Cavaroc & Son and the said New Orleans Banking Association."

The decree adjudges that Schuchardt & Sons had a lien upon the bonds for the balance of the account of Cavaroc & Son with them, and "also" that they held them, to the extent of one hundred thousand dollars, "by virtue of a pledge or hypothecation" to secure the indebtedness of the bank.

The Circuit Court said, (13 Fed. Rep. 428:) "The bonds having been left by Cavaroc & Son with Schuchardt & Sons, without any special agreement, except the pledge of a portion of them for the New Orleans Banking Association, those not thus pledged are subject to the banker's lien of Schuchardt & Sons." And again, (18 Fed. Rep. 578:) "The terms of the pledge were that the bonds then in the possession of the Schuchardts should be held by them as security for any advance or overdraft which might ultimately exist in the dealings of the parties, to the extent of $100,000."

But if the bonds were liable by express contract for the obligations of the bank, could they also be made to respond to the indebtedness of Cavaroc & Son, in the absence of express agreement, by force of a lien implied from the usage of the business?

In our judgment, the bonds, being in effect all pledged to guarantee the remittance by the bank of exchange purchased, could not be held by implication as security for the indebtedness of Cavaroc & Son on a balance of account. The specific pledge withdrew them from the operation of the alleged banker's lien, for it was inconsistent with the presumed intention of the parties. And, applying the principles upon which such a lien rests, it is doubtful whether it ever existed in favor of Schuchardt & Sons. Undoubtedly while "a general lien for a balance of accounts is founded on custom, and is not favored, and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it," and "general liens are looked at with jealousy, because they encroach upon the common law, and disturb the equal distribution of the debtor's estate among his creditors," (2 Kent Com. *636,) yet a general lien does arise in favor

of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien. *Brandaõ* v. *Barnett* (Common Pleas), 1 Man. & Gr. 908; *S. C.* (Exch. Chamb. In error), 6 Man. & Gr. 630; *S. C.* (House of Lords), 3 C. B. 519, 532 and also 12 Cl. & Fin. 787, 806; *Bock* v. *Gorissen*, 2 De G., F. & J. 434, 443. In this latter case the foreign correspondents of a London firm directed the firm to purchase for them Mexican bonds to a specified amount at a specified price, and to hold the bonds at the disposal of the correspondents. The London firm made the purchase and wrote the correspondents that they would, until further order, retain the bonds for safe custody, and it was held that the letters constituted a special contract sufficient to exclude a general lien on the part of the London firm, if they would otherwise have been entitled to any.

It was held in *In re Medewe*, 26 Beavan, 588, that where a customer's security was specifically stated to be "for the amount which shall or may be found due on the balance of his account" it could not be held for a subsequent floating balance, but only for the then existing balance; and in *Vanderzee* v. *Willis*, 3 Bro. Ch. 21, that a security specifically given for a contemporaneous advance of £1000 by the banker was not applicable against an independent indebtedness of £500 afterwards arising upon an ordinary running account.

A bankers' lien, said Mr. Justice Matthews, speaking for the court in *National Bank* v. *Insurance Co.*, 104 U. S. 54, 71, "ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion."

In *Bank of the Metropolis* v. *New England Bank*, 1 How. 234, 239, Mr. Chief Justice Taney, in delivering the opinion, referring to the general principle that a banker who has advanced money to another has a lien on all paper securities in his hands for the amount of his general balance, says: "We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."

"Here, then," said Caton, J., in *Russell* v. *Hadduck*, 3 Gilman, 233, 238, "is the true principle upon which this, as well as all other bankers' liens, must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or in expectancy." *Fourth National Bank* v. *City National Bank*, 68 Illinois, 398.

In *Duncan* v. *Brennan*, 83 N. Y. 487, 491, the language of the court is: "The general lien which bankers hold upon bills, notes, and other securities deposited with them for a balance due on general account, cannot, we think, exist where the pledge of property is for a specific sum and not a general pledge;" and in *Neponset Bank* v. *Leland*, 5 Met. 259: "The notes were deposited under special circumstances; they were not pledged generally, but specifically; and this negatives any inference of any general lien, if, in the absence of such special agreement, the law would imply one;" and in *Wyckoff* v. *Anthony*, 90 N. Y. 442, that "where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance or for the payment of other claims." See also *Masonic Savings Bank* v. *Bang's Administrator*, 84 Kentucky, 135; *Bank of the United States* v. *Macalester*, 9 Penn. St. 475; *Hathaway* v. *Fall River Nat. Bank*, 131 Mass. 14. The facts in *Biebinger* v. *Continental Bank*, 99 U. S. 143, were that a customer of a bank had deposited with it, as collateral security for his current indebtedness on discounts, a note secured by mortgage, which he withdrew for foreclosure, at the sale under which he

purchased the property, and left the deed he received with the bank at its request. His indebtedness to the bank was then fully paid, but after a temporary suspension of his dealings he again incurred debts to it. It was held that as it did not appear that money was loaned or debt created on the faith of possession of the deed, the bank could not claim against the debtor's assignee an equitable mortgage by the deposit of the conveyance. There are instances of an express pledge of securities for a specific loan, where the surplus realized from them has been directed to be applied to satisfy a general debt, *In re General Provident Assurance Company, ex parte National Bank*, L. R. 14 Eq. 507; but there is no pretence in the case at bar of any ground for the application of the principle of tacking.

Subjected to the test of these well-settled rules, the facts do not admit of serious doubt as to the correct result.

The bonds were not lodged in the hands of the Schuchardts in the ordinary course of banking business. They were sent to New York for a specific purpose, and, when that purpose was accomplished, permitted to remain for "safe-keeping," and because New York was a better market than New Orleans, and the express charges for their return very heavy, as is said on one side; and for convenience in procuring loans as is asserted on the other. But the loans made were always specific loans, and the bonds were always otherwise subject to Cavaroc & Son's call; and when the Schuchardts themselves loaned, as they did once or twice, it was upon an express pledge of a designated number of the bonds as security. Cavaroc & Son were bankers as well as Schuchardt & Sons, and the latter appear to have reposed implicit confidence in them, yet there is no satisfactory evidence that they extended to Cavaroc & Son any special indulgence in the way of general accommodation. Their cashier thinks he can specify a case in which the bills of exchange sent by Cavaroc to Schuchardt were not accompanied by bills of lading, but he does not do so, and the acceptances of Dumont & Co. were on account of the purchase price of the bonds. If, as argued by counsel, there is a presumption, as between customer and banker, that the secur-

ities or property of the customer, found in the possession of the banker, have been left with him to secure him generally against loss, this is not an irrebuttable presumption, and each case stands upon its own circumstances.

And, since Schuchardt & Sons did not claim at the time of the failure that they had a general lien, but simply that they held the bonds by "written authority," "as collateral security against the bank of New Orleans," we can arrive at no other conclusion than that Schuchardt & Sons were not entitled to maintain a bankers' lien against the bonds, for the ultimate debit balance of Cavaroc & Son.

We are asked to dispose of the case adversely to appellants upon the ground that they received the remaining bonds and money after the liens decreed in Fry's favor were satisfied; but such receipt does not oust the jurisdiction. The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled. *Embry* v. *Palmer*, 107 U. S. 3, 8. Nor can the objection be sustained that there was an absence of jurisdiction in equity because of the adequacy of the remedy at law. The Schuchardts had collected many thousands of dollars on coupons cut from the bonds after October 4, 1873, and before their own failure. Fry, their assignee, had made similar collections. Fry claimed to hold the moneys and the bonds to secure a balance of account due to the Schuchardts from the Cavarocs, and also as collateral to the indebtedness of the New Orleans Bank. Dumont & Co. claimed a large part of the bonds as against the general creditors of the Cavarocs and as against Schuchardt & Sons, and Cavaroc's general creditors claimed the residuum. As to the amount due to Fry, controversy over some thousands of pounds in the Union Bank of London was involved. An accounting was necessary between the parties, and a multiplicity of suits was inevitable, unless the determination of the conflicting rights set up could be arrived at in a proceeding in equity. And, in addition to these considerations, we think we ought not to regard with

favor the raising of this objection, for the first time, at this stage of the cause.

The rule as stated in 1 Daniell's Chancery Practice, 555, 4th Am. ed., is, that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defence at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that "if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification, that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter."

In *Wylie* v. *Coxe*, 15 How. 415, 420, it is said: "The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill."

It was held in *Lewis* v. *Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs* v. *Spain*, 15 Wall. 211. The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken *in limine*, it might have been worthy of attention.

The decrees are reversed at the cost of Fry, trustee, in this and the Circuit Court, and the cause remanded for further proceedings in conformity with this opinion.

GIBBS *v.* CONSOLIDATED GAS COMPANY OF BALTIMORE.

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

No. 220. Argued March 19, 20, 1889. — Decided April 15, 1889.

Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character, that restraint to any extent will be prejudicial to the public interest.

But where the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained.

A corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests.

Where particular contracts are inhibited by statute, and if attempted, are in positive terms declared "utterly null and void," such contracts will not be enforced.

Recovery cannot be had for services rendered, or losses incurred, in securing the execution of an illegal agreement, by a party privy to the unlawful design.

THE case, as stated by the court in its opinion, was as follows:

Plaintiff in error brought this action in the Circuit Court of the United States for the District of Maryland against the defendant in error, "a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff," as stated in the "bill of particulars of plaintiff's claim," "for services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas-Light Co. of Balto. City, between July 1st, 1884, and November 1st, 1884, $50,000;" and a trial was had upon the general issue pleaded, resulting in verdict and judgment for the defendant, May 14, 1885.

From the bill of exceptions it appears that: "At the trial of this case, the incorporation of the defendant being admitted,

the plaintiff, to maintain the issues upon his part joined, gave in evidence the agreement following between said defendant and the Equitable Gas-Light Company of Baltimore City, a Maryland corporation — that is to say:

"'AGREEMENT.

"'This agreement made this seventh day of October, eighteen hundred and eighty-four, between the Equitable Gas-Light Company of Baltimore City, a corporation duly organized under the laws of the State of Maryland, party of the first part, and the Consolidated Gas Company of Baltimore City, a corporation duly organized under the laws of the same State, party of the second part. Whereas the parties hereto conduct the business of making and selling gas in the city of Baltimore, Maryland, and for some time past have been drawn into active competition, resulting in a loss of profits to each company, as well as large expenses and great annoyance; and whereas each party hereto desires to enter into an arrangement with the other, whereby the business of each may be conducted in a more profitable manner than at present:

"'Now, therefore, in consideration of the premises and of the mutuality hereof, it is hereby agreed between said parties as follows, viz.:

"'1. Gas shall be sold by each company at a rate of one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet to consumers for payment within seven days from date of rendering bill, unless the rate shall be changed by mutual agreement of the parties hereto in writing; but in view of the much larger interest of the party of the second part in the subject-matter of this contract, it is agreed that in case of competition on the part of any other gas company the said party of the second part shall have the right at its discretion to reduce the rate at which gas shall be sold by either or both of the parties hereto, and shall have the right at its discretion to fix and change said price at which gas shall be sold by either or both of the parties hereto, from time to time so long as such competition shall continue: *Provided*, That said price shall not be placed at less than one

dollar ($1.00) per thousand feet without the mutual consent of the parties hereto in writing. The introduction of gas from the street main to the inside of the building to be lighted will in all cases be done by the companies, for which the proprietor of the building or the person applying for the supply of gas will be required to pay in advance the sum of eight dollars ($8.00) to cover the expenses of tapping main, laying service pipe, setting meter and its connection to the building line. An extra charge will be made where the building is set back from the building line.

"'2. Each party hereto shall deduct from its receipts and retain the sum of one dollar for every thousand feet of gas sold by it as a basis of cost to cover all expenses of the business of each.

"'3. All extensions of mains, including services and meters on said extensions, and all enlargement of the capacity of the works necessary to do the increasing business during the continuance of this agreement, shall be made by the Consolidated Gas Company of Baltimore City at its own cost and expense, whose property such enlargements and extensions shall be, the Equitable Company only being required to provide the meters and services necessary to supply such additional consumers as may be furnished by it under § 5, below.

"'4. Division of receipts shall be made as follows, viz.:

"'1. All receipts (over and above the sum of one dollar per thousand feet allowed as a basis of cost) from gas sold each year upon sales not exceeding the total quantity of gas sold by both of said companies during the year ending October first, eighteen hundred and eighty-four, shall be divided between the parties hereto in the following proportions, viz.: The party of the first part shall receive such a proportion of the same as the amount of gas sold by it during the year ending October first, eighteen hundred and eighty-four, shall bear to the total quantity of gas sold by both of the parties hereto during that period, provided the quantity sold by the party hereto of the first part during said period shall not exceed two hundred and thirteen millions of feet (213,000,000), and the party of the second part shall receive all the balance after deducting the amount to

which the party of the first part shall be entitled, as above provided, it being expressly understood and agreed that the basis of participation in said receipts shall be the proportion which the quantity of gas sold by each party from October first, eighteen hundred and eighty-three, to October first, eighteen hundred and eighty-four, bears to the total quantity of gas sold by both parties hereto, and that neither party hereto shall receive more thereof than by such a basis of division it would be entitled to, subject, however, to the foregoing provision that the quantity sold by the party of the first part during the said year ending October first, eighteen hundred and eighty-four, shall not be considered as exceeding two hundred and thirteen millions (213,000,000) of feet as aforesaid.

"'2. All receipts (over and above the said allowance of one dollar per thousand feet as a basis of cost) from gas sold each year upon sales in excess of the said total quantity sold during the year ending October first, eighteen hundred and eighty-four, shall be divided as follows, viz.: The party of the first part shall receive thereout a percentage equal to one-half of the percentage which it will receive as above, and the party of the second part shall receive all the balance of such receipts from said increased sales.

"'5. Neither party hereto shall solicit any business belonging to the other, but either party may take such consumers of the other as may voluntarily, without any solicitation, desire to change from one to the other.

"'6. All the accounts between the parties hereto hereunder shall be adjusted quarterly on the tenth days of February, May, August, and November of each year for the quarter ending on the last day of December, March, June, and September, and settlements of all balances shall be made within ten days thereafter. The said adjustment of accounts shall be made by an auditor, who shall be chosen by the agreement of both parties hereto.

"'7. If any differences or misunderstanding arise hereunder, the matter in dispute shall be referred for decision to three arbiters, whose decision shall be binding upon the parties hereto, so far as in law it may have binding force and effect.

Said arbiters shall be chosen as follows, viz.: One shall be chosen by each party hereto and the third by the two so chosen: *Provided*, That if either party hereto neglects or refuses for ten days after request, in writing, mailed or personally delivered, to appoint an arbiter, the party making such request shall appoint two arbiters, who shall appoint a third, as above provided.

"'8. It is further understood and agreed that if either party hereto shall at any time wilfully fail, omit, or neglect to perform or shall violate any of the covenants herein contained, such party shall be liable to the other for all loss and damage caused to or suffered by it thereby, and that the damages which shall be caused thereby will be equal to the sum of two hundred and fifty thousand dollars ($250,000), and that the party who shall so fail, neglect, or omit to perform, or who shall violate any of the covenants herein contained, shall at once thereupon pay to the other party the sum of two hundred and fifty thousand dollars as liquidated damages, and that upon failure to pay the same upon demand suit may be brought therefor, in which the damages so caused or suffered shall be assessed at said sum of two hundred and fifty thousand dollars.

"'9. This agreement shall take effect from October fifteenth, eighteen hundred and eighty-four, and shall continue in force for thirty years from its date.'

[Duly signed and sealed October 7th, 1884.]

"The plaintiff then proved the incorporation of the United Gas Improvement Company, a corporation incorporated by and doing business in the State of Pennsylvania.

"The plaintiff further proved that, at the time of the agreement aforesaid, he was the general manager of the said United Gas Improvement Company, and the business of the said corporation was the owning, improving, leasing, and manipulation of gas property throughout the country, said company being the owner of many gas-works in various parts of the Union, and constantly in negotiation for the sale and purchase of that kind of property.

"He further proved that, by reason of the rivalry in the city of Baltimore between the defendant and the Equitable

Statement of the Case.

Gas-Light Company aforesaid, the price of gas had been reduced to a figure below that at which it could be profitably manufactured, and that the company of which the plaintiff was manager, as well as other gas companies throughout the country, had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore. It became, therefore, the interest of the plaintiff and his company that the conflict in Baltimore should, if possible, be brought to an amicable termination, and the plaintiff made a suggestion to that effect to the president of the Equitable Gas-Light Company, and in consequence thereof was employed by that company to bring about a settlement, if possible, with the defendant. For this purpose the plaintiff visited Baltimore and opened negotiations with the defendant, which were carried on for some time by proposition and counter-proposition, and resulted, finally, in the agreement heretofore inserted in this bill of exceptions.

"The plaintiff gave further evidence tending to show that early in those negotiations he informed the defendant, through the committee representing it, that he was employed and would be paid by the Equitable Gas-Light Company if he made an arrangement satisfactory to that company, and that if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise.

"Further testimony in respect to the matter of his said negotiations and services and his claimed and expected compensation from the defendant was given by the plaintiff tending to support and establish the hypotheses of fact set up by the plaintiff in those regards in his prayers hereinafter to be inserted.

"The defendant then, to maintain the issues upon its part joined, gave in evidence the acts of the General Assembly of Maryland of 1867, chap. 132, and of 1882, chap. 337, both relating to the Equitable Gas-Light Company of Baltimore City, which it was agreed might be read in evidence, if necessary, from the statute-book, on the hearing in error.

Citations for Plaintiff in Error.

"The defendant further gave evidence tending to contradict the evidence on the part of the plaintiff in regard to what occurred between the plaintiff and the defendant's committee in respect to the negotiations aforementioned, and to the plaintiff's alleged demand for compensation from the defendant, and tending to disprove the facts assumed as the hypotheses of the plaintiff's prayers; and the defendant further gave evidence tending to establish and maintain the hypotheses of fact set up by the defendant in its prayers to the court, hereinafter to be inserted."

Various instructions were asked on behalf of each of the parties, which the court declined to give, but at defendant's request instructed the jury "that the plaintiff, upon the pleadings and evidence in this case, is not entitled to recover, because the contract offered in evidence, and for the procuring of the making whereof he claims compensation in this suit, was illegal and void."

Mr. S. T. Wallis, for plaintiff in error, cited: *Leslie* v. *Lorillard*, 110 N. Y. 519; *Kellogg* v. *Larkin*, 3 Chandler (Wisconsin), 133; *S. C.* 56 Am. Dec. 164; *Jencks* v. *Coleman*, 2 Sumner, 221; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353; *Palmer* v. *Stebbins*, 3 Pick. 188; *S. C.* 15 Am. Dec. 204; *Richardson* v. *Mellish*, 2 Bing. 229; *Davies* v. *Davies*, 36 Ch. D. 359; *Printing &c. Co.* v. *Sampson*, L. R. 19 Eq. 462; *Trust Estate of Woods*, 52 Maryland, 520; *Vidal* v. *Girard*, 2 How. 126, 197; *Richmond* v. *Dubuque &c. Railroad*, 26 Iowa, 191; *Swann* v. *Swann*, 21 Fed. Rep. 299; *Walsh* v. *Fussell*, 6 Bing. 163; *Hobbs* v. *McLean*, 117 U. S. 567; *United States* v. *Central Pacific Railroad*, 118 U. S. 235; *Baines* v. *Geary*, 35 Ch. D. 154; *Roussillon* v. *Roussillon*, 14 Ch. D. 351; *Provident Bank* v. *Marshall*, 40 Ch. D. 112; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Mogul Steamship Co.* v. *McGregor*, 21 Q. B. D. 544; *Hare* v. *London &c. Railway*, 2 Johns. & Hem. 80; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Booth* v. *Robinson*, 55 Maryland, 419; *Skrainka*

v. *Scharringhausen*, 8 Missouri App. 522; *Androscoggin & Kennebec Railroad* v. *Androscoggin Railroad*, 52 Maine, 417; *Hilton* v. *Eckersley*, 6 El. & Bl. 47; *Hornby* v. *Close*, L. R. 2 Q. B. 153; *Collins* v. *Locke*, 4 App. Cas. 674; *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83; *St. Louis* v. *St. Louis Gaslight Co.*, 5 Missouri App. 484; *Arnot* v. *Pittston &c. Coal Co.*, 68 N. Y. 558; *India Bagging Association* v. *Kock*, 14 La. Ann. 168; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Western Union Tel. Co.* v. *Burlington &c. Railway*, 3 McCrary, 130; *Cook* v. *Sherman*, 4 McCrary, 20.

Mr. R. D. Morrison and *Mr. N. P. Bond*, for defendant in error, cited: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Morris Run Coal Company* v. *Barclay Coal Company*, 68 Penn. St. 173; *Hartford & New Haven Railroad* v. *New York & New Haven Railroad*, 3 Robertson (N. Y.) 411; *Stanton* v. *Allen*, 5 Denio, 435; *S. C.* 49 Am. Dec. 382; *St. Louis* v. *St. Louis Gas Light Co.*, 5 Missouri App. 484; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *York & Maryland Line Railroad* v. *Winans*, 17 How. 30; *Sinking Fund Cases*, 99 U. S. 700; *Pennsylvania College Cases*, 13 Wall. 190; *Irwin* v. *Williar*, 110 U. S. 499; *Salt Lake City* v. *Hollister*, 118 U. S. 256; *National Bank* v. *Matthews*, 98 U. S. 621; *Harris* v. *Runnels*, 12 How. 79; *Craig* v. *Missouri*, 4 Pet. 410; *Bank of the United States* v. *Owens*, 2 Pet. 527; *Aubert* v. *Maze*, 2 Bos. & Pul. 374; *Watts* v. *Brooks*, 3 Ves. Jr. 612; *Webb* v. *Pritchett*, 1 Bos. & Pul. 264.

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

The plaintiff sought to recover compensation for services alleged to have been rendered by him to the defendant in securing the contract in question between the defendant and the Equitable Gas-Light Company of Baltimore. It is objected that the court erred in giving the instruction that the plaintiff was not entitled to recover, because it assumed a material fact

in dispute, which should have been left to the jury, namely, that it was "for the procuring of the making" of the contract offered in evidence that compensation was claimed. The record does not show that this objection to the instruction was taken in the court below, nor does it contain any evidence tending to establish that the plaintiff claimed compensation for anything else than for services in bringing about the agreement. Plaintiff's bill of particulars is for services "in negotiating and consummating an arrangement and settlement of differences" between the two gas companies, and he put the contract in evidence and adduced proof that he carried on negotiations, which "resulted finally" in the execution of it. He was general manager of a corporation engaged in the business of "the owning, improving, leasing and manipulation of gas property throughout the country," and as his company and other gas companies "had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore," he suggested "that the conflict in Baltimore should, if possible, be brought to an amicable termination," "and in consequence thereof" was employed by the Equitable Gas-Light Company "to bring about a settlement, if possible, with the defendant." The conflict referred to seems to have been the competition in the making and vending of gas in the city of Baltimore, which it had been the object of the General Assembly of Maryland to encourage, and the settlement to which he alludes was embodied in the contract in question, by which competition was to be destroyed and the object of the General Assembly defeated.

We do not feel called upon, under such circumstances, to reverse the judgment, upon the ground that the court assumed in the instruction a matter of fact which should have been left to the jury to determine.

According to the evidence given by the plaintiff, he informed the defendant "that he was employed and would be paid by the Equitable Gas-Light Company, if he made an arrangement satisfactory to that company, and that if he should be successful in bringing about a settlement satisfactory to the

defendant also, he should expect and claim to be compensated by the defendant likewise."

Since he had thus entered upon the enterprise under a specific agreement with the Equitable Gas Company, it is somewhat difficult to understand upon this record how, in carrying such an express contract out, he could impose the obligation on the defendant to pay him for doing so, upon a mere notification that he should expect from it compensation for the services he had expressly agreed to render the other company, because the result might be satisfactory to the defendant — a result necessarily to be assumed if any contract was arrived at. The defendant could not in that view be held to have laid by and accepted services which the plaintiff would otherwise not have been obliged to perform or could assert that he did perform only upon the expectation of being also paid by the defendant. The hypotheses of fact set up by the plaintiff in the instructions he asked, and which were refused, contain nothing in respect of which testimony tending to support and establish such hypotheses would add to the mere fact of the notification of plaintiff's expectation, and the evidence on defendant's part tended to show a denial of any obligation to pay. But apart from this, the real question submitted to us for decision is whether, even if there were no other objection to plaintiff's recovery, such recovery could be allowed in view of the nature of the alleged services.

In *Irwin* v. *Williar*, 110 U. S. 499, 510, it was held that where a contract, void on account of the illegal intent of the principal parties to it, had been negotiated by a person ignorant of such intent, and innocent of any violation of law, the latter might have a meritorious ground for the recovery of compensation for services and advances, but when such agent "is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." It is clear from the evidence adduced by the plaintiff that he falls within the category last described; and he makes profert of the fact that

the first suggestion in the line of manipulating the gas interests of Baltimore came from himself. Hence, if the contract he brought about was forbidden by statute, or by public policy, it is evident that he could not recover, and the judgment must be affirmed.

By this contract it is recited that active competition between the two companies had resulted in expense, annoyance and loss of profits, and it was therefore provided that the price of gas to consumers should be placed at one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet for payment within seven days, "unless the rate shall be changed by mutual agreement of the parties hereto in writing;" but as the defendant had much the larger interest, it might, in case of competition on the part of any other gas company, reduce the rate at which gas should be sold "by either or both of the parties hereto, from time to time so long as such competition shall continue," provided it should not be put at less than one dollar per thousand feet without the written consent of both parties; that the entire net receipts from the sale of gas should be pooled and divided between the companies in a fixed ratio without regard to the amount of gas actually supplied by either; that one of the companies should lay no more pipes or mains for the supply of gas in the city; that all future pipes or mains should be laid by and remain the property of the other company; and that either party which violated any of the covenants in the contract should pay to the other the sum of $250,000 as liquidated damages. It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed except that, in case of competition, the rate might be lowered by one, but not below a certain specified rate, without the consent of the other. And in the case in hand the Equitable Gas-Light Company was expressly forbidden to enter into such a contract. That company was incorporated by an act of the General Assembly of Maryland, passed March 6, 1867, with a capital of two millions of dollars, which might be increased to three millions, and with

authority to lay pipes along and under the streets, squares, lanes and alleys of the city of Baltimore, and to supply with light any dwelling house or other buildings or places whatever belonging to individuals or corporations, adjacent to any such street, square, lane or alley, and with 'all the rights and privileges granted to the Gas-Light Company of Baltimore, by the second, third, fourth and fifth sections of the ordinances of the mayor and city council of Baltimore, entitled an ordinance to provide for more effectually lighting the streets, squares, lanes and alleys of the city of Baltimore, approved June seventeenth, eighteen hundred and sixteen, and the act of assembly of December session, eighteen hundred and sixteen, chapter two hundred and fifty-one, so far as the same are not inconsistent with the provisions of this act, and the said company hereby incorporated shall be liable to all the duties, restrictions and penalties [provided] for in said sections of said ordinance and in said act of assembly." Laws of Maryland, 1867, pp. 207, 211, 212.

Reference to the act and ordinance of 1816, Maryland Laws, 1813–1817, c. 251, 1816; Ordinances, Baltimore, 1813–1822, p. 95, does not contribute to the argument here save as indicating the design of the General Assembly to give equal powers to a competing company. Said act of March 6, 1867, § 14, further provided that "the General Assembly hereby reserves the right to alter, amend, or repeal this act at pleasure." Laws of Maryland, 1867, 207, 214.

On the 3d of May, 1882, an act supplementary to the act incorporating the Equitable Gas-Light Company of Baltimore City was approved, (Laws of Maryland, 1882, 551, c. 337,) authorizing and empowering said company to manufacture and sell gas in Baltimore County as well as in Baltimore City, and to exercise all the powers and rights conferred upon it by the acts of assembly and any amendments thereto, including the right to lay all necessary and convenient pipes, etc., in the county as well as in the city, and the fourth section of this act was as follows:

"That the said company be, and hereby is, prohibited from entering into any consolidation, combinations, or contract with any other gas company whatever; and any attempt to

do so, or to make such combinations or contracts as herein prohibited, shall be utterly null and void."

In *Greenwood* v. *Freight Co.*, 105 U. S. 13, the right to repeal the charter of a street railroad company was sustained under a provision of the General Statutes of Massachusetts declaring "every act of incorporation passed after the 11th day of March, in the year 1831, shall be subject to amendment, alteration, or repeal at the pleasure of the legislature."

In *Close* v. *Greenwood Cemetery*, 107 U. S. 466, 476, it was said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Similar views were expressed in *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *County of Callaway* v. *Foster*, 93 U. S. 567, and other cases.

The consent of the corporation was not required to the operation of such a provision as that embodied in the fourth section of the act of 1882, but if acceptance were necessary, the exercise of corporate action by this gas company after the passage of the amendment was sufficient evidence of such acceptance.

The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Shepard* v. *Milwaukee Gas Co.*, 6 Wisconsin, 539; *Chicago Gas-Light & Coke Co.* v. *Peoples' Gas-Light & Coke Co.*, 121 Illinois, 530; *St. Louis* v. *St. Louis Gas-Light Co.*, 70 Missouri, 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, *Printing &c. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462, yet in the instance of business of such character that

it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c Gas Co.* v. *Peoples' Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Georgia, 160.

The decision in *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *S. C.* Smith's Leading Cases, 407, 7th Eng. Ed.; 8th Am. Ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

"Cases must be judged according to their circumstances," remarked Mr. Justice Bradley in *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in

order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn — or in evasion of — what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong, — are void." Bishop on Contracts, § 549; *Woodstock Iron Co.* v. *Richmond & Danville Extension Co.*, 129 U. S. 643, decided at this term, opinion by Mr. Justice Field; *Trist* v. *Child*, 21 Wall. 441; *Irwin* v. *Williar*, 110 U. S. 499; *Arnot* v. *Pittston &c. Coal Co.*, 68 N. Y. 558; *Central Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Woodruff* v. *Berry*, 40 Ark. 251, 261; *H. & N. H. Railroad* v. *N. Y. & N. H. Railroad*, 3 Robert. (N. Y.) 411; *Craft* v. *McConoughy*, 79 Ill. 346; *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Central Railroad* v. *Collins*, 40 Georgia, 582; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173.

It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

"Where," says Mr. Justice Miller, delivering the opinion of the court in *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by char-

ter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy."

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfil the public purposes to subserve which they were incorporated. At common law corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity generally of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the State as well as restrained the particular corporation.

The distinction between *malum in se* and *malum prohibi-*

tum has long since been exploded, and as "there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal," *Bank of United States* v. *Owens*, 2 Pet. 527, 539, it is clear that contracts in direct violation of statutes expressly forbidding their execution, cannot be enforced.

The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared "utterly null and void."

"The rule of law," said Parker, C. J., in *Russell* v. *DeGrand*, 15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain."

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be

Affirmed.

ROBERTSON *v.* SALOMON.

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

No. 446. Argued January 16, 1889. — Decided April 15, 1889.

In settling the meaning and application of tariff laws, the commercial designation of an article is the first and most important thing to be ascertained.

When the commercial designation of an article fails to give it its proper place in the classification of a tariff law, then resort must be had to its common designation.

In an action to recover back duties paid on an importation of white beans, which were classified at the Custom House as "vegetables," in the general category of "articles of food," it was error in the court to exclude evidence offered by the collector to prove the common designation of "beans" as "an article of food."

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Joseph H. Choate for defendants in error.

Mr. Henry Edwin Tremain and *Mr. Mason W. Tyler* were with *Mr. Choate* on his brief.

Mr. Justice Bradley delivered the opinion of the court.

This is an action brought by the defendants in error against the collector of New York, to recover an alleged excess of duties on goods imported. The goods referred to were white beans, upon which the collector levied a duty of twenty per cent *ad valorem*, as garden seeds. This charge was paid under protest; the plaintiffs insisting that the article was exempt from duty under the free list, as seeds "not otherwise provided for," or, if not free, they were only dutiable at ten per cent, as "*vegetables*." The Treasury Department finally conceded that the beans did not properly come under the denomination of "garden seeds," and directed ten per cent to be refunded; but still insisted that they are liable to a duty of ten per cent as "vegetables," in the general category of "articles of food." The plaintiffs adhere to their first position that beans are free of duty, as seeds "not otherwise provided for;" and that is the only question here presented.

The clauses of the law which are to be construed in determining the controversy are to be found in the last customs duties act, passed March 3, 1883, 22 Stat. 488, c. 121, as a substitute for Title XXXIII of the Revised Statutes. Among the various schedules attached to this act, classifying the articles subject to, or free from, import duties, is one entitled "Provisions," in which are enumerated, amongst other things, beef and pork, cheese, butter, lard, wheat, rye, barley, indian corn, oats, meal, flour, potato or corn starch, rice, hay, different kinds of fish, pickles, potatoes; *vegetables* in their natural state, or in salt or brine, not specifically enumerated or provided for in this act, vegetables prepared or preserved, currants, dates, fruits of various kinds, almonds, walnuts, peanuts, etc. Beans are not mentioned specifically in this list. If they are properly

classed under the term "vegetables in their natural state," they are subject to a duty of ten per cent, as contended for by the government.

Under the head of "Free List — Sundries," we find amongst a great number of other miscellaneous articles, the following: "Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and *seeds of all kinds*, except medicinal seeds, not specially enumerated or provided for in this act." If the white beans imported by the plaintiffs are properly to be classified as "seeds," then they are free from all duty, as claimed by the plaintiffs.

Schedule N, entitled "Sundries," contains a list of miscellaneous articles, (many of them articles of manufacture), subject to various rates of duty. The following is one of the items of this schedule: "Garden seeds, except seed of the sugar beet, 20 per cent *ad valorem*." If white beans are to be classed as "garden seeds" then the original decision of the collector was right. This decision, however, has been abandoned, and we think very properly. Although beans are often planted in gardens as seed, yet, as a product, and a commodity in the market, they are not generally denominated as "garden seeds," any more than potatoes, which are also sometimes planted as seed in gardens. The same consideration also applies in regard to the use of the more general term "seeds." We do not see why they should be classified as seeds any more than walnuts should be so classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance.

On the other hand, in speaking generally of provisions, beans may well be included under the term "vegetables." As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced. But on the trial, the parties deemed it important to introduce a great deal of testimony. The court, however, did not allow the defendant to prove the common

designation of beans as an article of food. It was shown by the evidence that beans are generally sold and dealt in, under the simple designation of "beans;" but that does not solve the question as between the rival designations of "seeds" and "vegetables." The common designation as used in every-day life, when beans are used as food, (which is the great purpose of their production,) would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted. In addition to this, the court told the jury that "the commercial designation of the article, or what the article is called in trade and commerce, or the name bean, has nothing to do with the question." We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. See *Arthur* v. *Lahey*, 96 U. S. 112, 118; *Barber* v. *Schell*, 107 U. S. 617, 623; *Worthington* v. *Abbott*, 124 U. S. 434, 436; *Arthur's Executors* v. *Butterfield*, 125 U. S. 70, 75. But if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred both in its charge and in the exclusion of the evidence offered; especially as, without any evidence, and with the common knowledge which we all possess, the court might almost have been justified in directing a verdict for the defendant.

We have not adverted to a clause of the customs act in which beans are specifically named, because we do not think it applies to the case. We refer to that clause of the free list which enumerates "drugs, barks, *beans*, berries, etc., any of the foregoing of which are not edible and are in a crude state." As this clause refers to articles "not edible," it cannot include beans of the character now under consideration.

Nor have we thought it necessary to refer particularly to the case of *Ferry* v. *Livingston*, 115 U. S. 542, in which the clauses of the law respecting "garden seeds" in Schedule N, and "seeds of all kinds" in the free list are elaborately dis-

cussed and commented on. There the question was between "garden seeds" and "field seeds," and the decision depended on the particular circumstances of the case. The opinion concludes with this declaration: "As this case rests for decision on the facts found, it is not possible for this court to lay down any general rules which will apply to cases differing in their facts from this case." We regard our present decision as in harmony with the decision in that case; and only refer to it for the purpose of disclaiming any intention to dissent from it.

The judgment of the Circuit Court is reversed, and the cause remanded with instructions to order a new trial.

FRIEDLANDER *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 236. Argued April 4, 5, 1889. — Decided April 15, 1889.

A bill of lading, fraudulently issued by the station agent of a railroad company without receiving the goods named in it for transportation, but in other respects according to the customary course of business, imposes no liability upon the company to an innocent holder who receives it without knowledge or notice of the fraud and for a valuable consideration: and this general rule is not affected in Texas by the statutes of that State.

THE court stated the case in its opinion as follows:

Friedlander & Co. brought suit in the District Court of Texas, in and for the county of Galveston, against the Texas and Pacific Railway Company, to recover for the non-delivery of certain cotton named in an alleged bill of lading hereinafter described, of which they claimed to be assignees for value, their petition after counting upon said bill of lading, thus continuing:

"That the said defendant, fraudulently contriving to avoid its liability to these plaintiffs, pretends and alleges that the said cotton was not so delivered as in and by said bill of lading is recited and acknowledged, but that the said bill of lading was

executed without the receipt by its said agent of any of said cotton, all of which said pretences on the part of the defendant, plaintiffs allege are untrue; but they say that even if it be true that no cotton was delivered to said defendant as in and by said bill of lading is recited and acknowledged, yet is the defendant estopped from setting up that fact in defence of plaintiffs' cause of action upon said bill of lading, because these plaintiffs say that the said bill of lading was executed in form negotiable and transferable by indorsement under the usage and customs of merchants, and that these plaintiffs, relying upon the validity of said bill of lading in all respects and upon the facts therein stated, that said cotton had been delivered to said defendant as aforesaid, and that defendant had contracted to carry and deliver said cotton as aforesaid, advanced to the said Joseph Lahnstein and paid out upon his order and at his request and in consideration of his said transfer of said bill of lading to these plaintiffs the sum of eight thousand dollars on, to wit, the 10th day of November, 1883, and that said payment was made and advanced upon the faith of the recitals and effect of said bill of lading as a contract to deliver the cotton therein mentioned as aforesaid, and that if the said cotton was never received by defendant, yet ought it to be held to the terms of the said bill of lading for the indemnification of these plaintiffs for said payment, with interest thereon from the date thereof, because of the fraud practised by the said agent upon these plaintiffs in the issuance of said bill of lading in the ordinary form and manner wherein he was authorized by the defendant to act, and defendants are estopped to deny that said cotton was received as against the claims of these plaintiffs for damages on account of defendant's failure to comply with said bill of lading to the extent of eight thousand dollars, with interest thereon, at the rate of 8 per cent per annum, from the date of payment thereof as aforesaid; and if it be true, as alleged, that defendant received said cotton in said bill of lading mentioned, then plaintiffs claim of defendant the full value thereof, to wit, the sum of fifteen thousand dollars, with interest thereon from and after the 6th day of December, 1883, when and before which time defend-

ant should have delivered said cotton under said bill of lading, according to the true intent and meaning thereof."

Defendant demurred, and also answered, denying "all and singular the allegations in the petition contained." The case was subsequently removed to the Circuit Court of the United States for the Eastern District of Texas, whereupon by leave the defendant amended its answer by adding these further averments:

"That one E. D. Easton, on the 6th of November, 1883, was the station agent of defendant at Sherman station, in Grayson County, Texas, on the Eastern Division of defendant's line in Texas, and that as such agent he was authorized to receive cotton and other freight for transportation and to execute bills of lading for such cotton and other freight by him received for the purpose of transportation by defendant.

"That on the said 6th day of November, 1883, the said Easton, combining and confederating with one Joseph Lahnstein, did fraudulently and collusively sign a certain bill of lading purporting to be his act as agent of defendant, whereby he falsely represented that defendant had received from the said Joseph Lahnstein two hundred bales of cotton in apparent good order, to be transported from Sherman to New Orleans, La., and did deliver the said false bill of lading to the said Joseph Lahnstein; and defendant says that in point of fact the said bill of lading was executed by the said Easton fraudulently and collusively with the said Lahnstein without receiving any cotton for transportation, such as was represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that the said pretended bill of lading was the one that is set out in the petition of the plaintiffs, and was false, fraudulent and fictitious, and was not executed by defendant nor by its authority, and that the said Easton only had authority as agent aforesaid to execute and deliver bills of lading for freights actually received by him for transportation."

The cause was submitted to the court for trial, a jury being waived, upon the following agreed statement of facts:

"1st. On November 16th, 1883, at Sherman station, in

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Grayson County, Texas, on the Eastern Division of the Texas and Pacific Railway Company, E. D. Easton, agent for the defendant at said station, executed as such agent a bill of lading, of which a copy is hereinafter given, and delivered the same to Joseph Lahnstein, the person named in said bill of lading.

"2d. That said Easton was at the time and place aforesaid the regularly authorized agent of the defendant for the purpose of receiving for shipment cotton and other freight for transportation by defendant over and along its line from Sherman station aforesaid, and that said bill of lading was in the usual form and made out upon the usual printed blanks in use by said defendant at said station, and that said Easton was authorized by said defendant to execute bills of lading for cotton and other freight by him received for the purpose of transportation by the defendant.

"3d. That the said Joseph Lahnstein indorsed said bill of lading by writing his name across the back thereof and drew a draft on the plaintiffs in this cause on or about November 6th, 1883 (of which draft a copy is hereinafter given), for the sum of eight thousand dollars, payable at sight to the order of Oliver & Griggs, and attached said draft to said bill of lading so indorsed, and on or about November 6th, 1883, forwarded the same through said Oliver & Griggs for presentation to and payment by the plaintiffs in this cause; that in due course of business Oliver & Griggs forwarded said draft, with bill of lading attached, to New Orleans, where the same was presented to and paid by plaintiffs on or about November 10th, 1883.

"4th. That in paying said draft said plaintiffs acted in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any knowledge of any fraud or misrepresentation connected with said bill of lading and draft, and with the full and honest belief that said bill of lading and draft were honestly and in good faith executed, and that the cotton mentioned in said bill of lading had been in fact received by said defendant as represented in said bill of lading.

"5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading, signed by the said Easton as agent aforesaid, for cotton shipped them by said Joseph Lahnstein, for sale by plaintiffs as commission merchants for account of said Joseph Lahnstein, and that the cotton so previously advanced upon was received by plaintiffs in the due course of transportation, pursuant to the terms of the bills of lading upon which they made advances respectively, and the bill of lading of November 6th, 1883, was the first received by plaintiffs from said Lahnstein and not fulfilled by defendant.

"6th. That, in point of fact, said bill of lading of November 6th, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that said Easton and said Lahnstein had fraudulently combined in one other case, whereby said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received, and which the said Easton had no expectation of receiving, the latter-named bill of lading having been given early in November, 1883, but that plaintiffs in this suit had no knowledge whatever of the facts stated in this (sixth) clause until after they had in good faith paid and advanced upon the bill of lading sued on and the draft thereto attached, to them presented as aforesaid, the sum of $8000.00, as hereinbefore stated.

"7th. That the cotton mentioned in said bill of lading, (of November 6th, 1883,) had the same been actually received by defendant and forwarded to plaintiffs, would have been worth largely more than the amount so advanced by said plaintiffs as aforesaid — that is to say, would have been worth about $10,000.00, and that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary and in the usual course of trade, and in accordance with the usage and customs of merchants and shippers and receivers of cotton.

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"8th. That on said November 6th, 1883, and long prior thereto and ever since, the headquarters and main offices of defendant were and have been connected by railroad and telegraph communication with all stations on defendant's railroad and with Sherman station aforesaid, among others.

"9th. That the defendant is a corporation created and existing and domiciled as alleged in the petition.

"10th. That on November 10th, 1883, said Joseph mentioned above was insolvent, and that he has been insolvent ever since and is so now."

Then follows bill of lading, indorsed by Lahnstein and with draft on Friedlander & Co. for $8000 attached, acknowledging the receipt from Joseph Lahnstein of "two hundred bales of cotton in apparent good order, marked and numbered as below, to be transported from Sherman to New Orleans, La., and delivered to the consignees or a connecting common carrier," and proceeding in the usual form, Lahnstein being named as consignee, and directions given, "Notify J. Friedlander & Co., New Orleans, La." The Circuit Court found for the defendant, and judgment was rendered accordingly, and writ of error thereupon brought to this court.

Upon the argument certain parts of the statutes of the State of Texas were cited, with especial reference to the provision as to common carriers, "that the trip or voyage shall be considered as having commenced from the time of the signing of bill of lading." Title 13, Carriers, c. 1, Art. 277; Art. 280; Art. 283, [Act February 4, 1860]; Title 84, Railroads, c. 10, Art. 4258 *b*, § 8, [Approved, April 10, 1883, General Laws, Texas, 1883, p. 69]. Sayles' Texas Civil Statutes, 1888, Vol. I, pp. 131, 134, 135; Vol. II, p. 450.

Mr. A. G. Safford, for plaintiffs in error, cited: *Martin* v. *Webb*, 110 U. S. 7; *Carr* v. *London and Northwestern Railway Co.*, L. R. 10 C. P. 307; *Bank of Batavia* v. *New York, Lake Erie &c. Railroad*, 106 N. Y. 195; *Cooper M'f'g Co.* v. *Ferguson*, 113 U. S. 727; *Bulger* v. *Roche*, 11 Pick. 36; *S. C.* 22 Am. Dec. 359; *United States* v. *State Bank*, 96 U. S. 30; *Pollard* v. *Vinton*, 105 U. S. 7; *Grant* v. *Norway*, 10 C. B. 665;

Citations for Defendant in Error.

Armour v. *Michigan Central Railroad*, 65 N. Y. 111; *Relyea* v. *New Haven Rolling Mill Co.*, 42 Connecticut, 579; *Brooke* v. *New York, Lake Erie &c. Railroad*, 108 Penn. St. 529; *Wichita Savings Bank* v. *Atchison, Topeka &c. Railroad*, 20 Kansas, 519; *Sioux City & Pacific Railroad* v. *Fremont Bank*, 10 Nebraska, 556; *St. Louis &c. Railroad* v. *Larned*, 103 Illinois, 293; *Wilkens* v. *Baltimore & Ohio Railroad*, 44 Maryland, 11; *Williams* v. *Wilmington & Weldon Railroad*, 93 North Carolina, 42; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Drew* v. *Kimball*, 43 N. H. 282; *S. C.* 80 Am. Dec. 163; *Bank* v. *Lanier*, 11 Wall. 369, 377; *Bridgeport Bank* v. *New York & New Haven Railroad*, 30 Connecticut, 231; *New York & New Haven Railroad* v. *Schuyler*, 34 N. Y. 30; *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616; *Sturges* v. *Bank of Circleville*, 11 Ohio St. 153; *S. C.* 78 Am. Dec. 296; *Cocheco National Bank* v. *Haskell*, 51 N. H. 116; *Rapp* v. *Latham*, 2 B. & Ald. 795; *Hume* v. *Bolland*, 2 Ryan & Moody, 371; *Beach* v. *State Bank*, 2 Indiana, 488; *Doremus* v. *McCormick*, 7 Gill, 49; *Sweet* v. *Bradley*, 24 Barb. 549; *Hawkins* v. *Appleby*, 2 Sandf. (N. Y.) 421; *Griswold* v. *Haven*, 25 N. Y. 595; *S. C.* 82 Am. Dec. 380; *French* v. *Rowe*, 15 Iowa, 563.

Mr. Winslow F. Pierce for defendant in error.

Mr. J. F. Dillon filed a brief for defendant in error, citing: *Lickbarrow* v. *Mason*, 2 T. R. 63; *Grant* v. *Norway*, 10 C. B. 665; *S. C.* 15 Jurist, 396; *S. C.* 2 Eng. L. & Eq. 337; *Hubbersty* v. *Ward*, 8 Exch. 330; *Brown* v. *Powell Duffryn Co.*, L. R. 10 C. P. 562; *The Freeman* v. *Buckingham*, 18 How. 182; *The Loon*, 7 Blatchford, 244; *Robinson* v. *Memphis & Charleston Railway*, 9 Fed. Rep. 129; *S. C.* 16 Fed. Rep. 57; *Pollard* v. *Vinton*, 105 U. S. 7; *Sears* v. *Wingate*, 3 Allen, 103; *Baltimore & Ohio Railroad* v. *Wilkens*, 44 Maryland, 11; *Hunt* v. *Mississippi Central Railroad*, 29 La. Ann. 446; *Louisiana Bank* v. *Laveille*, 52 Missouri, 380; *Williams* v. *Wilmington & Weldon Railroad*, 93 North Carolina, 42; *Chandler* v. *Sprague*, 5 Met. 306; *S. C.* 38 Am. Dec. 404, and note, page 407; *Cox* v. *Bruce*, 18 Q. B. D. 147; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Knight*, 122 U. S. 79; *Walker* v.

Brewer, 11 Mass. 99; *Miller* v. *Hannibal & St. Joseph Railroad*, 90 N. Y. 430.

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

The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading" cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by any-

thing short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bonâ fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 563; *Pollard* v. *Vinton*, 105 U. S. 7, 8; *Gurney* v. *Behrend*, 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman* v. *Buckingham*, 18 How. 182, 191; *The Lady Franklin*, 8 Wall. 325; *Pollard* v. *Vinton*, 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow* v. *Mason*, 2 T. R. 77; *Grant* v. *Norway*, 10 C. B. 665; *Cox* v. *Bruce*, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice Miller, in *Pollard* v. *Vinton*, *supra*, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no

valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in *Iron Mountain Railway* v. *Knight*, 122 U. S. 79, 87, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman* v. *Buckingham*, 18 How. 182, and *Pollard* v. *Vinton*, 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Willes, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course

of the service and for the master's benefit, though no express command or privity of the master be proved." See also *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q. B. D. 714.

The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be

Affirmed.

SHEPHERD *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 213. Argued March 20, 21, 1889.—Decided April 8, 1889.

To entitle a property owner to recover for injury to his property in Ohio by reason of the location of a railroad on a public street, road or alley, it is not necessary under the provisions of Rev. Stats. Ohio, § 3283, that the property should be situated upon the street so occupied; but it is

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sufficient if it is near enough to it to be injured by the location and occupation.

Damages for a temporary injury sustained by a property owner by reason of the occupation of a street during the construction of a railroad are not recoverable under § 3283, Rev. Stats. Ohio.

The pleadings in this case cover both the claim for damages under the statute, and the claim for special damages by reason of obstruction during construction.

THE court, in its opinion, stated the case as follows:

This action was brought to recover damages for injuries alleged to have been done by the defendant in error to certain improved lots on Union Street, in Bellaire, Ohio, of which the plaintiff in error, who was the plaintiff below, claims to be the owner. It is based upon § 3283 of the Revised Statutes of Ohio, which provides: "If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation or public officers or authorities, owning or having charge thereof, and the company may agree upon the manner, terms and conditions, upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals; but every company which lays a track upon any such street, alley, road or ground, shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track." Rev. Stats. Ohio (ed. 1880), 851. This is, without material change, the first section of the act of April 15, 1857, entitled "An act to amend the act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' passed May 1, 1852, and to regulate railroad companies." Laws of Ohio, 1857, 133.

Statement of the Case.

The lots in question are situated on the west side of Union (formerly Water) Street, thirty-three feet south from Thirty-first (formerly First) Street, and extend back one hundred and twenty feet to an alley, running from Crescent Street to Thirty-first Street. Upon the lots is a two-story brick building, the first floor being used as a dry goods store and the rest of the building as a hotel. The railroad company — with the assent, as we assume, of the municipal authorities of Bellaire — constructed its road in Thirty-first Street, upon arches springing from stone pillars about twenty-seven feet apart, each pillar being twelve feet long, six feet thick, and thirty feet high. Two of the pillars are in Union Street, at the intersection of that street with Thirty-first Street, each of them extending fifteen inches within the line of the sidewalk on each side of the roadway of Union Street, through Thirty-first Street. It took from three to four years to build the railroad in the latter street. During that period Union Street for about one hundred feet south from Thirty-first Street towards Crescent Street (which is parallel to and the next street south from Thirty-first Street) was obstructed by stone, timber, rock, derricks, steam engines, barrels, guy-ropes, etc., such obstructions extending in front of and past the lots in question. For a great part of the time the railroad was being built teams could not get to this property because of these obstructions, and at times persons could hardly get to it or pass by it on foot. Before the railroad was built in Thirty-first Street the property was worth from $9000 to $10,000, the store bringing an annual rent of from $400 to $500, and the whole building $1000; afterwards it was not worth more than from $4000 to $5000, and the rental was reduced one half.

These facts having been proven by a witness on behalf of the plaintiff, subject to objection to their competency, the court, on motion of the defendant, excluded from the consideration of the jury so much of the evidence as related to the depreciation of the value of the property by reason of the above obstructions, and all the testimony relative to the diminution of its rental value.

Statement of the Case.

The plaintiff then made a formal offer to prove that the building of the railroad in Thirty-first Street was in progress three or four years, during which time the company obstructed Union Street, in front of his property, with materials of all kinds used in building the railroad, so that access to his property was seriously obstructed; that because of such obstruction his tenants occupying the premises left them, and he was unable to rent them, and by reason thereof he lost their rental value, amounting to at least two thousand dollars; that access from Thirty-first Street to the alley in the rear of his property was entirely cut off during the building of the railroad; that the alley was too narrow for teams coming in from the other direction to turn, and that he had a stable at the rear of his property and abutting on the alley, which became entirely untenantable during the construction of the railroad; that the building of the pillars and the archway connecting the same at the intersection of Union and Thirty-first streets damaged the access to his property from Union Street, and the building of the railroad in Thirty-first Street, west of Union Street, damaged his access to his property through the alley in the rear, and depreciated its market value in the sum claimed in the petition. The court refused to admit this proof, and ruled that damages to the rental value of the property were not recoverable in this action, nor damages resulting from the placing of obstructions on Union Street in front of the property, during the time of the building of the railroad, and that no recovery could be had by him for damages to his property by reason of the building of the railroad in Thirty-first Street.

The court further decided that § 3283 of the Revised Statutes of Ohio does not enlarge or extend the liabilities of railroad companies, but only preserves the right of property owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corporations or public officers or authorities, as provided in that section, precisely as if no such agreements had been made.

These rulings having been made, and duly excepted to by

the plaintiff, the court, on defendant's motion, gave a peremptory instruction to the jury to return a verdict in its behalf, which was done.

Mr. John W. Herron, for plaintiff in error, cited: *Railroad Co.* v. *Hambleton*, 40 Ohio St. 496; *Bingham* v. *Doane*, 9 Ohio, 165; *Crawford* v. *Village of Delaware*, 7 Ohio St. 459; *Cincinnati & Spring Grove Railway* v. *Cumminsville*, 140 Ohio St. 523; *Railway Co.* v. *Lawrence*, 38 Ohio St. 41; *Columbus &c. Railroad* v. *Mowatt*, 35 Ohio St. 284; *Railway Co.* v. *Gardner*, 45 Ohio St. 309; *Rude* v. *St. Louis*, 93 Missouri, 408.

Mr. Hugh L. Bond, Jr., and *Mr. E. J. D. Cross*, for defendant in error, cited: *Clark* v. *Fry*, 8 Ohio St. 358; *S. C.* 72 Am. Dec. 590; *Rochette* v. *Chicago &c. Railway*, 32 Minnesota, 201; *S. C.* 17 Am. & Eng. Railroad Cas. 192; *Proprietors of Lock &c.* v. *Nashua & Lowell Railroad*, 10 Cush. 385; *Railway Co.* v. *Gardner*, 45 Ohio St. 309; *Crawford* v. *Village of Delaware*, 7 Ohio St. 459; *Jackson* v. *Jackson*, 16 Ohio St. 163; *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1; *Caledonian Railway* v. *Ogilvy*, 2 Macq. H. L. Cas. 229; *Pierce* v. *Dart*, 7 Cowen, 609; *Houck* v. *Watcher*, 34 Maryland, 265; *Sargent* v. *Ohio & Mississippi Railroad*, 1 Handy (Super. Ct. of Cincinnati), 52, 59; *Pittsburg & Lake Erie Railroad* v. *Jones*, 111 Penn. St. 204.

Mr. Justice Harlan delivered the opinion of the court.

The express requirement that every railroad company occupying a street or other public ground, under an agreement with the municipal or other authorities, owning or having charge thereof, "shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground," leaves little room for construction. The right to recover damages for such injuries is not limited to owners of property immediately upon the street occupied by the track or other structures of the railroad company. If the legislature had intended to restrict the right of action given by the statute to owners of the latter class of property, the words "or near to" would not have been used. The manifest purpose was to place those whose property was "near to" any public

street thus occupied upon an equality, in respect to the right to sue, with those whose property abutted on the street.

In *Columbus, Springfield &c. Railroad* v. *Mowatt*, 35 Ohio St. 284, 287, which was an action to recover damages for injuries to private property not immediately upon the street occupied by the railroad track, the court held the limitation of two years prescribed by the statute to be applicable, because the street was occupied under an agreement with the municipal authorities, and because the premises were "near to" that street. But an adjudication more directly in point is *Railway Co.* v. *Gardner*, 45 Ohio St. 309, 318, which was made after the decision in the court below of the case now before us. The property there alleged to have been injured was immediately upon the street in which the railroad track was maintained under municipal authority. Referring to *Parrot* v. *Railroad Co.*, 10 Ohio St. 624, as not controlling the case then before the court, it was said: "For, whereas the court declares in that case that the owner of such lot has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts, the act in question expressly authorizes an action and recovery for injuries done by laying a track upon any such street or ground to private or public property 'lying upon or *near to* the street or ground upon which the track is laid.' It seems that to entitle a property owner to recover for injury to his property, it need not necessarily be situated *upon* the street occupied by the track. The statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location and operation of a railroad track through the street by a railroad corporation. . . . The provision in force at the time of the injury complained of in that case, of which § 3283 is an amendment, created no such remedy for land owners as we are considering."

This interpretation of the statute is, in our judgment, the only one justified by its words, although it may sometimes be difficult to determine whether particular property, alleged to have been injured by the placing of a railroad track or struc-

ture in a public street, is, within the meaning of the statute, "near to" that street. It is certain, however, that property is "near to" the street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. And an injury for which the company is liable, under the statute, arises when the diminution of the value of the property can be fairly attributed to such occupancy and use of the street. In *Grafton* v. *Baltimore & Ohio Railroad*, 21 Fed. Rep. 309, which was an action under this statute for injury done by the obstructions here in question, Mr. Justice Matthews said: "There does not appear to be any ground, in the words or intention of the act, for a distinction between temporary injuries to the use, and permanent injuries to the value, of the property injured; and, in the absence of any ambiguity, the statute must be taken to mean what it plainly says; and, there being no sufficient reason to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the property of the plaintiffs." It is scarcely necessary to say that the same rule as to compensation must be applied in the case of property "near to" any street so occupied by a railroad company. The injury, in a case of that kind, may not, in every case, be easily ascertained, but the right of the owner, under the statute, to full compensation for it, is as clear as is the right of the owner of property abutting on the street, to be compensated for any substantial injury resulting from its occupancy by a railroad.

One of the questions discussed at the bar was as to the right of the plaintiff to recover damages in this action on account of the obstructions placed in Union and Thirty-first Streets during the building of the railroad, whereby access to his property by way of Union Street, as well as through the alley in the rear, was materially obstructed. We are of opinion that the temporary injury sustained by the plaintiff on account of such obstructions cannot properly be said to have been done to the property itself, within the meaning of the statute. The

inquiry in every case, under the statute in question, is, whether the property alleged to be injured has been depreciated in value by reason of the street being occupied by a railroad company, and that question is solved by ascertaining the difference in its value before and its value after the final location and construction of the railroad. *Railway Co.* v. *Gardner*, 45 Ohio St. 309, 322. The authority given to the railroad company to place its track in Thirty-first Street carried with it authority to obstruct its use temporarily, so far as the building of the track required it to be done. The rule, in Ohio, applicable in such a case is thus stated in *Clark* v. *Fry*, 8 Ohio St. 358, 373: "The right of transit in the use of public highways is subject to such incidental, temporary, or partial obstructions as manifest necessity may require," and among those are the temporary impediments necessarily occasioned in the building and repair of houses on lots fronting upon the streets of a city, and in the construction of sewers, cellars, drains, etc. "These are not invasions, but qualifications of the right of transit; and the limitation upon them is that they must not be *unnecessarily* and *unreasonably* interposed or prolonged."

But the plaintiff's special damages, if any, on account of such obstructions, constituted a cause of action apart from his claim, under the statute before us, for damages on account of the depreciation of the value of the property itself, as the result of the permanent occupancy of the street with a railroad track. And here the point is made that the petition is not so framed as to cover those special damages. In this view we do not concur. Its allegations are broad enough to admit evidence in support of the claim for damages on account of any unnecessary obstruction of the plaintiff's access to his property during the building of the railroad track in Thirty-first Street, as well as of the claim for injury done to the permanent value of the property. The plaintiff could have been required to separately state his two causes of action, but no motion to that end having been made in the court below, that objection was waived. *McKinney* v. *McKinney*, 8 Ohio St. 423; *Hartford Township* v. *Bennett*, 10 Ohio St. 441, 443; Civil Code Ohio, §§ 80, 81, 86. Nor, so far as the record shows,

were the rulings of the court below based in any degree upon the ground that the petition did not sufficiently set forth a separate cause of action for special damages on account of the temporary obstructions referred to.

The point was pressed at the bar, that, as no proof was introduced by the plaintiff to overcome the denial by the defendant in its answer of his ownership of the property in question, any errors committed by the court as to other issues made by the pleadings are immaterial, since the peremptory instruction was proper in view of the plaintiff's failure to prove his ownership. This objection is too technical and cannot be sustained, as the property is repeatedly referred to in the record as being owned by the plaintiff, and the court so assumed in its rulings. After the exclusion of competent evidence introduced and offered in behalf of the plaintiff upon the issue as to the injury done to the property, his ownership being unquestioned except by a formal denial in the answer, and the issue as to the injury being treated as the real point of inquiry, we ought not to affirm for the want of affirmative proof in the record of such ownership.

It results from what we have said that the plaintiff was entitled to go to the jury upon the issue as to the damage he sustained, if any, by reason of the access to his property during the construction of the track being unnecessarily and materially obstructed by the company, as well as upon the issue as to the depreciation, if any, in the value of his property, as the direct and necessary result of the permanent occupancy of Thirty-first Street by the track and structures of the company. Evidence was offered which tended to support those issues, upon his part, and was improperly excluded.

The judgment is reversed with directions for a new trial, and for further proceedings consistent with this opinion.

ANDES v. SLAUSON.

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

No. 225. Argued March 29, 1889. — Decided April 15, 1889.

This court has no authority to review on bill of exceptions rulings of a judge of the Circuit Court at the trial of an action at law, had before him at chambers, by consent of the parties, under an order providing that it should be so tried, and that if at such trial there should appear to the judge to be in issue questions of fact of such a character that he would submit them to a jury if one were present, they should be submitted to a jury at the next term.

Albert Slauson brought two actions against the town of Andes in the Circuit Court of the United States for the Northern District of New York, alleging in the complaint in each action that he was a citizen of the State of New Jersey and the defendant was a municipal corporation of the State of New York; that the defendant subscribed to the stock of the Delhi and Middletown Railroad Company, and issued its bonds, with coupons for interest annexed, in payment thereof, in accordance with the law of New York of 1869, chapter 907; and that certain of those coupons passed into the possession and became the property of the plaintiff in good faith and for a valuable consideration, and payment thereof was duly demanded at maturity and refused. The amount for which judgment was asked in the first action was $2709 and interest, and in the second action $2044 and interest.

In the answer to each complaint, the defendant admitted that it was a municipal corporation of the State of New York, but denied all the other allegations of the complaint, and alleged that the coupons sued on were in fact the property of citizens of New York, in whose behalf and for whose benefit the action was prosecuted; that at the time of its commencement an action was pending in the Supreme Court of the State of New York, brought by residents and taxpayers of the

defendant town against the holders of the bonds and coupons, to restrain their transfer and collection, on the ground that they were illegal and void; and that, if the plaintiff held any of the coupons, he took them without consideration, and for the purpose of avoiding and nullifying the effect of any judgment that might be recovered in that court, and of enabling him to bring an action in the Circuit Court of the United States.

The subsequent proceedings, as shown by the record transmitted to this court, were as follows:

1st. An order, filed June 18, 1884, for trial before the District Judge at chambers, in these words:

"At a stated term of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit, held at Canandaigua, on the 18th day of June, A.D. 1884.

"Present: The Honorable A. C. Coxe, Judge.

"Albert Slauson against The Town of Andes. No. 2512.

"Albert Slauson against The Town of Andes. No. 2513.

"These actions having been each moved for trial on the part of the plaintiffs therein at this term of court, and application for a postponement having been made on behalf of the defendant, it is now, at the suggestion of the court and by consent of parties, ordered that the said actions pass said term, and be tried before Hon. A. C. Coxe, at his chambers at Utica, without a jury, with the same force and effect as if tried at a circuit term of this court, such trial to be had within two weeks after the first day of September next, at a time to be fixed by the judge, unless the parties shall agree; and if it shall appear to said judge upon such trial that there are questions of fact arising upon the issues therein, the same are to be submitted to a jury at the November term, provided the said questions of fact are of such a character that the judge would submit them to a jury if one were present; and that no further notice of trial is required.

"Alfred C. Coxe."

Statement of the Case.

2d and 3d. Two orders, each entitled "At a stated term of the Circuit Court for the Northern District of New York, held at Utica on October 1, 1884, Present Hon. A. C. Coxe, Judge," and signed by him, and reciting the trial of the two actions together by consent of parties before him at his chambers in Utica — the one, an order filed November 15, 1884, for the consolidation of the two actions; and the other, an order filed December 4, 1884, by which the judge made a general finding for the plaintiff upon the facts, and found that in the consolidated action there was due to the plaintiff from the defendant the sum of $5316.46, (being the aggregate of the sums due in both actions at the day of trial, October 1, 1884,) with interest, and directing judgment for the plaintiff accordingly, with costs.

4th. The judgment of the court, enrolled and signed by the clerk December 13, 1884, by which, after reciting the bringing of the two actions, the order and stipulation of June 18, 1884, the trial of the actions accordingly before the judge on October 1, 1884, the order of consolidation, and the judge's finding as aforesaid, it was adjudged that the plaintiff recover of the defendant the said sum of $5316.46, with interest from the day of trial, amounting to $64.68, and costs taxed at $260.70, amounting in the aggregate to $5641.84.

5th. A bill of exceptions, signed and sealed by the judge October 13, 1885, and filed October 21, 1885, referring to the order of June 18, 1884, and stating that the actions were afterwards brought on for trial together by consent of parties before the judge, without a jury, at his chambers in Utica, on October 1, 1884; setting forth in full the evidence introduced by both parties at the trial; and stating that the defendant excepted to the admission of specific portions of the plaintiff's evidence, and asked permission, under the stipulation and order of June 18, 1884, to submit to a jury the questions of good faith, and of the collusive transfer of the coupons in suit, and of the ownership thereof, and that the motion was denied, and exception taken by the defendant to the denial, as well as to the judge's final decision, order and finding.

6th. The opinion of the judge in favor of the plaintiff, indorsed: "Decision. Filed November 12, 1884."

The defendant sued out this writ of error.

Mr. Isaac H. Maynard for plaintiff in error.

Mr. John B. Gleason for defendant in error.

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

The authority of this court to review the judgments of the Circuit Court by bill of exceptions and writ of error is regulated exclusively by the acts of Congress and the practice of the courts of the United States, without regard to the statutes of the State or the practice of its courts. *Chateaugay Co., petitioner*, 128 U. S. 544. The right of review is limited to questions of law appearing on the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, or by the court after due waiver in writing of a jury trial; and when the trial is by rule of court and consent of parties before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts found by him support the judgment below. *Campbell* v. *Boyreau*, 21 How. 223; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Paine* v. *Central Vermont Railroad*, 118 U. S. 152.

In the present case, there was no demurrer, or case stated, or special verdict, or finding of facts by the court or by a referee, presenting a pure question of law. But the pleadings presented issues of fact which, in the legal and regular course of proceeding, could be tried by a jury only, and at a stated term of the court, unless the parties either in writing waived a jury and submitted the case to the court's decision, or else agreed that the case should be tried and determined by a referee. There was no waiver of a jury trial and submission of the determination of all issues of fact to the court. But the case was tried by consent of the parties before the judge at chambers under an order providing that it should be so tried,

and that "if it shall appear to the judge upon such trial that there are questions of fact arising upon the issues therein, of such a character that the judge would submit them to the jury if one were present," they should be submitted to a jury at the next term of the court; and the only finding of the judge was a general finding for the plaintiff.

The trial thus ordered, consented to and had, was neither a trial by jury, nor a trial by the court, in accordance with the acts of Congress, but was a trial by the judge as a referee. The trial deriving its whole efficacy from the consent of the parties, the bill of exceptions allowed at that trial was irregular and unavailing, and the facts stated in that bill of exceptions cannot be regarded, nor the rulings stated therein reviewed, by this court. As the questions argued by the plaintiff in error do not appear of record independently of the bill of exceptions, this court has no authority to pass upon them, and no error is shown in the judgment afterwards rendered by the Circuit Court. *Campbell* v. *Boyreau*, above cited; *Lyons* v. *Lyons Bank*, 19 Blatchford, 279.

Judgment affirmed.

BADEAU *v.* UNITED STATES.

UNITED STATES *v.* BADEAU.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 659, 749. Submitted January 4, 1889. — Decided April 15, 1889.

A retired army officer, accepting pay under an appointment in the diplomatic or consular service, is thereby precluded from receiving salary as an officer in the army.

Whether a retired army officer, whose name is dropped from the rolls under the provisions of Rev. Stat. § 1223, in consequence of his accepting an appointment in the diplomatic or consular service of the government, can be restored to the army under the provisions of the act of March 3, 1875, 18 Stat. 512, is not decided in this case.

An officer whose name is placed on the retired list of the army by the Secretary of War, in apparent compliance with provisions of law, is an officer *de facto* if not *de jure*, and money paid to him as salary cannot be recovered back by the United States.

Statement of the Case.

THE case, as stated by the court in its opinion, was as follows:

On the 21st day of June, 1883, the Secretary of the Treasury, pursuant to § 1063 of the Revised Statutes, and in compliance with the certificate of the Second Comptroller of the Treasury, transmitted to the Court of Claims the claim of Adam Badeau for pay as an officer of the United States Army, "together with all the vouchers, papers, documents and proofs pertaining thereto, that the same might be proceeded in, in said court, as if originally commenced therein by the voluntary action of the claimant;" and thereafter upon the 19th day of February, 1884, the claimant filed his petition in which, after making certain averments, and stating that he was secretary of legation at London from May 19 to December 6, 1869, and consul-general at London, April 28, 1870, to September 16, 1881, and at Havana, Cuba, from November 25, 1882, to the date of the filing of the petition, and that he had received pay as a military officer from December 6, 1869, to April 30, 1870, and from September 16, 1881, to November 25, 1882, he claimed to be entitled to "the amount of pay and allowances of a captain, mounted, retired from active service, for the period from April 28, 1870, to September 16, 1881, and from November 25, 1882, up to the present time, amounting to the sum of eighteen thousand eight hundred and fifty-two dollars and sixty-five cents, not having received such pay or allowances during said period; also, to the additional pay and allowance provided by § 1262 of the Revised Statutes, which section is as follows:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

A general traverse was filed by the United States, March 8, 1884, and on the 10th of February, 1885, a counter-claim, stating "that Adam Badeau, the claimant in the above entitled cause, before and at the time of the commencement of this suit was, and still is, indebted to the said defendants in a large sum of money, to wit, two thousand five hundred and sixty dollars

and ten cents, ($2560.10,) for money erroneously paid to said Badeau without authority of law, the same being on account of payments of salary made to him as an army officer, (captain, retired,) from December 31, 1869, to October 31, 1882, during all of which time said Badeau was not in fact in the army nor an officer thereof;" to which the claimant filed a replication March 9, 1885.

The United States also pleaded the statute of limitations to the larger part of petitioner's claim.

Findings of fact and conclusions of law were announced by the Court of Claims, May 9, 1887, as follows:

I. On the 21st April, 1869, the claimant, then being a first lieutenant of infantry in the army of the United States, unassigned, was appointed by the President assistant secretary of legation at London. On the 19th May, 1869, he accepted the appointment, filed in the Department of State his oath of office, and embarked for his post, reaching England May 31st, 1869.

II. On the 15th May, 1869, a military board was convened by the following order:

[Special Orders, No. 116. — Extract.]

HEADQUARTERS OF THE ARMY,

ADJUTANT GEN'L'S OFFICE,

WASHINGTON, *May* 15, 1869.

12. By direction of the President, a board of officers will assemble in New York City at 12 M. on the 18th inst., or as soon thereafter as practicable, for the examination of Bvt. Brig. General Adam Badeau, 1st lieutenant U. S. Army, for retirement, in pursuance of the act of Congress of the 3d of August, 1861. . . .

Upon completion of the examination of General Badeau the president of the board will dissolve the board and order the officers composing the same to resume their proper duties.

* * * * *

By command of Gen'l Sherman. E. D. TOWNSEND,

Adjutant General.

Statement of the Case.

The board met in New York on the 18th May, 1869, and the following proceedings took place:

NEW YORK, *May 18th*, 12 M.

The board met pursuant to above order. Owing to the illness and consequent absence of Gen'l Reeve the board adjourned.

NEW YORK, *May 18th*, 4 P.M.

The following telegram was received:

WASHINGTON, D. C., *May 18th.*

General McDOWELL, *New York City*:

By direction of the Secretary of War, General Rufus Ingalls is detailed as a member of the retiring board, vice Reeve.

Acknowledge receipt.

E. D. TOWNSEND,
Adjutant General.

On receipt of the above telegraphic order the board reconvened.

Present all the members and the recorder.

The board proceeded to consider the case of 1st Lieut. Adam Badeau, bvt. brig. gen'l U. S. A., who appeared before the board, and having heard the orders convening it read, was asked if he objected to any member named in the orders. He having no objection, the board was duly sworn in his presence by the recorder, and the recorder by the president. . . . The board was cleared, and after mature deliberation find "that 1st Lieutenant Adam Badeau, U. S. Infantry, bvt. brig. general U. S. A., is incapacitated for active service, and that said incapacity is due to a wound received in the foot whilst on duty as captain and additional aide-de-camp to Brig. Gen'l T. W. Sherman in the assault on Port Hudson in May, 1863."

IRWIN McDOWELL,
Bvt. Maj. Gen'l, Pres'd't Board.

H. STOCKTON,
1st Lieut. Ord., Bvt. Capt., A. D. C. Recorder of Board.

Statement of the Case.

On the 22d May, 1869, this was approved by the Secretary of War, and on the 25th May the President made the following order:

[Special Orders, No. 126 — Extract.]
HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE.
WASHINGTON, *May* 25, 1869.

* * * * *

12. Brevet Brigadier General Adam Badeau, 1st lieutenant U. S. Army, having, at his own request, been ordered before a board of examination, and having been found "incapacitated for active service, and that said incapacity is due to a wound received in the foot whilst on duty as captain and additional aide-de-camp to Brigadier General T. W. Sherman in the assault on Port Hudson in May, 1863," the President directs that his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from some injury incident thereto, in accordance with §§ 16 and 17 of the act approved August 3, 1861. In accordance with § 32 of the act approved July 28, 1866, General Badeau is, by direction of the President, retired with the full rank of captain, to date from May 18, 1869.

* * * * *

By command of General Sherman. E. D. TOWNSEND,
Adjutant General.

III. The claimant held the office of assistant secretary of legation, and received the salary thereof, until the 6th December, 1869, when he resigned. By order of the President December 23, 1869, he was "assigned to duty in the city of Washington" as an officer of the army, it being stated that the order was to date from December 6, 1869. He drew from the pay department of the army the pay of an active captain for the period from December 6, 1869, to February 21, 1870, and the pay of a retired captain from February 21, 1870, to April 30, 1870, the pay so drawn amounting to $621.84. He was appointed consul general at London, England, April 28,

1870, and was in the consular service of the government until the commencement of this suit, except for a period of about fourteen months, beginning in September, 1881, and ending in November, 1882.

IV. From May, 1869, until May, 1878, the claimant was borne upon the retired list of the army as having been retired with the rank of captain on the 18th May, 1869. On the 7th May, 1878, the following order was issued:

[General Orders, No. 20.]

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *May* 7, 1878.

The following are announced:

Dropped.

* * * * *

In conformity with § 1223 Revised Statutes, and opinion of Attorney General dated December 11, 1877. (1) Captain Adam Badeau, U. S. Army, retired, to date from May 19, 1869.

* * * * *

By command of General Sherman. E. D. TOWNSEND,
Adjutant General.

The claimant thereupon applied to have the above order revoked upon the ground that he was disabled within the intent of the act 3d March, 1875, and he produced and filed the following certificate:

BANGOR, MAINE, *Feb.* 20, 1878.

I, Eugene F. Sanger, physician and surgeon, certify that I was medical director of the 2d division, 19th Army Corps, before Port Hudson, May 27, 1863, and that Captain Adam Badeau, A. D. C. on Brig. Gen'l T. W. Sherman's staff, received a bullet wound penetrating the instep of the left foot, and making its exit below the internal malleolus. I resected

the 2d cuniform bone, parts of the 1st and 3d cuniform, and the proximal end of the 2d metatarsal bone, on acc't of which resection he was sent to the rear at New Orleans.

Respectfully, your ob't servant,

EUGENE F. SANGER,

Brevet Lt. Col. and late Brigade Surgeon, late Medical Director, 19th Army Corps, now Examining Surgeon Pension Bureau.

The foregoing surgeon's certificate was duly referred to the Surgeon General of the army. The order of reference and the Surgeon General's report thereon were as follows:

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,

WASHINGTON, *March* 4, 1878.

Respectfully referred to the Surgeon General, U. S. Army, for his opinion as to whether the disability of Captain Badeau, for which he was retired, can be regarded as bringing him within that class of officers specified in the proviso of § 2, act of March 3, 1875, (G. O. 16 of 1875,) who have "an arm or leg permanently disabled by reason of resection on account of wounds."

The proceedings of the Retiring Board in Captain Badeau's case and other papers are enclosed herewith.

By order of the Secretary of War. E. D. TOWNSEND,

Adjutant General.

SURGEON GENERAL'S OFFICE,

March 6, 1878.

Respectfully returned to the Adjutant General of the army with opinion that the evidence submitted is sufficient to establish that Captain Badeau's case comes properly within that class of officers specified by § 2, act of March 3, 1875, as one in which an arm or leg is permanently disabled by reason of resection on account of wounds.

J. K. BARNES,

Surgeon General.

Whereupon the Secretary of War, on the 3d July, 1878, made the following order, under which the claimant was borne on the retired list of the army up to the time of his bringing this action:

WAR DEPARTMENT, *July* 3, 1878.

Respectfully returned to the Adjutant General of the army.

The former decision in Captain Badeau's case was correct, as the record then stood, but it now appearing that his case comes clearly within the provisions of the proviso to § 2, act of March 3, 1875, his name will be restored to the retired list.

GEORGE W. MCCRARY,
Secretary of War.

V. From the 18th May, 1869, to the 6th December, 1869, the claimant received no pay as a military officer, nor has he received military pay at any time while holding a diplomatic or consular office.

From the 6th December, 1869, to the 21st February, 1870, while assigned to duty in the city of Washington as a retired officer under the act 21st January, 1870, (16 Stat. 22,) the claimant was paid as a captain in active service the sum of $396.92, during which period he was rendering service as an officer.

From the 21st of February, 1870, to the 31st October, 1882, the claimant was paid as an officer on the retired list, for periods when he was not holding a diplomatic or consular office, the sum of $2163.18.

There has been withheld from the claimant while not holding a diplomatic or consular office his pay as a retired officer from November 1, 1882, to November 25, 1882, amounting to $.

There has been withheld from the claimant while holding a diplomatic or consular office between the 19th May, 1869, and the 19th February, 1884, when this action was brought, his pay as a retired officer, amounting to the sum of $.

VI. The claimant was beyond the seas at the times when the foregoing claims accrued, and his petition was filed in this court within three years after the disability had ceased.

CONCLUSIONS OF LAW.

The court being equally divided upon the foregoing findings as to the claimant's right to recover, does, for the purposes of an appeal, frame the following conclusions of law:

The petition of the claimant and the counter-claim of the defendants should both be dismissed.

Thereupon judgment was entered dismissing the petition of the claimant and the counter-claim of the United States. Appeals were prosecuted by both parties to this court, and the records filed herein August 10 and October 5, 1887.

On the 5th of October, 1888, a stipulation was filed, adding to the record certain conclusions and order of the Court of Claims and certain matters introduced in evidence, at a stage of the case prior to the final findings.

Mr. Daniel P. Hays for Badeau.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for the United States.

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

Section 2 of the act of March 30, 1868, entitled "An act making appropriations for the consular and diplomatic expenses of the government for the year ending thirtieth June, 1869, and for other purposes," (15 Stat. 56, 58,) is as follows: "That any officer of the Army or Navy of the United States who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consular service of the government, shall be considered as having resigned his said office, and the place held by him in the military or naval service shall be deemed and taken to be vacant, and shall be filled in the same manner as if the said officer had resigned the same." This was carried into the Revised Statutes (1874) as § 1223.

By § 18, c. 42, act of August 3, 1861, (12 Stat. 290,) it was provided "that the officers partially retired shall be entitled to wear the uniform of their respective grades, shall continue

to be borne upon the Army Register or Navy Register, as the case may be, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles." And this was re-enacted as § 1256 of the Revised Statutes.

By § 16 of the said act of August 3, 1861, it was provided "that there shall not be on the retired list at any one time more than seven per centum of the whole number of the officers of the Army as fixed by law," while by § 5 of the act of July 15, 1870 (16 Stat. 317), "the number of officers who may be retired in accordance with existing laws shall be in the discretion of the President: *Provided*, That the whole number on the retired list shall at no time exceed three hundred;" and this reappears as § 1258 of the Revised Statutes.

By § 23 of the act of July 15, 1870 (16 Stat. 320) "any retired officer may, on his own application, be detailed to serve as professor in any college," and such is § 1260 of the Revised Statutes.

By the first section of "An act relating to retired officers of the Army," approved January 21, 1870, (16 Stat. 62,) it was provided "that no retired officer of the Army shall hereafter be assigned to duty of any kind, or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade; and all such assignments heretofore made shall terminate within thirty days from the passage of this act;" but by resolution of April 6, 1870 (16 Stat. 372) the law of January 21st was limited so as not to apply "to officers selected by the Board of Commissioners of the Soldiers' Home, District of Columbia, for duty at that institution, such selection being approved by the Secretary of War," and this is re-enacted in § 1259 of the Revised Statutes.

By § 18 of the act of July 15, 1870, already referred to, (16 Stat. 319,) it was enacted "that it should not be lawful for any officer of the Army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the Army, and his commission shall be vacated thereby," and this is carried into the Revised Statutes as § 1222.

Thus in the acts of 1868 and 1870, and in §§ 1222 and 1223 of the Revised Statutes, Congress distinguished, and adhered to the distinction, between officers on both lists and officers on the active list only, and between ordinary civil appointments and appointments in the diplomatic or consular service. No officer, whether on the active or retired list, could accept appointment in the latter, and remain an officer, but that rule was not applied to retired officers in the matter of holding a civil office.

The second section of the act of Congress of March 3, 1875, reads as follows:

"That all officers of the army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list, placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an arm or leg, or has an arm or leg permanently disabled by reason of resection, on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of section two, chapter thirty-eight, act of March thirty, eighteen hundred and sixty-eight: *and be it also provided*, That no retired officer shall be affected by this act who has been retired or may hereafter be retired on the rank held by him at the time of his retirement; and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed." 18 Stat. 512, c. 178.

By § 32 of the act of July 28, 1866, (14 Stat. 337,) it was provided "that officers of the regular Army entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command

held by them, whether in the regular or volunteer service, at the time such wounds were received."

It was within the power of Congress to change the rank here spoken of, and this it did by the act of 1875, which substitutes for "the full rank of the command held by them" the "actual rank held by them," and which embraces only "those now borne on the retired list, placed upon it on account of wounds received in action." *Wood* v. *United States*, 107 U. S. 414, 417. Under this act officers of twenty-five years' service at the date of their retirement, and officers who had lost an arm or leg or had an arm or leg permanently disabled, or both eyes, were not subject to be considered as retired upon the actual rank held by them when wounded, as provided in the first part of the section; and no retired officer was affected by the act who had been or might be retired on the rank actually held by him at the time of such retirement; and all officers mentioned in the first part of the section, or of twenty-five years' service, or who had lost an arm or leg, etc., could accept appointment in the diplomatic or consular service, notwithstanding § 2 of the act of March 30, 1868, or § 1223 of the Revised Statutes, as we think the words "every such officer now borne on the retired list shall be continued thereon" refer to all officers previously mentioned in the section, and the provision in this respect shows that up to March 3, 1875, § 2 of the act of 1868 applied to officers on the retired list as well as those in active service.

Sections 1763, 1764, and 1765 of the Revised Statutes are as follows:

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

"Sec. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or

clerk may be required to perform, unless expressly authorized by law.

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

Whether by the order of the Secretary of War, July 3, 1878, the claimant's name was properly restored to the retired list we are not called upon to determine in this case, because even were that so we do not think his petition can be sustained.

General Badeau received as consul general at London an annual salary of seventy-five hundred dollars, and at Havana, of six thousand dollars, as fixed by law, and was expressly inhibited from receiving any additional salary, allowance, pay, or compensation for discharging the duties of any other office unless expressly authorized by law, of which there is no pretence in this case. It has been decided that a person holding two offices or employments under the government, when the services rendered or which might be required under them, were not incompatible, is not precluded from receiving the salary or compensation of both. *Converse* v. *United States*, 21 How. 463; *United States* v. *Brindle*, 110 U. S. 688. But the Treasury Department did not apparently regard this case as falling within that exception, and we agree with that conclusion. *United States* v. *Shoemaker*, 7 Wall. 338; *Stansbury* v. *United States*, 8 Wall. 33; *Hoyt* v. *United States*, 10 How. 109, 141.

Under the act of 1875 retired officers situated as therein described, are so far taken out of the operation of the act of 1868 as not to be held, if they accept or hold diplomatic or consular appointment, to have resigned their places in the army; but this does not change the general policy of the law, and does not entitle them to pay as army officers during the period of time when they are absent from their country in the discharge of continuous official duties inconsistent with subjection to the

rules and articles of war, and the other incidents of military service. Notwithstanding § 1223, such officers, when in the diplomatic or consular service, may still be borne on the retired list, but cannot receive double compensation.

Nor can we disturb the judgment adverse to the counter-claim. As between individuals, where money has been paid under a mistake of law, it cannot be recovered back, but it is denied that this rule is applicable to the United States, upon the ground that the government is not bound by the mistakes of its officers, whether of law or of fact. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Bank of Metropolis*, 15 Pet. 377; *McElrath* v. *United States*, 102 U. S. 426. But inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex æquo et bono*, he ought to return.

He was paid as a military officer from December 6, 1869, to the 21st of February, 1870, and for the time from February 21, 1870, to April 30, 1870, and for about fourteen months, beginning in September, 1881, and ending in November, 1882. After May 19, 1869, he was employed in a diplomatic or consular capacity, except during the above specified periods, and the implication from the findings is that he was paid for those periods, because he was actually rendering service, whether subject to assignment thereto or not.

The judgment of the Court of Claims is *Affirmed.*

Mr. Justice Miller dissented.

UNITED STATES *v.* CUMMING.

CUMMING *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 723, 724. Submitted January 4, 1889. — Decided April 22, 1889.

Congress enacted that A B and C D "be permitted to sue in the Court of Claims, which court shall pass upon the law and facts as to the liability

of the United States for the acts of its officer" E F, . . . "collector of internal revenue" etc., "and this suit may be maintained, any statute of limitation to the contrary notwithstanding." *Held*, that this was a waiver of the defence based upon the statute of limitations, but not a waiver of the defence based on the general principle of law that the United States are not liable for unauthorized wrongs inflicted on the citizen by their officers while engaged in the discharge of official duties.

THE case is stated in the opinion.

Mr. Assistant Attorney General Howard for the United States.

Mr. Michael Jacobs, *Mr. Leonard Myers* and *Mr. David McAdam* for Cumming and others.

MR. JUSTICE HARLAN delivered the opinion of the court.

These are appeals from a judgment against the United States in favor of Joseph M. Cumming and Hamilton J. Miller, surviving members of the late firm of J. M. Cumming & Co., formerly manufacturers, distillers, vendors and exporters of whiskeys and alcohols, for the sum of thirty-six thousand dollars, as the damages sustained by that firm in consequence of certain acts of Joshua F. Bailey, collector of internal revenue for the fourth internal revenue district of New York, and of other officers who served under or with him. The amount for which the plaintiffs asked judgment was $1,635,753.

The suit was brought under the authority of the following act of Congress, approved February 26, 1885, 23 Stat. 639, c. 167.

"AN ACT for the relief of Joseph M. Cumming, Hamilton J. Miller and Wiliam McRoberts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Joseph M. Cumming, Hamilton J. Miller and William McRoberts, late copartners in the business of commission merchants and bonded warehousemen in the city of New York, be permitted to sue in the Court of Claims; which court shall pass upon the law and facts as to the liability of the United

States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books and papers in and connected with said business, by Joshua F. Bailey, collector of internal revenue for the fourth internal revenue district of said State or by said Bailey and other internal revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding.

"Approved, February 26, 1885."

It is evident that Congress intended to open the doors of the Court of Claims to the plaintiffs, so far as to permit them to sue the government, unembarrassed by any defence of the statute of limitations, and to obtain an adjudication, based upon "the law and facts," as to the liability of the United States for the wrongs of which complaint is made. In other words, the jurisdiction of the Court of Claims was so enlarged as to embrace this particular demand and to authorize such judgment as, under all the evidence, would be consistent with law. Here, however, we are met with the suggestion, that there is a general principle, applicable, as this court said, in *Gibbons* v. *United States*, 8 Wall. 269, 275, to all governments, which "forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." Did Congress intend to abrogate this principle so far as the demands of the present plaintiffs are concerned? Did it invest the Court of Claims with jurisdiction to render a judgment against the United States upon its appearing that the revenue officers transcended the authority conferred upon them by law, or had exercised their authority in such manner as made them personally liable in damages to the plaintiffs? There would be some ground for an affirmative answer to these questions if the statute had not required the court to pass upon both the law and the facts "as to the

liability of the United States." If the facts disclosed a case of unauthorized wrongs done to the plaintiffs by the revenue officers of the United States, the question, by the very terms of the act, would still remain, whether the United States were liable, in law, for such damages as the plaintiffs had sustained. There would seem to be no escape from the conclusion that Congress intended that the liability of the government should be determined by the settled principles of law. The only right waived by the government was a defence based upon the statute of limitations. *Erwin* v. *United States*, 97 U. S. 392; *Tillson* v. *United States*, 100 U. S. 43; *McClure* v. *United States*, 116 U. S. 145.

It is said that the act, professedly for the relief of the plaintiffs, would be unavailing, unless it is so construed as to relieve them from the operation of the rule laid down in *Gibbons* v. *United States*. A satisfactory answer to this suggestion is that if Congress intended to do more than give the plaintiffs an opportunity, in an action for damages brought in the Court of Claims, to test the question as to the liability of the United States, upon the law and facts, for the alleged wrongs of their officers, that intention would have been expressed in language not to be misunderstood. It is as if the plaintiffs asserted before Congress the liability, in law, of the government for the damages they sustained, and Congress permitted them to invoke the jurisdiction of the Court of Claims in order that there might be a judicial determination of the question by that tribunal, with the right of appeal "as in ordinary cases against the United States in said court."

According to this construction of the act, the plaintiffs were not entitled to judgment against the United States in any sum; for, if Collector Bailey and other revenue officers did nothing more than the law authorized them to do, neither they nor the government would be liable in damages; while, if they acted illegally, they would be personally liable in damages; not the government.

The judgment is reversed, with directions to render judgment in favor of the United States.

Mr. Justice Miller and Mr. Justice Field dissented.

HURLBUT *v.* SCHILLINGER.

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

No. 215. Argued March 19, 1889. — Decided April 22, 1889.

Reissued letters patent No. 4364, granted to John J. Schillinger, May 2, 1871, for an "improvement in concrete pavements," on the surrender of original letters patent No. 105,599, granted to said Schillinger, July 19, 1870, were valid.

The proper construction of the claims of the reissue stated, in view of a disclaimer filed March 1, 1875.

The questions of utility, novelty and infringement considered.

The entire profit made by the defendant from laying his pavement was given to the plaintiff, because it appeared that it derived its entire value from the use of the plaintiff's invention; that if it had not been laid in that way it would not have been laid at all; and that the profit made by the defendant was a single profit derived from the construction of the pavement as an entirety.

IN EQUITY, to restrain alleged infringement of letters patent and for damages. Decree in favor of the complainants. Respondent appealed. The case is stated in the opinion.

Mr. L. L. Bond, (with whom was *Mr. E. A. West* on the brief,) for appellants, cited: *Smith* v. *Nichols*, 21 Wall. 112; *Roberts* v. *Ryer*, 91 U. S. 150, 159; *Heald* v. *Rice*, 104 U. S. 737, 755; *Atlantic Works* v. *Brady*, 107 U. S. 192; *Railroad Co.* v. *Sayles*, 97 U. S. 554; *Duff* v. *Sterling Pump Co.*, 107 U. S. 636; *Carver* v. *Hyde*, 16 Pet. 513; *Burr* v. *Duryee*, 1 Wall. 531; *Fuller* v. *Yentzer*, 94 U. S. 288; *Brooks* v. *Fiske*, 15 How. 212; *Snow* v. *Lake Shore Railway Co.*, 121 U. S. 617; *Ashcroft* v. *Railroad Co.*, 97 U. S. 189; *Mathews* v. *Machine Co.*, 105 U. S. 54; *Bridge* v. *Excelsior Co.*, 105 U. S. 618; *Neacy* v. *Allis*, 13 Fed. Rep. 784; *McCormick* v. *Talcott*, 20 How. 402; *Schillinger* v. *Gunther*, 2 Ban. & Ard. Pat. Cas. 544; *S. C.* 3 Ban. & Ard. Pat. Cas. 491; *Schillinger* v. *Greenway Brewing Co.*, 17 Fed. Rep. 244; *California Stone Paving Co.* v. *Perine*, 8 Fed. Rep. 821; *California Stone Paving Co.* v.

Freeborn, 17 Fed. Rep. 735; *Schillinger* v. *Middleton*, 31 Fed. Rep. 736; *Cammeyer* v. *Newton*, 94 U. S. 225; *Bates* v. *Coe*, 98 U. S. 31; *Garretson* v. *Clark*, 111 U. S. 120; *Black* v. *Thorne*, 111 U. S. 122; *Brown* v. *Piper*, 91 U. S. 41; *Vance* v. *Campbell*, 1 Black, 427; *Agawam Co.* v. *Jordan*, 7 Wall. 583; *Blanchard* v. *Putnam*, 8 Wall. 420; *Slawson* v. *Grand Street Railroad*, 107 U. S. 649; *Terhune* v. *Phillips*, 99 U. S. 592; *Gill* v. *Wells*, 22 Wall. 1, 29; *Guidet* v. *Brooklyn*, 105 U. S. 650; *Phillips* v. *Detroit*, 111 U. S. 604; *New York Belting Co.* v. *Sibley*, 15 Fed. Rep. 386; *Tyler* v. *Welch*, 3 Fed. Rep. 636; *White* v. *Gleason M'f'g Co.*, 17 Fed. Rep. 159; *Dunbar* v. *Myers*, 94 U. S. 187; *Atlantic Giant Powder Co.* v. *Hulings*, 21 Fed. Rep. 519; *Union Cartridge Co.* v. *U. S. Cartridge Co.*, 112 U. S. 624; *Hollister* v. *Benedict M'f'g Co.*, 113 U. S. 59.

Mr. George W. Hey, for appellees, cited: *Schillinger* v. *Gunther*, 14 Blatchford, 152; *S. C.* 17 Blatchford, 66; *California Stone Paving Co.* v. *Perine*, 8 Fed. Rep. 821; *Schillinger* v. *Brewing Company*, 24 O. G. 495; *Kuhl* v. *Mueller*, 21 Fed. Rep. 510; *California Stone Paving Co.* v. *Freeborn*, 17 Fed. Rep. 735; *California Stone Paving Co.* v. *Molitor*, 113 U. S. 613; *Grant* v. *Raymond*, 6 Pet. 218; *Ames* v. *Howard*, 1 Sumner, 482, 485; *Blanchard* v. *Sprague*, 3 Sumner, 535, 539; *Davoll* v. *Brown*, 1 Woodb. & Min. 53, 57; *Parker* v. *Hayworth*, 4 McLean, 370; *Le Roy* v. *Tatham*, 14 How. 156, 181; *Warswick M'f'g Co.* v. *Steiger*, 17 Fed. Rep. 250; *Tilghman* v. *Proctor*, 125 U. S. 136; *Brady* v. *Atlantic Works*, 3 Ban. & Ard. Pat. Cas. 577; *Cox* v. *Griggs*, 2 Fish. Pat. Cas. 174; *Hays* v. *Sulsor*, 1 Fish. Pat. Cas. 532; *Bell* v. *Daniels*, 1 Fish. Pat. Cas. 372; *Wayne* v. *Holmes*, 2 Fish. Pat. Cas. 20; *Serrell* v. *Collins*, 1 Fish. Pat. Cas. 289; Curtis on Patents, § 338; *Lowell* v. *Lewis*, 1 Mass. 184.

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 Northern District of Illinois, by John J. Schillinger and Elmer J. Salisbury against J. B. Hurlbut,

founded on the alleged infringement of reissued letters patent, No. 4364, granted to John J. Schillinger, May 2, 1871, for an "improvement in concrete pavements," on the surrender of original letters patent No. 105,599, granted to said Schillinger, July 19, 1870. The defences set up in the answer are the invalidity of the reissue, want of utility in the invention, want of novelty and non-infringement.

The bill was filed in October, 1882. Salisbury having died, the suit was, so far as his interest was concerned, revived in March, 1884, in the name of Olive G. Salisbury, as administratrix. The interest of Salisbury was that he was the exclusive licensee under the reissued patent for the State of Illinois. Issue having been joined, proofs were taken on both sides, and on the 15th of May, 1884, the court entered an interlocutory decree, adjudging that the reissued patent was valid, that the defendant had infringed it, and that the administratrix of Salisbury recover profits and damages from the 26th of August, 1882, the date of the license to Salisbury. The decree also ordered a reference to a master to take an account of the profits and the damages.

The master took proofs, and on the 30th of September, 1884, filed his report, to the effect that between August 26, 1882, and May 20, 1884, the defendant had laid 70,909 feet of pavement by the use of the plaintiff's patent, for which he should be held to account; and that the plaintiffs had shown an established license fee of five cents a square foot, or $3545.45, as damages, which amount he reported. He also reported that the defendant's profits had amounted to four cents a square foot. The defendant excepted to this report, and, on a hearing, the court held that the evidence did not establish a fixed license fee as a royalty, and that the proper amount of recovery was the defendant's profits, at the rate of four cents a square foot, or $2836.36; and it entered a final decree, on the 16th of November, 1885, for that amount. The defendant has appealed from that decree.

The specifications, claims and drawings of the original and the reissued patents are as follows, the specifications and claims being placed in parallel columns, the parts of each

which are not found in the other being in italic, and the drawings of the original and the reissue being the same:

Original.

"Be it known that I, John J. Schillinger, of the city, county, and State of New York, have invented a new and useful improvement in concrete pavements; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing, forming part of this specification, in which drawing —

"Figure 1 represents my pavement *in plan view.* Fig. 2 is a vertical section of the *pavement.*

Reissue.

"Be it known that I, John J. Schillinger, of the city, county, and State of New York, have invented a new and useful improvement in concrete pavements; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing, forming part of this specification, in which drawing —

"Figure 1 represents *a plan of* my pavement. Fig. 2 is a vertical section of the *same. Similar letters indicate corresponding parts.*

Fig. 1.

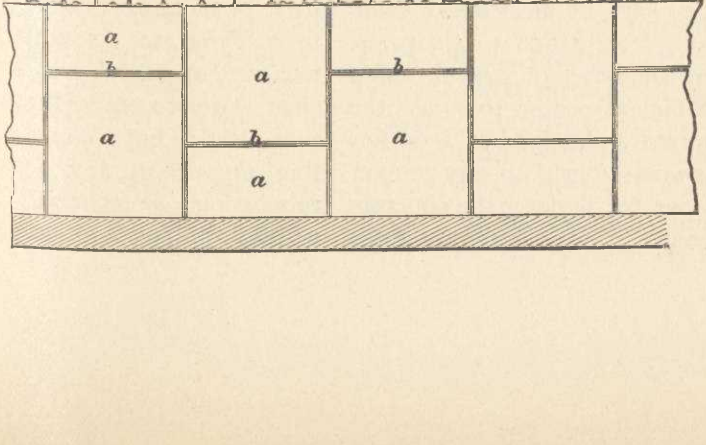
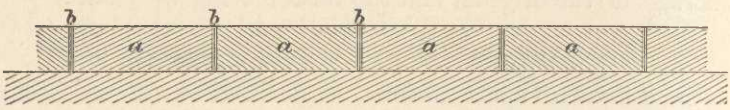


Fig. 2.



"This invention relates to *pavements for sidewalks and other purposes, and consists in combining*, with the joints of concrete *pavements*, strips of tar-paper or equivalent material arranged between the several blocks in such a manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting *or injuring* the blocks adjacent thereto.

"In carrying out my invention I form the concrete by mixing cement with sand and gravel or other suitable *materials* to form a *suitable* plastic *composition*, using about the following proportions: One part, by measure, of cement; one part, by measure, of sand, and from three to six parts, by measure, of gravel, *using* sufficient water to *make* the mixture plastic; but I do not confine myself to any proportions for making the concrete composition. While the mass

"This invention relates to *a concrete pavement which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections.* With the joints of *this sectional* concrete *pavement are combined* strips of tar-paper or equivalent material arranged between the several blocks *or sections* in such a manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

"In carrying out my invention I form the concrete by mixing cement with sand and gravel or other suitable *material* to form a plastic *compound*, using about the following proportions: One part, by measure, of cement; one part, by measure, of sand, and from three to six parts by measure, of gravel, *with* sufficient water to *render* the mixture plastic; but I do not confine myself to any *definite* proportions *or materials* for making the concrete composi-

is plastic I lay or spread the same *upon* the foundation or bed of the pavement, either in *moulds* or between movable joists of the proper thickness, so as to form the edges of the concrete blocks *a a*, &c. When the block *a* has *been formed* I *take strips of tar-paper b, of a width equal or almost equal to the height of the block, and place them up against the edges of the block in such a manner that they form the joints between such block and the adjacent blocks.* After completing one block, *a*, I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint and proceed with the formation of the new block until it is completed. In this manner I proceed *in making all the blocks* until the pavement is completed, interposing tar-paper between their several joints, as described. The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks.

tion. While the mass is plastic I lay or spread the same *on* the foundation or bed of the pavement, either in *moulds* or between movable joists of the proper thickness, so as to form the edges of the concrete blocks *a a*, *one block being formed after the other.* When the *first* block has *set* I *remove the joists or partitions from between it and the next block to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set,* [*and since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on,*] *and when the pavement is completed each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips b of tar-paper or other suitable material in the following manner:* After completing one block, *a*, I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is

The paper *does not adhere* when placed against the *edge of the fully formed* block, and therefore the joints are always free between the several blocks, although *adherence may take place between the paper and* the *plastic* edges of the blocks *which are* formed after the *paper* joints *are set up in place.*

"What I claim as new and desire to secure by letters-patent is —

completed, interposing tar-paper between the several joints, as described. The paper constitutes a tight, water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. The paper when placed against the block *first formed does not adhere thereto*, and therefore the joints are always free between the several blocks, although *the paper may adhere to* the edges of the *block or* blocks formed after the *same has been set up in its place between the* joints. [*In such cases, however, where cheapness is an object, the tar-paper may be omitted and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other and can be taken up and relaid each independent of the adjoining blocks.*]

"What I claim as new and desire to secure by letters-patent is —

"The arrangement of tar-paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose *described*."

"*1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.*

"*2.* The arrangement of tar-paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose *set forth*."

On the 1st of March, 1875, Schillinger filed in the Patent Office the following disclaimer: "To the Commissioner of Patents: Your petitioner, John J. Schillinger, of the city and county and State of New York, represents that letters patent of the United States, reissue No. 4364, bearing date May 2, 1871, were granted to him for an improvement in concrete pavements. That he has reason to believe that, through inadvertence, accident, or mistake, the specification and claim of said letters patent are too broad, including that of which your petitioner was not the first inventor, and he therefore hereby enters his disclaimer to the following words: 'And since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on,' and which occurs near the middle part of the said specification, and to the following words near the end of the specification : 'In such cases, however, where cheapness is an object, the tar-paper may be omitted and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other and can be taken up and relaid each independent of the adjoining blocks.' Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation. Your petitioner owns the said patent and the whole interest therein, except in the following places or territory, for which he has granted exclusive licenses under royalty, or sold rights under said patent, to wit, the counties of

Kings, Queens, and Richmond, New York State; Hartford County, Connecticut; the District of Columbia; the States of New Jersey, Georgia, Maryland, Louisiana, Texas, Ohio, Michigan, Missouri and Illinois, which above-named States and places comprise all the territory for which he has sold or granted exclusive licenses or rights in or under said patent, to the best of his recollection, knowledge and belief."

The words specifically disclaimed by the disclaimer are embraced in brackets in the copy of the specification of the reissue above set forth.

The Schillinger patent has been before several of the Circuit Courts of the United States, and also before this court, for adjudication.

In the Circuit Court for the Southern District of New York, before Judge Shipman, in February, 1877, in *Schillinger* v. *Gunther*, 14 Blatchford, 152, and 2 Ban. & Ard. Pat. Cas. 544, and 11 Off. Gaz. 831, and in the same case, before Judge Blatchford, in August, 1879, 17 Blatchford, 66, and 4 Ban. & Ard. Pat. Cas. 479, and 16 Off. Gaz. 905; in the Circuit Court for the District of California, before Judge Sawyer, in May, 1881, in *California Artificial Stone Paving Co.* v. *Molitor*, and *The Same* v. *Perine*, 7 Sawyer, 190, and 8 Fed. Rep. 821, and 20 Off. Gaz. 813; in the Circuit Court for the Northern District of New York, before Judge Blatchford, in July, 1883, in *Schillinger* v. *Greenway Brewing Co.*, 21 Blatchford, 383, and 17 Fed. Rep. 244, and 24 Off. Gaz. 495; and in the Circuit Court for the Southern District of Ohio, before Judge Sage, in June, 1884, in *Kuhl* v. *Mueller*, 21 Fed. Rep. 510, and 28 Off. Gaz. 541; the patent was sustained. In the Supreme Court of the District of Columbia, in general term, in July, 1885, in *Schillinger* v. *Cranford*, 4 Mackey, 450, and 37 Off. Gaz. 1349, it was held void, on the question of novelty. It was also interpreted by Judge Sawyer, in the Circuit Court for the District of California, in *California Artificial Stone Paving Co.* v. *Freeborn*, in January, 1883, 8 Sawyer, 443, and 17 Fed. Rep. 735, and by Judge Deady, in the Circuit Court for the District of Oregon, in August, 1887, in *Schillinger* v. *Middleton*, 31 Fed. Rep. 736.

Opinion of the Court.

The patent was before this court in *California Paving Co.* v. *Molitor*, 113 U. S. 609, in March, 1885, but only on a question of contempt, and in *California Paving Co.* v. *Schalicke*, 119 U. S. 401, in December, 1886.

We are of opinion that the proper construction of the reissued patent is, that the invention consists in dividing the pavement into blocks, so that one block can be removed and repaired without injury to the rest of the pavement, the division being effected by either a permanent or a temporary interposition of something between the blocks. Concrete pavement had been laid before in sections, without being divided into blocks. The effect of the disclaimer was to leave the patent to be one for a pavement wherein the blocks are formed by interposing some separating material between them. To limit the patent to the permanent interposition of a material equivalent to tar-paper, would limit the actual invention. The use of a bottom layer of coarse cement, and placing on it a course of fine cement, and dividing the upper course into blocks by a trowel run partially or wholly through the upper course while it is plastic, in a line coincident with the joints between the sections in the lower layer, accomplishes the substantial results of Schillinger's invention, in substantially the way devised by him, and is within the patent as it stands after the disclaimer. The disclaimer took out of the first claim of the reissue only so much thereof as claimed a concrete pavement made of the plastic material laid in detached blocks, without interposing anything in the joints in the process of formation, leaving that claim to be one for such a pavement laid in detached blocks, when free joints are made between the blocks, by interposing permanently or temporarily between them, in the process of their formation, tar-paper or its equivalent.

In *California Paving Co.* v. *Schalicke*, (*supra*,) it was said, (p. 406:) "The evidence in the present case shows that the defendant, during the process of making his pavement, marked off its surface into squares. But the question is whether he, to any extent, divided it into blocks, so that the line of cracking was controlled, and induced to follow the joints of the divisions, rather than the body of the block, and so that a

block could be taken out, and a new one put in its place, without disturbing or injuring an adjoining block. The specification makes it essential that the pavement shall be so laid in sections 'that each section can be taken up and relaid without disturbing the adjoining sections.' Again it says that the joint between the blocks 'allows the several blocks to heave separately, from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks.' This is essential; and, in all the cases where infringement has been held to have been established, there have been blocks substantially separate, made so by the permanent or temporary interposition of a separating medium or a cutting instrument, so that one block could upheave or be removed without disturbing the adjoining blocks. The patentee, in the disclaimer, expressly disclaimed 'the forming of blocks from plastic material without interposing anything between their joints while in the process of formation.' It appears that the defendant laid his pavement in strips from the curb of the sidewalk inward to the fence, in one mass, and then marked the strip crosswise with a blunt marker, which is made an exhibit, to the depth of about one sixteenth of an inch. But it is not shown that this produced any such division into blocks as the patent speaks of, even in degree. There were no blocks produced, and, of course, there was nothing interposed between blocks. The mass underneath was solid, in both layers, laterally. So far as appears, what the defendant did was just what the patentee disclaimed. The marking was only for ornamentation, and produced no free joints between blocks, and the evidence as to the condition of the defendant's pavements after they were laid shows that they did not have the characteristic features above mentioned as belonging to the patented pavement."

In its decision in the present case, which was made before that in the Schalicke case, the court said that the case was in no way different, so far as infringement was concerned, from the cases against Perine and Molitor and the case against the Greenway Brewing Company.

In the Schalicke case, it was said, in the opinion of this

court, in regard to the pavement in the Molitor case: "The defendant's pavement was made by cutting a lower course into sections with a trowel, to a greater or less depth, according to the character of the material, making a joint, and doing the same with an upper course, the upper joint being directly over the lower joint. Into the open joint, in each case, was loosely put some of the partially set material from the top of the laid course, answering the purpose of tar-paper. A blunt and rounded joint-marker, which was said to be $\frac{1}{16}$ or $\frac{1}{8}$ of an inch in depth, was then run over the line of the joints, marking off the block. The pavement was weaker along the line of the joint than in any other place. This was held to be an infringement." It was also there said that, in the Greenway Brewing Company case, "it was held that the 2d claim of the reissue was infringed by a concrete pavement which had an open cut made by a trowel entirely through two courses of material, the line of cut in the upper course being directly over the line of cut in the lower course, and that the interposition of the trowel, though temporary, was an equivalent for the tar-paper, even though the joint was left open after the trowel was removed, and was not made tight."

In the present case, the only pavement for which the defendant was held liable was what was called in his account or statement before the master "concrete flag pavement," the manner of constructing which is thus described by Mr. Perkins, a witness for the plaintiff: "First, joists are placed seven to eight feet apart, in front of the property where the work is to be laid. First, one stone is formed by placing a joist across between the others at right angles, generally at about four feet from the place of beginning. In this space a mortar, composed of sand, gravel and cement, is put and thoroughly tamped, so that the coarse material will be from three to four inches in thickness, leaving about one half inch on top for a mortar composed of sand and cement, which is trowelled off and made even with the top surface of the joists. Then the short joist that is put in at right angles, as before described, is taken up and placed about the same distance as before, and again filled in. The finer material in the coarse concrete is generally

worked next to the joist, so as to make a good, smooth, strong edge. When the top stuff is put on this last stone, and finished over on top with a trowel, the joint between the two stones being marked on the outer joist, a trowel is drawn through the top stuff, to make a joint straight, to correspond with the joint below." The evidence is satisfactory, that the trowel was used to cut through or into the top layer to an extent sufficient to make such a separation of the top layer into blocks, at a line corresponding with the joint below between the sections of the first layer, as to control the cracking of the top layer, by dividing it substantially into separate blocks. This division depends on the depth of the cut. The defendant contends that the object and effect of the marking with the trowel was only to give to the pavement the appearance of flagging; but the evidence is entirely clear, that the cut was made sufficiently deep, in proportion to the thickness of the upper layer, to make such a separation of the upper layer into blocks as would compel any tendency to crack to follow the line of the cut made by the trowel, and not run off into the body of the layer; and that thus the object of Schillinger's invention was attained. The defendant is, by the report of the master and the decree of the Circuit Court, made liable only for concrete flagging so laid and cut as to produce such result. The defendant was particular to have the cut in the upper layer made with the trowel directly over the line between the two sections of the lower layer, and it is shown that the upper layer of his pavement thus made would come up in separate blocks. He made his lower course of sand, gravel and cement, mixed in the proportions of one part of cement to six or seven of sand and gravel, while he made his upper course of one half sand and one half cement, made plastic with water. The lower course of his flagging was composed of material in which there was only one part of cement or adhesive substance to six or seven parts of non-adhesive substance, and there was but a slight tendency to adhere between the faces of the two sections in the lower course; while as the upper layer was composed one half of adhesive substance, the tendency was for its material to adhere strongly. Therefore, a cut in the

upper course, coincident with the joint below, would permit any action of the settling of the lower course, through frost or upheaval, to extend to the top of the upper course through a joint cut in that course, of sufficient depth to prevent the tendency of the upper course to crack in its body rather than in the line of the cut.

We are, therefore, of opinion that the first claim of the reissue, as it stands after the disclaimer, is infringed, because the defendant's pavement is a concrete pavement, laid in detached blocks or sections, substantially in the manner shown and described in the specification of the reissue, the detached blocks in the upper course being the equivalent of the detached blocks or sections of the Schillinger pavement; and that the second claim of the reissue is infringed, because the temporary use of the trowel or cutting instrument, to divide the upper course into blocks, is the equivalent of the tar-paper of the Schillinger patent, the cutting making a division which controls the cracking, and facilitates the taking up and relaying of the blocks or sections in the upper course "without disturbing the adjoining sections," and the trowel being interposed to effect its object during the process of forming the pavement on the spot where it is to remain.

The invention of Schillinger was a very valuable one. The evidence is that it entirely superseded the prior practice of laying concrete pavements in a continuous, adhering mass.

The defendant introduced in evidence, on the question of novelty, the following patents:

English patent to Claridge, No. 7489, of 1837; English patent to D'Harcourt, No. 7991, of 1839; United States patent to Russ, No. 5475, of 1848; English patent to Chesneau, No. 350, of 1852; English patent to Coignet, No. 2659, of 1855; English patent to De la Haichois, No. 771, of 1856; and United States patent to Van Camp, No. 93,142, of July 27, 1869. All of these patents, except the Van Camp patent, were introduced in evidence on the part of the defence in the case against the Greenway Brewing Company, and it was held in that case that none of them anticipated the Schillinger invention. A copy of the record in that case, embracing the

pleadings, and the evidence and patents put in by the defendant in it, on the question of novelty, forms part of the record in the present case.

An examination of the patents put in evidence by the defendant, in connection with the testimony in regard to them, shows that the Claridge pavement was not a concrete pavement, and was not formed in detachable blocks, but was a continuous asphalt pavement; that the D'Harcourt pavement was not a concrete pavement laid in detached blocks or sections, nor could one section be removed without disturbing adjacent sections; that the Russ patent shows a concrete foundation for a stone pavement, the pavement proper being constructed of granite or syenite placed on top of the concrete foundation, such concrete foundation not being formed in detachable blocks, but only being provided at certain places with removable panels, consisting of frames filled with concrete, to be lifted out to give access to water-pipes or for other purposes; that the Chesneau pavement was not a concrete pavement laid in detached sections or blocks, but was a continuous pavement, provided with panels to give access in certain places to gas and water-pipes, the panels being made of sections set in frames, which were removably inserted in the surrounding pavement, and there was no arrangement of tar-paper or its equivalent between adjoining blocks of concrete, for the purpose set forth in the Schillinger patent; that the Coignet patent did not show a concrete pavement, made in detachable blocks after the manner of Schillinger's, and built on the ground where it was to remain; that the De la Haichois pavement was not a concrete pavement laid in detachable blocks or sections, or having the arrangement of tar-paper or its equivalent between adjoining blocks of concrete, like that of Schillinger; and that the Van Camp patent showed only blocks formed in moulds, and removable from the moulds, or the pavement to be laid cemented in the moulds, and it not being stated that the blocks should be formed on the spot where they were to remain, nor that they should be formed of cement and gravel or sand. It further appears that, in the Van Camp patent, when the blocks are made in moulds, they are like

bricks, or artificial stones, or wooden blocks, which are prepared and then brought to the place where they are to be laid and put down in the usual manner; and that, when the blocks remain in the moulds and are thus laid, they do not present a uniform wearing surface of concrete, or constitute a concrete pavement formed in detachable blocks by joints.

Other testimony as to prior public use was introduced in this case, taken from the record in the case of *Schillinger* v. *Phillip Best Brewing Co.*, in the Circuit Court for the Eastern District of Wisconsin, which testimony was also introduced in the case against the Greenway Brewing Company, having been taken in November, 1882. In the decision in the latter case, it was correctly said of that testimony: "So far as it refers to prior use in Germany, not shown in a patent or printed publication, it was duly objected to in this case and must be excluded. As to the cement malt floor which Row laid in Baltimore twenty-five years ago, he shows that it was not made in sections detachable by free joints. The testimony of Botzler as to a prior malt floor laid by him in Chicago is too indefinite to amount to sufficient evidence to defeat a patent." So far as that testimony related to a pavement used in Germany, it was objected to at the time it was introduced in this case, as incompetent. It was clearly inadmissible under § 4923 of the Revised Statutes, because it did not show anything that had been patented or described in a printed publication.

We do not think that the reissued patent, as it stood after the filing of the disclaimer, was open to the objection that it was not for the same invention as that of the original patent. Whatever there was of objectionable matter inserted in the specification or the first claim of the reissue, when it was granted, was removed by the disclaimer. The reissue was granted within ten months after the original. The single claim of the original patent was repeated in the reissue as the second claim of the latter, and the first claim of the reissue, as it stood after the disclaimer, did not expand beyond the claim of the original what was claimed in the reissue.

As to the amount of the decree, we think the court properly awarded the sum of four cents per square foot as the profits of

the defendant, and that it was right to give to the plaintiff the entire profits made by the defendant by the laying by him of his concrete flagging, in view of the testimony in the case. It clearly appears that the defendant's concrete flagging derived its entire value from the use of the plaintiff's invention, and that if it had not been laid in that way it would not have been laid at all.

In *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126, 139, it is said that "when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy." This language was quoted with approval in *Root* v. *Railway Co.*, 105 U. S. 189, 203. As in the case of the Nicholson patent, so in the case of the Schillinger patent, the pavement was a complete combination in itself, differing from every other pavement, and the profit made by the defendant was a single profit derived from the construction of the pavement as an entirety. *Callahan* v. *Myers*, 128 U. S. 617, 665, 666.

Within the decision in *Garretson* v. *Clark*, 111 U. S. 120, the proof in this case is satisfactory, that the entire value of the defendant's pavement, as a marketable article, was properly and legally attributable to the invention of Schillinger.

The decree of the Circuit Court is

Affirmed.

WILSON *v.* EDMONDS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 245. Argued April 11, 12, 1889.— Decided April 22, 1889.

On the facts of this case, it was held that the defendant was not a co-partner with another person, in his general business, and liable for his debts.

THE case is stated in the opinion of the court.

Mr. Enoch Totten and *Mr. W. Willoughby*, for appellant, cited: *Waugh* v. *Carver*, 2 H. Bl. 235; *Pleasants* v. *Fant*, 22

Citations for Appellee.

Wall. 116; *Parker* v. *Canfield*, 37 Connecticut, 250; *Pratt* v. *Langdon*, 12 Allen, 544; *Richardson* v. *Hughitt*, 76 N. Y. 55; *Cox* v. *Hickman*, 9 C. B. (N. S.) 747; *S. C.* 8 H. L. Cas. 268; *Bond* v. *Pittard*, 3 M. & W. 357; *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Perley* v. *Driver*, 5 Ch. D. 458; *Kitsham* v. *Jukes*, 1 B. & S. 868; *Beauregard* v. *Carr*, 91 U. S. 140; *Smith* v. *Knight*, 71 Illinois, 148; *Linton* v. *Millikin*, 47 Illinois, 178; *Curry* v. *Fowler*, 87 N. Y. 133; *Mifflin* v. *Smith*, 17 S. & R. 165; *In re Estate of Davis*, 5 Wharton, 530; *S. C.* 34 Am. Dec. 574; *Brooks* v. *Washington*, 8 Grattan, 268; *S. C.* 56 Am. Dec. 142; *South Carolina Bank* v. *Case*, 8 B. & C. 427; *Barton* v. *Hanson*, 2 Campb. 597; *Bank of the United States* v. *Binney*, 5 Mason, 176; *Wood* v. *Olmer*, 7 Ohio St. 172; *Leggett* v. *Hyde*, 58 N. Y. 272; *Everett* v. *Coe*, 5 Denio, 180; *Berthold* v. *Goldsmith*, 24 How. 536; *Hargrave* v. *Conroy*, 19 N. J. Eq. (4 C. E. Green) 281; *Sheridan* v. *Medara*, 10 N. J. Eq. (2 Stockton) 469; *S. C.* 64 Am. Dec. 464; *In re Francis*, 2 Sawyer, 286.

Mr. Nathaniel Wilson, for appellee, cited: *Brown* v. *Swann*, 10 Pet. 497; *Russell* v. *Clarke*, 7 Cranch, 69, 89; *Gregory* v. *Morris*, 96 U. S. 619, 623; *Hauselt* v. *Harrison*, 105 U. S. 401, 405; *Casey* v. *Cavaroc*, 96 U. S. 467, 480; *Clark* v. *Iselin*, 21 Wall. 360; *Peugh* v. *Davis*, 96 U. S. 332, 336, 337; *Russell* v. *Southard*, 12 How. 139, 147; *Hughes* v. *Edwards*, 9 Wheat. 489; *Babcock* v. *Wyman*, 19 How. 289; *Shillaber* v. *Robinson*, 97 U. S. 68; *Villa* v. *Rodriguez*, 12 Wall. 323; *Cook* v. *Tullis*, 18 Wall. 332; *Stewart* v. *Platt*, 101 U. S. 731, 738, 739; *Donaldson* v. *Farwell*, 93 U. S. 631; *Jerome* v. *McCarter*, 94 U. S. 734; *Yeatman* v. *Savings Institution*, 95 U. S. 764; *Seymour* v. *Freer*, 8 Wall. 202; *Beckwith* v. *Talbot*, 95 U. S. 289; *Dale* v. *Pierce*, 85 Penn. St. 474; *Curry* v. *Fowler*, 87 N. Y. 33; *Harvey* v. *Childs*, 28 Ohio St. 319; *Luitner* v. *Milliken*, 47 Illinois, 178; *Adams* v. *Funk*, 53 Illinois, 219; *Smith* v. *Knight*, 71 Illinois, 148; *Boston & Colorado Smelting Co.* v. *Smith*, 13 R. I. 27; *Williams* v. *Soutter*, 7 Iowa, 435, 445, 446; *Ruddick* v. *Otis*, 33 Iowa, 402; *Hart* v. *Kelley*, 83 Penn. St. 286, 290; *Wells* v. *Babcock*, 56 Mich. 276; *Beecher* v. *Bush*, 45 Mich. 188, 196; *Buzard* v. *Bank of*

Greenville, 67 Texas, 84; *Rice* v. *Austin*, 17 Mass. 197, 206; *Meehan* v. *Valentine*, 29 Fed. Rep. 276; *Barter* v. *Rodman*, 3 Pick. 434; *Denny* v. *Cabot*, 6 Met. 82; *Bradley* v. *White*, 10 Met. 303; *S. C.* 43 Am. Dec. 435; *Monroe* v. *Greenhoe*, 54 Mich. 9; *Thayer* v. *Augustine*, 55 Mich. 187; *Colwell* v. *Britton*, 59 Mich. 350; *Vanderburg* v. *Hull*, 20 Wend. 70; *Boyce* v. *Bundy*, 61 Indiana, 432; *Eastman* v. *Clark*, 53 N. H. 276; *Clifton* v. *Howard*, 89 Missouri, 192; *Cully* v. *Edwards*, 44 Arkansas, 423; *Polk* v. *Buchanan*, 5 Sneed, (37 Tennessee,) 721; *Dwinell* v. *Stone*, 30 Maine, 384; *Millett* v. *Holt*, 60 Maine, 169; *Darrow* v. *St. George*, 8 Colorado, 592; *Nicholas* v. *Thielges*, 50 Wisconsin, 491; *Pond* v. *Cummins*, 50 Connecticut, 372; *Setzer* v. *Beale*, 19 West Virginia, 274; *Crawford* v. *Austin*, 34 Maryland, 49; *Sangston* v. *Hack*, 52 Maryland, 173; *Heran* v. *Hall*, 1 B. Mon. 159; *S. C.* 35 Am. Dec. 178; *Cox* v. *Hickman*, 8 H. L. Cas. 268; *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. 419; *Kilshaw* v. *Jukes*, 3 B. & S. 847; *Easterbrook* v. *Barber*, L. R. 6 C. P. 1; *London Assurance Co.* v. *Drennen*, 116 U. S. 461; *Drennen* v. *London Assurance Co.*, 113 U. S. 51.

Mr. Justice Blatchford delivered the opinion of the court.

On the 7th of June, 1884, Josiah H. Squier, of the city of Washington, doing business there as a banker and broker, under the name of J. H. Squier & Co., being indebted in a large amount, made an assignment of all his property to Jay B. Smith, for the benefit of his creditors. Afterwards, in the same month, Theron C. Crawford, a creditor of J. H. Squier & Co., brought a suit in equity, in the Supreme Court of the District of Columbia, against Squier and Smith, to remove Smith from his position as assignee, and to have the estate settled. An order was made in that suit removing Smith and appointing Jesse B. Wilson receiver of the estate, for the purpose of administering its assets under the direction of the court. Squier died in September, 1884.

After the assignment to Smith and before the appointment of Wilson as receiver, James B. Edmonds filed in the Crawford suit a petition claiming that he was the owner of certain securi-

ties which were in a safe belonging to him in the office of the firm; and, by an order made in the cause, he was allowed to take possession of those securities, giving bond for the same. Thereupon Wilson, as receiver, filed a bill in equity, in the Supreme Court of the District of Columbia, against Edmonds. The bill alleged that Edmonds was not the owner of the securities; that he had been interested in business with Squier & Co. for a number of years; that the relations between Edmonds and Squier were defined by a written agreement, which in effect made Edmonds a partner with Squier in the business, down to the time of said assignment; that, in respect to two particular notes made by Squier & Co., and held by Edmonds, dated August 1, 1883, one for $40,000 and the other for $4000, Squier & Co. did not owe to Edmonds the moneys named in them; that, during all the time mentioned, Edmonds had been drawing out from the firm large sums of money, as interest upon moneys which he claimed to have advanced or paid to the firm; that such payments of interest had been largely in excess of that allowed by law, in many instances as great as 1½ per cent per month; that such sums so paid as interest had been drawn from deposits made with Squier & Co. by persons who deposited their money with that firm and were still its creditors; and that Edmonds ought to refund the money so received by him as unlawful interest, if it should appear that he was not liable, as a partner with Squier, to pay all the debts of the firm.

The bill prayed that Edmonds might set forth in his answer when he first had any business relations with Squier, what they were, and how long they continued; that he might state what was the consideration for the two notes, and when it arose; and that he might set forth any written contract between him and Squier, in relation to any business transaction between them, and when and how he became possessed of the securities referred to, and the particulars of the payments of money by Squier & Co., or Squier, to him, both as principal and interest, and what moneys he had loaned or advanced to Squier & Co., for the purpose of buying or speculating in the purchase of vouchers of army or navy officers, and other securi-

ties, and the dates and amounts of all notes given to him by Squier & Co., and how much he had received in payment on said notes for principal, and how much for interest, and, if any such notes were given, when they were surrendered, and for what purpose and for what consideration.

The bill further prayed that the court would direct the said securities or their proceeds to be delivered or paid by Edmonds to the plaintiff, for the benefit of the creditors of Squier & Co., as having been the property of Squier & Co., which passed under said assignment; that, if it should appear that Edmonds was not a partner and as such liable to pay the debts of the firm, then a decree might be made against Edmonds for so much as had been paid to him by Squier & Co. as illegal interest upon money advanced or lent by him to Squier & Co.; and that an account might be taken between him and Squier & Co., to ascertain the true indebtedness, if any, of the firm to him.

The defendant put in an answer to the bill, claiming to be the owner of the securities in question, and stating that their total amount was about $28,443; that they consisted mostly of pay vouchers of United States officers, which by custom had become a sort of commercial paper, having a market value; that a few of them were indorsed payable to Squier & Co., but all of them had been delivered to the defendant by Squier & Co. for a valuable consideration equal to their par value, and upon the promise by Squier & Co. that they would redeem the same or collect the money thereon for the defendant, or do what might be necessary to enable him to receive the money thereon; that, since the order of the court allowing him to take them, he had found about $9000 of them to be of such doubtful value that he had, under an order of the court, tendered them to the receiver; and that of the residue (less than $20,000) some were of doubtful value. The answer denied that he had been interested in the business of Squier & Co. except as a creditor, and that he had ever been a partner in Squier & Co. or with Squier. He set forth his relations with Squier substantially as follows:

Early in April, 1879, Squier informed the defendant that the firm of J. H. Squier & Co., which was constituted of

Squier alone, was borrowing money and paying 2 per cent a month therefor, to enable it to purchase certain securities, and that it wished to borrow additional moneys for the purchase of official pay vouchers, and would pay interest on such money at the rate of from 1 to 1½ per cent a month. Squier offered to borrow moneys from the defendant at such rate, but the defendant declined to make such loans, and informed Squier that he had no knowledge of Squier's responsibility, and that 10 per cent per annum was the highest rate of interest he had ever paid or received. Subsequently, Squier came to him with some of the pay vouchers, and urged him to receive the same as security for money to be lent to Squier to enable him to purchase such vouchers, and proposed that, for the money so lent, the note of Squier & Co. should be given, and interest paid at the rate of 10 per cent per annum, payable at the end of each month, and half as much more, to be applied on the principal in final settlement. It was also proposed by Squier that the securities so obtained should be delivered to the defendant, and should be surrendered by him as they matured, on payment of the money they represented, or by having others of like kind and amount substituted for them, provided payments were so made before the maturity of the notes given for the money borrowed. The defendant agreed to this proposal, and, from April, 1879, to April, 1882, he lent to Squier & Co. nearly $48,000, taking notes for each separate loan at 10 per cent interest, and pay vouchers as security therefor. The loans were intended by the defendant to have amounted in the aggregate to only a small sum, but they finally aggregated a large sum, and, when he found that payments were not made as promised, he refused to make further loans, and took a memorandum to protect his title to the vouchers, and his right to collect them. For each loan made by him to Squier & Co., a separate note was so taken, and the various notes were subsequently consolidated into the two notes for $40,000 and $4000. Some time in 1882, there having been an extension given and a renewal of notes, and due credit given for all sums received from Squier & Co. to apply on the loans, both interest and principal, Squier & Co

agreed to pay off the debt entirely, at a time not later than the early spring of 1883. This not having been done, the defendant, on August 1, 1883, demanded a settlement from Squier & Co., but, at the request of Squier & Co., consented to a further extension of six months as to $40,000 of the indebtedness, the defendant then holding the notes of Squier & Co. for $44,000, and pay vouchers as security therefor to about that amount. The interest on the notes had then been fully paid, and the debt had been slightly reduced by the monthly payments in excess of interest, made subsequently to April, 1882, the amount of which excess was less than $3000. Renewal notes were given for the same total amount as those surrendered by the defendant, leaving for further consideration what exact amount should be credited, with the agreement that, by means of such credit and payments of money, $4000 of the debt should be cancelled within three months. Squier & Co. agreed that while the notes were running they would keep the securities fully equal to the debt, and when unable to pay from the profits the stipulated monthly sum to apply on the notes, then any sums collected on the vouchers should not be reinvested nor others taken in lieu thereof, but should be applied on the debt, and that the securities of the defendant and any collections thereon should be kept free from other transactions of the firm. No portion of the notes was thereafter paid, except the monthly sum of $540 at the end of each month, before the failure of Squier & Co. Meantime, because of the reduction of the debt, though it was slight, the defendant allowed Squier & Co., in the exchange of securities, to reduce their aggregate. In so doing, he confided in Squier as to the quality and amount of the substituted securities, and, on the failure of Squier & Co., was surprised to find that the amount of securities held by him was less than had been represented and less than the aggregate debt, and that many of them which had been represented to be good were worthless.

This agreement, so made, and dated August 1, 1883, was evidenced by the following written instrument, executed by J. H. Squier & Co. and the defendant: "This agreement wit-

nesseth, that James B. Edmonds has delivered to J. H. Squier & Co. forty-four thousand dollars for investment by the latter for the former in the purchase of pay vouchers, payable not later than six months from date of purchase, of officers in army, navy, or civil service of the United States, and for re-investment, upon collection by said Squier, in same kind of securities, but not unless they are purchased so as to yield to said Edmonds a net profit of one and one-fourth per cent per month on forty thousand dollars and one per cent per month on four thousand dollars, and enough besides to pay said Squier & Co. for their services and for guaranteeing prompt payment of the vouchers. Said Squier & Co. guarantees the genuineness of each voucher he shall purchase, as well as its prompt payment and the return to said Edmonds of said principal sum of forty-four thousand dollars over and above said profits, and may retain all profits above those going to said Edmonds as aforesaid. Said Squier & Co. shall transact all the business without charge. Said Edmonds shall keep possession of the vouchers to the extent of the principal invested and two per cent besides, and will exchange, as they become payable, for others of like kind or for cash. He may keep his safe therefor in banking-house of said Squier free of charge. Said Squier & Co. give their notes to said Edmonds for said $44,000 and interest at ten per cent, to wit, one for forty thousand dollars and one for four thousand dollars, of same date as this memorandum, and as a further guaranty and indemnity to Edmonds. This contract shall terminate upon notice by either party or upon death of either, and then all the moneys so invested shall be returned to said Edmonds, with interest to extent aforesaid; and in case of death of said Edmonds the money shall be paid to his present wife, if she survive him. All moneys that may be collected by said Edmonds on said vouchers and received shall be credited to said Squier & Co. on said notes."

The total amount of the loans made by the defendant to Squier & Co. amounted to nearly $48,000, and the total amount of the moneys paid by Squier & Co., or Squier, to the defendant, in respect of such loans, for interest or principal, or for any other purpose, was less than $29,000. No sums were

drawn out of the firm by the defendant or received from it, except such payments to be applied first upon interest and the residue upon the principal. The defendant never put any money into the firm, or had any business transactions with it, except to make such loans, which were made to accommodate Squier & Co., and to enable them to purchase the vouchers, on condition that they should deliver them to the defendant as security for the loans. A note was given in every instance for the loan, bearing 10 per cent interest, which notes were surrendered to Squier & Co. whenever others were given in lieu thereof. The securities in question were delivered to the defendant from month to month, in lieu of others for the same or larger amounts surrendered to Squier & Co., it being usual for Squier & Co. to deliver a certain amount to him and to receive back others which had matured, of like or larger amounts; and occasionally the defendant entrusted small amounts to Squier & Co. for collection, upon the agreement to return a similar amount in a few days, to be purchased with the proceeds of the collection, according to the written agreement of August 1, 1883. A similar but briefer memorandum had been made in 1882 between the parties, which was given up with the old notes, to Squier & Co., on August 1, 1883. The total number of the notes given by Squier & Co. to the defendant was equal to the total number of the loans and renewals.

A replication was put in to this answer, and proofs were taken on both sides. The case was heard by the court at special term, before Mr. Justice Cox, and a decree made dismissing the bill. A copy of the opinion of the court is furnished to us, but it does not seem to be reported.

It appears from the opinion that the grounds on which the bill was dismissed were, that, although there may have been a partnership between the parties as to the particular venture or investment of the money in the securities in question, such a contract of partnership did not connect the defendant with the general business of Squier & Co.; that the contract was, that, in consideration of certain moneys placed by the defendant in the hands of Squier, he would purchase for the defendant a certain class of securities, which securities were not to be

mingled with the general business of Squier & Co., but were to be placed in the possession of the defendant and held by him; that no profits were to be received by the defendant except from this particular venture; that the property which the defendant's money was to buy was to be bought at a rate which would yield to the defendant a specified profit, and enough besides to pay Squier & Co. for their services and for guaranteeing prompt payment of the vouchers; that the property placed in the hands of the defendant was thus to be worth that much more than he paid for it, and his profit was to be derived from the identical securities which his money purchased; that the evidence showed that there was a large business done by Squier & Co. outside of the transactions with the defendant, in which business the defendant did not participate; that the parties connected with such other business had no concern with the transactions between the defendant and Squier & Co.; and that, although the relation between the defendant and Squier might be called a partnership relation to the limited extent mentioned, it was not of such a character as to involve the defendant in the responsibility with Squier claimed in the bill.

The plaintiff appealed to the court in general term, which affirmed the decree of the special term, and from that decree the plaintiff has appealed to this court. No opinion was rendered by the general term, and it may therefore be assumed that it proceeded upon the grounds stated by Mr. Justice Cox.

We are of opinion that, upon the same grounds, the decree must be affirmed. In addition, it may be said, that the evidence sustains the matters set up in the answer; that it is not shown that the defendant ever represented himself to be a member of the firm of Squier & Co., nor does it appear that any creditor of that firm was ever informed or supposed that the defendant was such member, or gave credit to the firm, or had dealings with the firm, on the understanding or belief that he was a partner. The dealings between the parties appear always to have been of the character mentioned in the written paper of August 1, 1883. In every case of an advance or loan of money by the defendant to Squier & Co., a note was given

to the defendant for the amount, bearing ten per cent interest, and pay-vouchers for the same amount were placed in the hands of the defendant. The money lent by the defendant to Squier & Co., for which the notes were given, was to be invested in vouchers which were to be bought at a rate to net in the way of discount the profit designated in the agreement; but that profit was not intended to be a profit to the defendant, in addition to the ten per cent interest, for it was expressly provided that all moneys which might be collected by the defendant on the vouchers, or received by him, should be credited to Squier & Co. on the notes. This compelled a credit to Squier & Co. on the principal of the notes, of all the monthly sums paid by Squier & Co. to the defendant, and called "profits," over and above the amount necessary to pay to him ten per cent interest on the aggregate amount of his loans; and the practical construction of the agreement by the parties was to the same effect, because the testimony of Edmonds shows that he had various settlements from time to time with Squier, in which prior notes that he had received from Squier for loans were surrendered to Squier, on the ground that they had been extinguished by the surplus of the monthly payments by Squier, over and above the amount necessary to pay to the defendant interest at ten per cent on the moneys which he had lent to Squier. It was lawful to stipulate in writing for interest at ten per cent. Rev. Stat. District of Columbia, § 714.

Decree affirmed.

CENTRAL TRUST COMPANY *v.* SEASONGOOD.

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

No. 224. Argued March 21, April 1, 1889.— Decided April 15, 1889.

An appeal prayed and granted in a Circuit Court "of this cause to the Supreme Court" brings the whole case here, including orders previously made in it.

A party to a decree in a state court in a matter subject to its jurisdiction

Statement of the Case.

cannot attack it collaterally in a suit commenced in a Circuit Court of the United States after the jurisdiction of the state court had attached. It is immaterial whether the receiver's certificates, which are in controversy in this suit were properly issued to the appellee, for the reason that: (1) it is apparent that the order of the state court under which they were issued was the result of an agreement between the parties to this suit; and (2) if they should be held to be invalid the appellee could not be restored to the rights under the decree of the state court which he surrendered for them.

THE case, as stated by the court in its opinion, was as follows:

The principal questions upon this appeal arise out of an order directing the receiver in this cause to issue to certain parties his certificate of indebtedness for the amount of claims held by them against the property of which he was directed to take possession. The history of those claims and the circumstances under which the above order was made will appear from the following statement:

Jacob Seasongood, Lewis Seasongood, and Bernard G. Stall, by written agreement, made August 29, 1876, bargained and sold to the Miami Valley Narrow Gauge Railway Company, (whose name was afterwards changed to the Miami Valley Railway Company,) for the purpose of its roadway, three adjoining lots in the city of Cincinnati, Ohio, for the sum of $18,500, of which $2000 were agreed to be paid in thirty days, and $16,500, at the end of ten years, the latter sum to bear interest at the rate of seven per cent per annum, payable quarterly. The company also agreed to pay the taxes and assessments on the property. The vendors retained the legal title, but bound themselves to convey the premises, upon the performance by the vendee on its part of the agreement of purchase. The company was put into immediate possession, and proceeded to construct its road over the lots.

On the 1st of November, 1876, it mortgaged the road, its property and franchises to secure bonds aggregating $500,000. In an action brought in the Court of Commons Pleas of Warren County, Ohio, that mortgage was foreclosed, and the mortgaged property sold. The title ultimately passed to the

Cincinnati Northern Railway Company, a corporation created under the laws of Ohio, with authority to construct and operate a railroad from Cincinnati through the counties of Hamilton, Butler and Warren to Waynesville in the latter county. That company, by mortgage in the nature of a trust deed, executed November 17, 1880, conveyed its property rights and franchises to the present appellant, as trustee, to secure bonds aggregating $1,000,000.

By a decree rendered by the Superior Court of Cincinnati, at general term, in an action brought May 2, 1881, by Jacob Seasongood, Lewis Seasongood and Bernard G. Stall against the Miami Valley Railway Company, the Cincinnati Northern Railway Company, the trustees in the mortgage of November 1, 1876, the Central Trust Company, (the trustee in the mortgage of November 17, 1880,) and others, it was found that there was due to the plaintiffs in that action, under the above agreement with the Miami Valley Railway Company, for interest and taxes, the sum of $7806.22; and it was adjudged that for the payment of the above sum, with interest, together with the balance of the principal sum, "the plaintiffs have the first and best lien upon the lots of land described in said agreement;" that unless such sum, and the costs of the action, were paid within ninety days, the master "shall, after the court has ascertained and determined the dimension and location of so much of the lots of land aforesaid as are not needed for the railroad, cause such portions of said lots as he shall find as aforesaid to be unnecessary for the railroad, to be appraised and advertised, and sold upon execution at law;" and that, "in the event that the sum realized from the sale of the portions of the lots of land aforesaid shall be insufficient to pay the sum of money and interest and costs last aforesaid, the entire railway, as owned and operated by the said Cincinnati Northern Railway Company, shall be sold as an entirety." To this decree the Cincinnati Northern Railway Company and the Central Trust Company excepted, the latter corporation tendering its bill of exceptions, which was signed, sealed, and made part of the record.

By a further decree rendered October 3, 1883, the court

found that certain portions of the lots, described by metes and bounds, were not necessary for the roadway of the Cincinnati Northern Railway Company, and ordered them to be appraised and sold separately, and if they did not sell for enough to pay the above judgment, interest and costs, then to sell the road as theretofore ordered. To that decree the defendants also excepted.

The present suit was instituted in the Circuit Court of the United States, by the Central Trust Company of New York, on the 14th day of August, 1883, (the day after it filed its answer in the above suit in the Superior Court of Cincinnati,) against the Toledo, Cincinnati and St. Louis Railroad Company, the Cincinnati Northern Railway Company, the Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman. The bill set out the above mortgage or deed of trust of November 17, 1880; the lease by the Cincinnati Northern Railway Company for the term of ninety-nine years of the tracks, road-bed, rights of way, property, franchises, etc., of the Spring Grove, Avondale and Cincinnati Railway Company, and the mortgage executed May 25, 1881, by the Cincinnati Northern Railway Company to the Central Trust Company, of its property, rights, and franchises, for the payment of $1,000,000 of bonds theretofore issued by the Spring Grove, Avondale and Cincinnati Railway Company, secured on its road, the lien of the latter mortgage to be second only to that of the mortgage of November 17, 1880; a mortgage by the Cincinnati Northern Railway Company, of May 25, 1881, to the same trustee, of its property, rights and franchises, to secure an issue of $1,000,000 of income bonds, payable out of the net earnings of the last-named railway company; and the consolidation of the above railroad companies under the name of the Toledo, Cincinnati and St. Louis Railroad Company, and the assumption by the consolidated company of the debts secured by each of said mortgages.

The prayer of the bill was, that all of said mortgaged property be sold, the proceeds to be applied to the payment of the bonds and coupons secured by the first of the above mortgages, and the balance, if any, to be paid to the Cen-

tral Trust Company, for the holders of bonds secured by the second and third mortgages; and that until such sale was had, a receiver be appointed of all the property and premises embraced by the first mortgage, with power to maintain and operate the Cincinnati Northern Railway, including the road leased from the Spring Grove, Avondale and Cincinnati Railway Company, to collect rents, etc.

Upon the motion of the Central Trust Company, an order was passed, October 20, 1883, appointing a receiver, who was directed to take possession, maintain and operate the Cincinnati Northern Railway, forty-two miles in length, constructed and to be constructed, and also the Spring Grove, Avondale and Cincinnati Railway Company.

On the 8th of December, 1883, the following order was made by the Circuit Court in this cause:

"It appearing to the court that the Superior Court of Cincinnati, in general term, in cause No. 2350, wherein Jacob Seasongood, Louis Seasongood and Bernard G. Stall are plaintiffs and the Central Trust Company of New York and others are defendants, has found that certain real estate belonging to said plaintiffs, situate in the city of Cincinnati, Ohio, and being lots 13, 14 and 15 of S. Kemper's subdivision, in section 7, town. 3, fractional range 2, Miami purchase, is occupied by the Cincinnati Northern Railway Company under an agreement entered into between said plaintiffs and the Miami Valley Narrow Gauge Railway Company, the predecessors of the said The Cincinnati Northern Railway Company, and that there is due to said plaintiffs thereon the sum of seventy-eight hundred and six and $\frac{22}{100}$ ($7806.22) dollars, with interest on the same from the 29th day of May, 1883, and that said plaintiffs are entitled to be paid on the 29th day of August, 1886, under said agreement, the further sum of sixteen thousand five hundred ($16,500.00) dollars, with interest thereon at the rate of seven per cent per annum, payable quarterly, from the 29th day of May, 1883, and all taxes they may be required to pay in the mean time; and it further appearing to this court that said Superior Court of Cincinnati has adjudged and decreed that said plaintiffs have a first and prior

lien on said lots for the payment of said sums so found to be owing to them, and has ordered that in the event of so much of said lots as may not be necessary for the purposes of said railway company being sold and proving insufficient to pay said claims, then that the whole of said railway be sold to pay the same; and it further appearing to this court that the portion of said lots not necessary for the purposes of said railway are insufficient to pay said claims, and that an order of sale has been issued by said Superior Court directing the appraisement and sale of the whole of said railway, and that said parties are proceeding to bring the same to sale in pursuance thereof; and it further appearing to the court that such sale would be contrary to the best interests of all concerned, and that it is necessary to the operation of said road by the receiver heretofore appointed herein that said proceedings to sell should be stopped; and it further appearing to the court that said parties are willing to have so much of said lots as are not necessary for railroad purposes sold by the master commissioner appointed by said Superior Court in said cause, and the proceeds arising therefrom credited upon the certificate of indebtedness hereinafter provided to be issued to them, and to accept as full satisfaction of all their remaining rights under said decree (and enter satisfaction of the same and convey said right of way to said railway) certificates of indebtedness, to be issued by the receiver herein, bearing interest at the rate of six (6) per cent per annum and payable when the said railroad shall be sold by the order of this court herein, unless sooner paid out of the earnings from the operation of said road or otherwise, as the court may order, provided the same be made a first lien upon said road, except only such other certificates as the court may find it necessary to issue, with all which they shall be of equal priority:

"Now, therefore, in consideration of the premises, it is ordered by the court that the master commissioner in said case in said Superior Court be authorized to proceed and sell under his order said outlying strips which were found not to be necessary for said right of way, and, after paying the costs of said action and taxes, to apply the balance of the purchase

money on said certificate and pay the same to said Seasongoods and Stall.

"And by agreement it is ordered that in the event that said case in said Superior Court shall be taken to the Supreme Court of Ohio by motion for leave to file within thirty (30) days, and leave shall be granted and bond given, then said certificate to be returned.

"Nothing herein contained shall prejudice the right of defendant to prosecute a proceeding in error in the Supreme Court of Ohio within said thirty (30) days.

"And it is ordered by the court that W. J. Craig, receiver herein, be, and he hereby is, authorized and directed to issue to said Jacob Seasongood, Louis Seasongood and Bernard G. Stall his certificate of indebtedness in the sum of twenty-five thousand one hundred and seventy-six and $\frac{20}{100}$ ($25,176.20) dollars, that being the total amount of the said claims on this 8th day of December, 1883, and bearing interest at the rate of six per cent (6) per annum from date and payable on or before one year after date to the order of said parties, said certificate to be equal in priority with all other certificates that may be issued herein, but to be prior to all other liens and to be paid first upon sale of this road, and the same to deliver to said parties upon the entering by them of satisfaction of all their claims under said judgment and decree in said Superior Court, and the execution and delivery by them of a proper deed of conveyance of said lots to said Cincinnati Northern Railway Company; and it is further ordered that upon the consummation thereof the said The Cincinnati Northern Railway Company shall stand subrogated to all the rights the said parties had against the said The Miami Valley Narrow Gauge Railway Company and the stockholders thereof."

Jacob Seasongood having died, the court, by an order made February 12, 1884, directed the receiver to issue the certificate provided for in the previous order to Louis Seasongood and Bernard G. Stall, survivors, "upon the same terms and conditions named in said original order."

On the 20th of November, 1885, the following order was made:

Statement of the Case.

"It appearing to the court from the report of the master commissioner of the sale of the Cincinnati Northern Railroad that there are sufficient of the proceeds of said road to pay the full amount of the claim of J. and L. Seasongood and Stall and interest, for which a receiver's certificate was issued to Lewis Seasongood and B. G. Stall, survivors of Jacob Seasongood, after paying all other certificates of the receiver of said Cincinnati Northern Railroad Company; that said money remains unpaid; that since said decree ordering said certificate to be issued said B. G. Stall and said Jacob Seasongood have died, leaving said Lewis Seasongood the sole survivor; that the certificate was issued to Lewis Seasongood and B. G. Stall as survivors after the death of said Jacob Seasongood, and that out of the proceeds of sale of said outlying strips of land on July 8th, 1884, there was paid to said Lewis Seasongood and B. G. Stall, survivors, the sum of $525.33, which is all that was left after paying the costs of said action in the Superior Court of Cincinnati and some taxes on said strips, which should be credited as of that date upon said certificate, which leaves a balance, with interest computed to November 12th, 1885, of $27,562.90 due and owing on said decree:

"It is therefore ordered by the court that the purchasers of said railroad pay to the clerk of this court said sum of $27,562.90, with interest from November 12th, 1885, until paid, and that said clerk pay forthwith to said Lewis Seasongood, survivor, said sum of $27,562.90, and until so paid he is entitled to and shall be paid by said clerk 6 per cent interest thereon from November 12th, 1885.

"It appears further to this court that said case in said Superior Court of Cincinnati was not carried to the Supreme Court of Ohio.

"Thereupon the Central Trust Company, complainant, prays an appeal in open court of this cause to the Supreme Court, and this court grants the appeal and fixes the amount of bond at double the amount of said claim and interest, to wit, fifty-five thousand and five hundred dollars, which bond shall operate as a supersedeas of this order and decree."

It appears from the record of the case in the Superior Court

of Cincinnati that the parts of the lots, ascertained not to be necessary for the roadway, were sold by the commissioner of that court, one bringing $861 and the other $201, and that the sale was confirmed June 17, 1884.

On the 29th of March, 1884, a decree of foreclosure and sale was entered in the court below, and pursuant thereto the Cincinnati Northern Railway was sold, on the 27th of June, 1885. It brought the sum of $200,000, which was less than its value, the purchasers being the bondholders represented by the Central Trust Company. It is stipulated by the parties that the portion of the proceeds of the sale which by the order of November 20, 1885, was directed to be paid to the appellees, would otherwise go to the appellant.

Mr. Lawrence Maxwell, Jr., (with whom was *Mr. Mortimer Matthews* and *Mr. William M. Ramsey* on the brief,) for appellant, cited: *Dayton, Xenia & Belfore Railroad* v. *Lewton*, 20 Ohio St. 401; *Washington Railroad* v. *Bradleys*, 10 Wall. 299; *Ayres* v. *Carver*, 17 How. 591; *Ex parte Railroad Company*, 95 U. S. 221; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Crosby* v. *Buchanan*, 23 Wall. 420, 453.

Mr. C. B. Matthews and *Mr. J. A. Jordan*, (with whom was *Mr. I. M. Jordan* on the brief,) for appellees, cited: *Davis* v. *Gray*, 16 Wall. 203; *Whitney* v. *Cook*, 99 U. S. 607; *Davies* v. *Corbin*, 113 U. S. 687; *Micas* v. *Williams*, 104 U. S. 556; *The S. C. Tryon*, 105 U. S. 267; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286; *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Perkins* v. *Fourniquet*, 6 How. 206; *Beebe* v. *Russell*, 19 How. 283; *Thompson* v. *Dean*, 7 Wall. 342; *Stovall* v. *Banks*, 10 Wall. 583; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Railroad Co.* v. *Swasey*, 23 Wall. 405; *Green* v. *Fisk*, 103 U. S. 518; *Trustees* v. *Greenough*, 105 U. S. 527; *Porter* v. *Bessemer Steel Co.*, 120 U. S. 649; *Munns* v. *Isle of Wight Railway Co.*, L. R. 8 Eq. 653; *S. C.* L. R. 5 Ch. 414; *St. Germains* v. *Crystal Palace Railway Co.*, L. R. 11 Eq. 568; *Walker* v. *Ware &c. Railway*, 35 Beavan, 52; *Winchester* v. *Mid Hants Railway*, L. R. 5 Eq. 17; *Allgood* v. *Merrybent*

Railway, 33 Ch. D. 571; *Pfeifer* v. *Sheboygan & Fond Du Lac Railroad*, 18 Wis. 155; *S. C.* 86 Am. Dec. 761; *Fries* v. *South Penn. Railroad & Mining Co.*, 85 Penn. St. 73; *Humphreys* v. *Allen*, 101 Illinois, 499; *Langdon* v. *Vermont & Canada Railroad*, 53 Vermont, 228, 265; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434; *Wallace* v. *Loomis*, 97 U. S. 146; *Coe* v. *Columbus, Piqua &c. Railroad*, 10 Ohio St. 372; *S. C.* 75 Am. Dec. 518; *Blossom* v. *Milwaukee Railroad*, 1 Wall. 655; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Butterfield* v. *Usher*, 91 U. S. 246; *Hinkley* v. *Gilman &c. Railroad*, 94 U. S. 467; *Sage* v. *Railroad Co.*, 96 U. S. 712; *Hovey* v. *McDonald*, 109 U. S. 150.

Mr. Justice Harlan delivered the opinion of the court.

The motion of appellee to dismiss this appeal is denied. If, as contended by him, the order of December 8, 1883, was one from which an appeal would lie, the appeal prayed and allowed on the 20th of November, 1885, would bring that order before us; for, although the bond required by the court was made to operate as a supersedeas only of the order of the latter date, the appeal asked and granted was "of this cause," that is, of the whole cause as far as it had then progressed.

Conceding appellee's lien on the lots to be prior to its lien on so much of the railroad as crossed those lots, the appellant denies that appellee had a lien upon the entire road of the Cincinnati Northern Railway Company. The proceeds of the sale of the whole road, it is insisted, must be distributed between the appellant and the appellee, upon the basis of the proportionate value of the parts upon which their respective liens rested; not, necessarily, the mathematical proportion of the three hundred and twenty feet of the railroad covering the lots in question to the entire length of the road, forty-two miles, but in the proportion of the fair value, all things considered, of the former to the latter. The precise mode of ascertaining this value was not suggested in the argument.

We are of opinion that the appellant is not in a condition to raise the question just stated. It was a party to the suit in the state court, the decree in which provided for a sale of

the entire road, in the event the sum found to be due the present appellee was not paid by the sale of such parts of the lots in question as were not needed for the railroad. That decree, even if erroneous, was binding upon all the parties to the suit in which it was rendered, until modified or reversed by the Supreme Court of Ohio. It was not open to collateral attack by any of those parties in a separate suit brought by them in the Circuit Court of the United States after the jurisdiction of the state court attached. No order in the former court could interfere with or suspend the sale which the state court had directed to be made. The only way in which such suspension could have been effected was by means of an arrangement that would be satisfactory to the present appellee, in whose behalf the state court had ordered a sale of the entire road. The order made in the Circuit Court on the 8th of December, 1883, shows upon its face that that court was informed as to the exact relation of the parties to the suit in the state court. It declared, without objection by any of the parties, that the sale then about to take place of the entire road, under the order of the state court, "would be contrary to the best interests of all concerned," and that it was necessary to the operation of the road by the receiver of the Circuit Court that the proceedings in the state court for a sale be stopped. The mode adopted to effect that end is indicated in the above order. We need not, however, stop to inquire whether it was proper for the Circuit Court to issue receiver's certificates for claims of the character of those held by the appellee. Upon that subject we express no opinion. We are relieved of any duty to consider that question, because it is apparent that the order of December 8, 1883, was the result of an agreement or arrangement between the appellee and the Central Trust Company, — the latter representing in this cause the holders of bonds secured by the mortgage of November 17, 1880, — and also because of the surrender by the appellee, in consideration of the receiver's certificate for the amount of his claims, of the rights accorded to him by the decree in the state court. The appellee cannot be restored to his rights under the decree of the state court, and it would be inequitable

to permit the appellant, representing those who purchased the property under the decree of the Circuit Court, now to raise any question as to the validity of the receiver's certificates, which it agreed might be issued to the appellee. It remained quiet for nearly two years, and until after the property had been sold, and after the sale had been confirmed to those it represented, before making an issue as to the propriety or validity of the order of December 8, 1883. The bondholders are concluded, under the circumstances disclosed in the record, by what their representative did, or assented to being done, in order to induce the appellee to surrender the rights secured by the judgment of the state court.

The decree of the Circuit Court is affirmed.

HASSALL *v.* WILCOX.

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

No. 68. Argued April 2, 3, 1889. — Decided April 22, 1889.

A statute of Texas, passed in 1879, gave a lien for wages to mechanics and laborers, on a railroad, prior to all other liens, and authorized its enforcement, in a suit, by a judgment for the sale of the railroad, and provided that it should not be necessary to make other lien-holders defendants, but that they might intervene and become parties. It did not provide for any notice by publication. In 1882, a railroad in Texas was mortgaged to secure bonds. In 1884, a creditor of the railroad company holding such labor claims, in a suit against it alone, in a court of the State, obtained a judgment for his claim and lien, and for the sale of the railroad. In a suit afterwards brought by a bondholder, in the Circuit Court of the United States, to have the rights of the creditors of the company ascertained, and a receiver appointed, it was referred to a master to report on the priority of claims. The creditor by judgment presented his claim; it was objected to by the bondholder as fraudulent and embracing amounts not covered by the statutory lien. The master reported that the claim included amounts which were not a lien, as well as amounts which were, but did not separate them; that the claim was a valid one against the company, but that it was not a lien entitled to priority. The

court, on exceptions, awarded priority of lien to the claim, for the full amount of the judgment: *Held*,

(1) The bondholders were not bound by the judgment rendered in a suit to which they were not made parties;

(2) As the claims of the creditor originated after the mortgage was made, he was bound to prove affirmatively, before the master, the existence and priority of his lien;

(3) The evidence before the master did not sustain the lien for the whole amount;

(4) The proceeding in the state court could not be sustained as one *in rem*, because the adverse claimants did not have even constructive notice of it;

(5) The claim was founded wholly on the statute of Texas;

(6) It was proper that the claim should be reëxamined before a master.

THE case is stated in the opinion of the court.

Mr. Silas W. Pettit, for appellant, cited: *Hassall* v. *Wilcox*, 115 U. S. 598; *Fosdick* v. *Schall*, 99 U. S. 235; *Brooks* v. *Railway Company*, 101 U. S. 443.

Mr. W. Hallett Phillips, for appellee, cited: *Hassall* v. *Wilcox*, 115 U. S. 599; *Fosdick* v. *Schall*, 99 U. S. 235; *Jeffrey* v. *Moran*, 101 U. S. 285; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Union Trust Co.* v. *Walker*, 107 U. S. 596; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Morrison*, 125 U. S. 591, 607.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 18th of February, 1879, an act was passed by the State of Texas, (General Laws of 1879, c. 12,) entitled "An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and sub-contractors or agents to pay their wages when due, and provide a lien for such wages," which provided as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That all mechanics, laborers and operatives who may have performed labor in the construction or repair of any railroad, locomotive, car, or other equipment to a railroad, or who may have performed labor in the operating of a railroad, and

to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipment for such wages as are unpaid.

"SEC. 2. In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either at the instance of said company, a contractor, or sub-contractor, or agent of said company, and that such wages are due, and the lien given by this act is sought to be enforced, it shall be the duty of the court having jurisdiction to try the same, to render judgment for the amount of wages found to be due, and to adjudge and order said railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment. In all suits of this kind it shall not be necessary for the plaintiff to make other lien-holders defendants thereto, but such lien-holders may intervene and become parties thereto and have their respective rights adjusted and determined by the court.

"SEC. 3. Suits by mechanics, laborers, and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which the principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law.

"SEC. 4. The lien created by this act shall cease to be operative in twelve months after the creation of the lien, if no step be sooner taken to enforce it."

On the 15th of May, 1882, the Rio Grande and Pecos Railway Company, a Texas corporation, made a mortgage to the Mercantile Trust Company of the State of New York, a New York corporation, covering all the property, real and personal, of the Texas corporation, including its franchises, lands, railways, and other property, to secure $600,000 of coupon bonds issued by it, dated June 1, 1882, payable in thirty years and bearing semi-annual interest at the rate of 6 per cent per annum.

On or prior to the 27th of March, 1884, A. W. Wilcox pre-

sented a petition to the District Court of the county of Webb, in the State of Texas, subscribed and sworn to by him before the clerk of that court, in the words following:

"The State of Texas, *County of Webb.*

"To the hon. the district court of Webb county:

"The petition of A. W. Wilcox, who resides in the county of Webb, and State of Texas, complaining of the Rio Grande and Pecos R. R. Co., a corporation duly incorporated under the laws of the State of Texas, and operating its lines through the county of Webb, where it has its principal offices, represents that heretofore, to wit, on the 12th day of January, 1884, the said defendant, in consideration of the payment of claims for labor on said defendant's R. R., executed and delivered to your petitioner a certain promissory note (see note) for the sum of fifty-five hundred and twenty-six $\frac{78}{100}$ dollars, with interest, 10 per cent, whereby defendant promised and became liable to pay your petitioner the said note, with interest, according to the tenor thereof. Your petitioner represents that he is the owner and holder of said note, and that defendant has failed and refused to pay the said note, though thereto requested, to petitioner's damage. Wherefore he prays for judgment for his debt and interest, and damages, and foreclosure of his lien on defendant's railroad and equipments."

The promissory note referred to in said petition was as follows:

"Laredo, Texas, *January 12th*, 1884.

"The Rio Grande and Pecos Railway Company, for value received, hereby promises to pay A. W. Wilcox, or bearer, on demand, the sum of fifty-five hundred and twenty-six $\frac{78}{100}$ dollars for services, and for amounts advanced on claims for labor performed in the construction and maintenance of the Rio Grande and Pecos Railroad, with interest at ten per cent per annum until paid, and upon default in payment A. S. McLane is hereby authorized, in the name of the said Rio Grande and Pecos Railroad Company, to confess judgment in any court

of competent jurisdiction, hereby waiving citation and service thereof.

"The Rio Grande and Pecos Railway Company,
"By A. C. Hunt, *The President.*

"[Corporate Seal of The Rio Grande and Pecos Railway Company.]"

On the 27th of March, 1884, the District Court rendered the following judgment:

"A. W. Wilcox
v.
"The Rio Grande & Pecos R'y Co. } 435.

"This day came plaintiff, and the defendant, by attorney-in-fact, A. S. McLane, comes and says that he cannot deny the action of the said A. W. Wilcox, and that he is justly indebted to plaintiff in the sum of fifty-five hundred and twenty-six and $\frac{78}{100}$ dollars, with ten per cent interest thereon from the 12th day of January, 1884, and it appearing to the court that a sufficient power of attorney has been filed in this cause authorizing A. S. McLane, in default of payment, to confess judgment before any court of competent jurisdiction, and waiving citation and service, it is therefore ordered, adjudged and decreed, that the plaintiff A. W. Wilcox, have and recover of the defendant, The Rio Grande and Pecos Railroad Company, the sum of fifty-five hundred and twenty-six $\frac{78}{100}$ dollars, with ten per cent interest thereon from the 12th day of January, 1884, for which execution may issue. It is further ordered by the court that the plaintiff have a lien on the said Rio Grande and Pecos Railroad Company and its equipments to secure the payment of this judgment, and that said railroad and its equipments, or so much thereof as may be necessary, be sold to satisfy this judgment."

On the 14th of April, 1884, C. B. Wright, a citizen of Pennsylvania and a holder of $121,000 of the bonds, the interest on which, due December 1, 1883, had not been paid, filed a bill

in equity in the Circuit Court of the United States for the Western District of Texas, against the railway company and the Mercantile Trust Company, setting forth that the railway company was the owner of valuable coal lands in the county of Webb, and had recently constructed a railroad from Santo Tomas to Laredo; that the business of the railway was that of a railway and transportation company and of a miner of coal; that recently there had been expended a large amount of money in opening the coal-beds, and erecting appliances for mining the coal and transporting it to market; that the principal business of the railroad was the transportation of the coal thus mined; that the value of the assets of the company consisted largely in the fact that the coal mines and the railroad were owned by the same corporation; and that any separation of the two properties would be disastrous to the creditors of the company, and would lessen materially the aggregate value of the two properties.

The bill then set forth the making of the bonds and the mortgage, and the interest of the plaintiff in the bonds; that the company had recently incurred a debt of between $20,000 and $40,000, in constructing and equipping the railroad; that, under the laws of Texas, such debt was entitled to a first lien on the road and its franchises and property, in preference to the first-mortgage bondholders, for a period of twelve months after its completion; that long before the expiration of twelve months from such completion, suits were brought upon many, if not upon all, "of the labor and material claims above mentioned," and judgment in some instances had been had thereon, on which executions had been issued which were then pending against the company, and under which, unless some relief was afforded by the court in which the bill was filed, a large portion of the property of the company would be diverted by sales by the sheriff, and the property be thus separated and its aggregate value impaired; that, in addition to such indebtedness, there was outstanding a large unsecured indebtedness, on which suit would shortly be brought, unless the property were put into the hands of a receiver; that the company was insolvent and unable to meet the interest on its fixed charges or its

ordinary debts and obligations; and that there was urgent necessity for the interference of the court, to protect the property from suits and executions, and to preserve it as a whole, so that its business might continue to be carried on, and its income and assets be applied to the payment of its debts in due order, for the general advantage of all its creditors, and more especially to enable provision to be made by the first-mortgage bondholders for the payment of the obligations held by laborers, material-men, and others, who, under the laws of Texas, were entitled to a lien upon the property, prior to that of the first-mortgage bondholders.

The prayer of the bill was, that the rights of the creditors of the company might be ascertained and declared; that, as it was doubtful whether the Mercantile Trust Company could, under the laws of Texas, take possession of the mortgaged property, the court would appoint a receiver to take possession of it, with such power and authority in regard to the preservation and use of it as should seem best adapted to protect the interests of all the persons concerned; and for general relief. The bill was not sworn to.

On the same 14th of April, 1884, the railroad company filed an answer, signed by its president, and which had been sworn to by him on the 9th of April, 1884, which stated that there were outstanding a large number of claims for work and labor done in and about the construction of the railroad of the company, and judgments had been obtained on some of the claims, on which executions had been issued, and, although sales under them had been put off from time to time, portions of the property would be exposed to sale under the executions, unless prevented by the decree of the court; and that the property of the company would be irreparably injured by any separation of its coal and railway properties, the two being both necessary for the transaction of its business of mining coal and transporting it to market. The company submitted itself to the decree of the court.

On the same 14th of April, 1884, an order, signed by the circuit judge, entitled in the cause, was filed, which stated that on the 9th of April, 1884, the case was heard on a motion

for the appointment of a receiver, on bill and affidavits, the plaintiff and the company appearing. By the order, one Smith was appointed receiver of the company and of its franchises and all its property. The order authorized the receiver to run and operate the railway, to preserve the property, to continue the mining operations and sell the coal already mined or to be mined, and out of the proceeds to pay wages, current expenses, and interest. It also directed the receiver to ascertain and report the condition of the property and of the debts charged thereon or owing by the company, and directed that, upon presenting such report, he be authorized to borrow money to pay the running expenses of the company, and to settle and pay off liens prior to the first-mortgage bonds, and all other expenses incurred by him, including his own compensation as receiver, and to issue receiver's certificates for the same, in such form and amounts as should be from time to time authorized by the court.

On the 11th of June, 1884, the court made an order directing the receiver to prepare certificates in a form given in the order, to an amount not exceeding $25,000, which certificates, together with such further like certificates as might be thereafter authorized by the court, the order stated should be a first and exclusive lien upon all the property of the company, prior to any other liens thereupon, each certificate to be for $1000, with interest at the rate of eight per cent per annum, and payable out of any surplus money in the hands of the receiver after paying the running expenses of the company; that he might dispose of the certificates at not more than one per cent discount, and that, after exhausting the receipts of the railroad, he should pay out of the proceeds of the certificates (1) the running expenses of the company which had accrued since his appointment as receiver, including the expenses of the first-mortgage bondholders in obtaining his appointment; and (2) out of the balance remaining, pay so much of the debts of the company as might be reported by the master and approved by the judge, taking an assignment of the claims to himself as receiver.

That order also appointed a master to report upon all claims

which should be presented to him after the publication by him of a notice calling on all persons having or asserting any claims, by judgment or otherwise, prior to the first-mortgage bonds, or entitled to a preference in payment out of the proceeds of the road, to present and file the same with him.

On the 24th of June, 1884, under that order, the said A. W. Wilcox filed with the master the following claim: "A judgment of the District Court of Webb County, Texas, rendered March 27th, 1884, in cause No. 435, in favor of the said A. W. Wilcox against the said Rio Grande and Pecos Railway Company, for $5526.78, with ten per cent interest thereon from January 12, 1884, and declaring and establishing a lien on said Rio Grande and Pecos Railway and its equipments, to secure the payment of said judgment, and directing the said railway and its equipments, or so much thereof as may be necessary, to be sold to satisfy the said judgment, as will more fully appear by a duly certified copy of said judgment hereto annexed, marked 'Exhibit A,' and made a part hereof. The lien declared in said judgment is based upon money due by the said Rio Grande and Pecos Railway Company to mechanics, laborers and operatives who performed labor in the constructing and repairing and operating said railway, and thereby under the laws of Texas acquired a lien prior to all others, and that said claims so constituting a prior lien were bought by the said A. W. Wilcox, and the said Rio Grande and Pecos Railway Company acknowledged the existence thereof, and promised to pay the same by its obligation and note of date January 12, 1884, upon which obligation and note the said judgment was rendered. The said judgment is unreversed and remains in full force. And the said A. W. Wilcox claims that his said lien, established by said judgment before the institution of this suit or the appointment of a receiver, is prior to the first-mortgage bonds, and is entitled to preference of payment out of the earnings and proceeds of said railway, and will apply to this court for such appropriate orders as will secure prompt payment." The claim was sworn to by Wilcox on the 23d of June, 1884.

The master filed his report upon the claims, and among them

the claim of Wilcox, on the 27th of September, 1884. By that report it appears that Wright, the plaintiff in this suit, filed objections before the master to the allowance of the claim of Wilcox, on these grounds: (1) that the judgment in favor of Wilcox in the District Court of the county of Webb was obtained by fraud and collusion between Wilcox and the president of the company; (2) that the note was without consideration and fraudulent; (3) that, for the purpose of defeating the lien of the mortgage, Wilcox falsely represented to the District Court that the note was for services and for amounts advanced on claims for labor performed in the construction and maintenance of the railroad, and that it was entitled to a lien prior to all others to secure its payment; that he was not entitled to any lien; that he performed no services and owned no claims which entitled him to such lien; that any lien was barred by the limitation of one year; that the act of the president of the company in making the note and in authorizing the confession of the judgment was *ultra vires;* and that the company was not indebted to Wilcox by reason of the note, and it was without consideration. The paper containing the objections also stated that Wright had, on the 19th of July, 1884, filed his suit against Wilcox, in the District Court of the county of Webb, to set aside and annul the said judgment on account of the acts of collusion and fraud in procuring the same, and that such suit was still pending.

It also appears by the report of the master, that Wilcox introduced before the master, as evidence in support of his claim, a copy of his petition to the District Court of the county of Webb, a copy of the promissory note, and a copy of the judgment of March 27, 1884, and that other evidence was put in by the respective parties, Wilcox and Wright.

The master reported that the note included amounts which were not secured by a lien under the state act of 1879, as well as amounts which were. The conclusion of the master was that Wilcox had a valid claim against the company for $5526.78, with 10 per cent interest from January 12, 1884; but that he had no lien prior to that of the first-mortgage bondholders. On the 6th of October, 1884, Wilcox filed exceptions to the report.

Opinion of the Court.

On the 7th of October, 1884, the Mercantile Trust Company was duly removed from its office as trustee under the mortgage, and William S. Hassall, of Philadelphia, was appointed trustee in its place. By an order of the court, the bill was dismissed as to the Mercantile Trust Company, and Hassall, as trustee, was joined as plaintiff with Wright; and a decree was entered by consent, on the 20th of October, 1884, providing for a sale of the property at auction by the trustee, which was modified by a further decree made December 10, 1884, directing the sale of the property free from all liens, for a sum not less than $100,000, which sum, it was stated, would cover the amount of the receiver's certificates and of the claims reported by the master. The sale was made, and the property was purchased by Wright and for the sum of $100,000. On the 19th of May, 1885, a decree was made confirming the sale and allowing certain claims as liens prior to the lien of the mortgage, and among them the claim of A. W. Wilcox, for the sum of $5526.78, with interest at 8 per cent per annum from the day of the contracting of the lien, such amount to be paid after the payment of the receiver's certificates and before any payment to the bondholders. On the 18th of June, 1885, Hassall, as trustee, appealed to this court from such decree, but the appeal was dismissed as to all the claimants but Wilcox. *Hassall* v. *Wilcox*, 115 U. S. 598.

Although the statute of Texas under which the superior lien of Wilcox is claimed was passed in 1879, prior to the making of the mortgage in 1882, and although Wilcox brought his suit and obtained his judgment in the state court prior to the filing of the present bill, we do not think it can be held that the trustee under the mortgage or the bondholders were bound by that judgment rendered in a suit to which they were not made parties. Although they had a right to intervene in that suit, they were not obliged to do so, nor was Wright obliged to prosecute the suit which he brought in the state court. They had a right to come into the Circuit Court of the United States to contest the priority of Wilcox's lien, and, as his claim originated after the mortgage was made, compel him to prove affirmatively in that court the existence and priority

of his lien, under the statute of Texas. He undertook to do so, but the master reported that he found, from the evidence, that the note on which the judgment was predicated included amounts not secured by a lien under the act of 1879, as well as amounts for which a lien was given under that act; and that Wilcox had no lien prior to the first mortgage bondholders. On exceptions by Wilcox, the Circuit Court sustained his exceptions, and awarded him a lien with the priority he claimed, for the full amount of $5526.78, with interest. We do not think the evidence before the master sustained the lien for the whole of that amount.

One of the exceptions taken by Wilcox to the master's report was, that the master had, by his finding, nullified the legal force and effect of the judgment of the state court. The Circuit Court may have proceeded on that ground, in its decree. But we do not think that the proceeding in the state court can be sustained as one *in rem*. It is essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate even as *prima facie* evidence. *Windsor* v. *Mc Veigh*, 93 U. S. 274, 278, 279. In the present case, no notice, either personal or constructive, was provided for by the Texas statute, or was given to the other lienholders.

The claim of Wilcox was presented before the master and the Circuit Court as a claim founded wholly on his judgment and on the statute of Texas and not as a claim arising on the principle adjudged in *Union Trust Co.* v. *Morrison*, 125 U. S. 591, or that acted on in the case of *Fosdick* v. *Schall*, 99 U. S. 235, and the cases which followed it; and no facts are shown to sustain it as a claim founded on anything but the statute of Texas.

The appellant claims that the evidence before the master shows that only $382.21 of Wilcox's claim consists of items for which the statute of Texas gives a lien. But, as the master, though saying that the note included amounts for which a

Statement of the Case.

lien was given under the act, did not attempt to state what was the total of such amounts, it is proper that

The decree should be reversed, and the case be remanded to the Circuit Court, with a direction to allow a reëxamination of the claim of Wilcox, before a master, on the same and further proofs, if desired; and it is so ordered.

KILBOURN *v.* SUNDERLAND.

SUNDERLAND *v.* KILBOURN.

SUNDERLAND *v.* KILBOURN.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 188, 261, 262. Argued March 7, 8, 1889. — Decided April 22, 1889.

Where it is competent for a court of equity to grant the relief asked for, and it has jurisdiction of the subject matter, the objection that the complainant has an adequate remedy at law should be taken at the earliest opportunity, and before the defendants enter upon a full defence. *Reynes* v. *Dumont*, 130 U. S. 354, followed.

Equity jurisdiction may be invoked, although there is also a remedy at law, unless the remedy at law, both in respect of the final relief and the mode of obtaining it is as efficient as the remedy which equity could confer under the same circumstances.

When a charge of fraud involves the consideration of principles applicable to fiduciary and trust relations, equity has jurisdiction over it, as "fraud" has a more extensive signification in equity than it has at law.

When a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon its discovery; and mere submission to any injury after the act inflicting it is completed cannot generally, and in the absence of other circumstances, take away a right of action, unless such acquiescence continues for the period limited by the statute for the enforcement of the right.

On the facts it is held that Stewart was not an indispensable party to this suit, and that the plaintiffs are entitled to a portion of the relief prayed for.

THE court, in its opinion, stated the case as follows:

In 1872, Thomas Sunderland, Curtis J. Hillyer and William M. Stewart associated themselves for the purchase and sale of

real estate in the city of Washington by way of investment and speculation. Hallet Kilbourn, James M. Latta and John F. Olmstead were carrying on business at that time in Washington as real estate agents, in partnership, under the firm name of Kilbourn & Latta, and they were employed as their agents by Sunderland, Hillyer and Stewart.

Within a period of a few weeks Sunderland, Hillyer and Stewart had purchased property through Kilbourn & Latta at a cost of several hundred thousand dollars. Sunderland's interest in the purchases was one half, Hillyer's one quarter, and Stewart's one quarter; and soon afterwards and in the same year, Stewart sold out his interest to Sunderland. In addition to these joint purchases, Sunderland purchased for himself in the same way to a large amount.

Two suits in equity in reference to the dealings between the parties had been commenced in the Circuit Court of the United States for the District of Indiana, against Latta alone, and as a partner of Kilbourn & Latta, one on behalf of Sunderland and Hillyer and the other on behalf of Sunderland alone, in which process was served on Latta but not on Kilbourn or Olmstead. Subsequently the original bill in this cause was filed in the Supreme Court of the District of Columbia and a stipulation was entered into whereby the subject matter of the causes in Indiana was transferred to the litigation here, and, by amendments made in pursuance of the stipulation, all the controversies were consolidated into this suit, the bill as amended seeking relief in favor of Hillyer and Sunderland as against Kilbourn, Latta and Olmstead, and as against Latta alone, and in favor of Sunderland as against the three and also as against Latta individually. And the answers of Kilbourn and Olmstead, and the several answers of Latta, put in issue all the causes of action respectively. The original bill was filed June 9, 1881, and the amendments March 22, 1882. During the proceedings Stewart, who had not been made a party in terms, entered his appearance and filed a disclaimer. The original bill and amendments alleged an arrangement between Sunderland, Hillyer and Stewart for the purchase of real estate, and charged that Kilbourn & Latta were employed

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as the agents of complainants and Stewart to make for them the proposed purchases under an agreement set out by the complainants as follows:

"That the plaintiffs and the said Stewart should entrust unto said firm as their agents aforesaid the negotiation for and the purchase of such real estate in the said quarter of the said city as the plaintiffs and the said Stewart might elect to acquire; that they should furnish unto the said firm, when by the same thereunto required, such sums of money as might be requisite for the acquisition of the property, and that the plaintiffs and the said Stewart should pay unto the said firm, upon the purchases to be made by said firm on their account, a reasonable compensation, by way of commission, when and in case the said firm should make no charge by way of commission against the vendors of the property, but in case any such charge should be made by the said firm against the vendors, that then the plaintiffs and the said Stewart should pay unto the said firm no commission whatever; that the said firm, in consideration of so being entrusted with the purchase of such real estate and of the commissions which it might derive upon such purchases, should ascertain and point out unto the plaintiffs and the said Stewart such lots and parcels of land, in the said section of the said city, as in the judgment of the said firm might be most advantageously acquired by the plaintiffs and the said Stewart; that the said firm should advise and counsel, to the best of its judgment, knowledge and experience, the plaintiffs and the said Stewart in respect of the purchase of any particular parcel of land within the said section which they, on their own motion, might suggest to the said firm as desirable to be purchased on their account, and that in any and all cases the said firm should negotiate for the purchase of any real property to be acquired on account of the plaintiffs and the said Stewart at the lowest possible rate at which it could be obtained from the owner, and after ascertaining the price at which any such property might be obtained from the owner, should fairly and to the best of the knowledge and ability of the said firm inform the plaintiffs and the said Stewart whether the said price was such as to render their ac-

quisition of the property desirable, and recommend to them whether they should purchase the property or not; that if the plaintiffs and the said Stewart consented to such purchase, the same should be made on their account by the said firm, and that upon receiving at its request from the purchasers the cash required in the first instance, and also the amount of deferred payments as the same might become payable, the said firm should make due settlement with the vendor or other person entitled to payment."

It is averred that large quantities of real estate were purchased, and that as to each purchase, Kilbourn & Latta represented that they had negotiated with the owner and obtained the lots at the lowest price, and that the price agreed on was the lowest price at which the property could be obtained, and that complainants relied on those representations; that complainants called the attention of Kilbourn & Latta to square No. 115, and requested Kilbourn & Latta to ascertain the owner and price thereof; that thereafter Kilbourn & Latta informed complainants that $65,000 was the lowest price at which the property could be obtained, and advised the purchase, which complainants authorized, paying $20,000 down, which was represented by Kilbourn & Latta to be required by the seller, and the property was conveyed to Latta as trustee for complainants; that these representations were false, and the real price, instead of being $65,000, was only $40,000, and the cash payment required only $8000, instead of $20,000; that such representations were made for the purpose of cheating complainants and obtaining from them the sum of $25,000, which defendants appropriated to their own use; that the real facts in relation to these purchases were not discovered by them until March, 1881; that complainants, about the same time and in substantially the same manner, were defrauded in reference to the purchase of lot 17 in square 158, the purchase price being put at $8316, when it was really only $5000, the firm of Kilbourn & Latta thereby receiving and appropriating $3316; that Kilbourn & Latta defrauded complainants out of the following sums through the acquisition of the following pieces of property: Square 155, the sum of $5319.55; three lots in square

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158, the sum of $2663.70; in square 156, the sum of $22,973; that the real truth as to the last transaction did not come to their knowledge until January or February, 1882; that afterwards the property purchased and two other valuable tracts were left in the care of the firm for resale, and in consideration of the probable commissions on such sales the firm agreed that it would keep upon its books the property, look after the payment of taxes, interest and the like, and disburse the funds therefor without any charge; that prior to January 1, 1873, complainants had sent to the firm some $250,000, and on December 31, 1876, Kilbourn & Latta held a balance in cash due to complainants of not less than $20,000, of which they appropriated $16,520 to their own use for the care and management of the property from June, 1872; that the complainants were ignorant of said charges until June, 1878; that being informed in 1877 by defendants that remittances should be sent to Latta for disbursements, considerable sums were sent to him, of which he wrongfully appropriated the sum of $5827.50; that Sunderland individually purchased several parcels of real estate through Kilbourn & Latta under the same agreement, which was left in the hands of the said firm, and out of funds of his in their hands the firm wrongfully appropriated $5973, and also $1000, of which he was not informed until July, 1878; and that the defendant Latta wrongfully appropriated $1672 belonging to Sunderland, of which the latter was ignorant until then.

The defendants in answering denied specifically any such agreement as that alleged by the complainants; averred that such a contract would have been void, if made; insisted that the claims were stale and complainants guilty of *laches;* and set up the statute of frauds and the statute of limitations and a receipt in full upon an accounting. They objected that Stewart was a necessary and indispensable party, averred that their charges for care and management were just, reasonable and proper, and denied all allegations of fraud.

The cause was ordered to be heard by the general term in the first instance, and that court rendered a decree January 9, 1885, in favor of the complainants and against all the defend-

ants for various sums, namely, the sum of $5319.55 for profit unjustly and illegally detained by the defendants from the complainants, arising out of the purchase of square No. 155, and also for the sum of $3316 in respect to profit made by defendants in the purchase of lot 17 in square No. 158; also for $8263.33 for overcharge made by defendants for care and management of complainants' property; and in favor of complainant Thomas Sunderland, individually, in pursuance of the stipulation of the parties filed in the cause against all of the defendants, for the sum of $5973.33 for overcharges for care and management of property belonging to Sunderland; and also, in pursuance of said stipulation, in favor of Sunderland individually against Latta individually, for $1672.85, being for overcharges for care and management; and also, in pursuance of said stipulation, in favor of complainants against Latta individually, for $2838.92 for overcharge made by Latta for care and management of their property, and for $1235.79, money retained by Latta from complainants' moneys in his hands.

For the opinion of the court, which was pronounced July 5, 1884, see *Sunderland* v. *Kilbourn*, 3 Mackey, 506.

Subsequently, upon petition for rehearing, the first decree was vacated and a second rendered January 22, 1885, awarding to complainants against defendants the sum of $3316; and also the sum of $8000 for excessive charges for care and management; and also in favor of complainants and against Latta individually of $2500. From this decree an appeal was taken by the defendants jointly and by Latta individually, which is No. 188, and appeals by the complainants jointly and by Sunderland individually, which are Nos. 261 and 262.

Mr. M. F. Morris, for Sunderland, cited: *Smith* v. *Woolfolk*, 115 U. S. 143; *Vallejo* v. *Green*, 16 California, 160; *Nuckolls* v. *Irwin*, 2 Nebraska, 60; *Lane* v. *Wheless*, 46 Mississippi, 666; *Hettrick* v. *Wilson*, 12 Ohio St. 136; *S. C.* 80 Am. Dec. 337; *Wylie* v. *Coxe*, 15 How. 415; *Boyce* v. *Grundy*, 3 Pet. 210; *Harrison* v. *Rowan*, 4 Wash. C. C. 202; *Gelpcke* v. *Dubuque*, 1 Wall. 220; *United States* v. *Hodson*, 10 Wall. 395; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *McBlair*

v. *Gibbes*, 17 How. 232; *Armstrong* v. *Toler*, 11 Wheat. 258; *Patterson* v. *De la Ronde*, 8 Wall. 292.

Mr. Enoch Totten, and *Mr. J. M. Wilson*, for Kilbourn, Olmstead and Latta.

I. There is no jurisdiction in equity in this cause. There is a plain, adequate and complete remedy at law. The prayers of the bill and amended bill are alike; they pray that the defendants "*may account fully* to the complainants of and concerning their said trusts," and that they may "*be required by the decree of the court* to pay" the several sums of money which are precisely set out in their pleadings. The widest scope which can be given to their prayers is that they amount to a prayer for a money decree or judgment for the several sums which have been so accurately ascertained. The authorities on this subject are numerous in this court; it is deemed unnecessary to cite authorities from other courts. *Buzard* v. *Houston*, 119 U. S. 347; *Hayward* v. *Andrews*, 106 U. S. 672; *New York Guarantee Co.* v. *Memphis Water Co.*, 107 U. S. 205; *Sullivan* v. *Portland and Kennebec Railroad*, 94 U. S. 806; *Litchfield* v. *Ballou*, 114 U. S. 190; *Killian* v. *Ebbinghaus*, 110 U. S. 568.

II. There never was any such special agreement as that set forth in the bill and amendments thereto.

III. The alleged agreement as set out in the pleadings and as described in the proof is void.

Such a contract is void because inconsistent with public policy. The two judges who entered the decree appealed from agreed that this alleged contract was void, but notwithstanding this they held, in effect, the agreement would be executed by a court of equity. This was error. A double agent of a real estate agent or broker involves inconsistent duties, and it is clear, upon both principle and authority, that in case of such double employment, the contract is void. It has been doubted whether such double agency, made even with the consent of both buyer and seller, can be upheld on the ground of public policy. See *Meyer* v. *Hanchett*, 43 Wisconsin, 246;

Raisin v. *Clark*, 41 Maryland, 158. That such agencies are void when the employment is concealed from one of the principals, there can be no doubt. *Ringo* v. *Binns*, 10 Pet 269; *Rupp* v. *Sampson*, 16 Gray, 398; *S. C.* 77 Am. Dec. 416; *Stewart* v. *Mather*, 32 Wisconsin, 344, 355; *Meyer* v. *Hanchett*, 39 Wisconsin, 419; *Farnsworth* v. *Hemmer*, 1 Allen, 494; *S. C.* 79 Am. Dec. 756; *Walker* v. *Osgood*, 98 Mass. 348; *S. C.* 93 Am. Dec. 168; *Bollman* v. *Loomis*, 41 Connecticut, 581; *Everhart* v. *Searle*, 71 Penn. St. 256; *Lloyd* v. *Colston*, 5 Bush, 587; *Shirland* v. *Monitor Iron Works*, 41 Wisconsin, 162; *Marye* v. *Strouse*, 6 Sawyer, 204; *Michaud* v. *Girod*, 4 How. 503; *Conkey* v. *Bond*, 34 Barb. 276; *Bell* v. *McConnell*, 37 Ohio St. 396; *Jacksonville, St. Louis &c. Railroad* v. *Mathers*, 71 Illinois, 592.

IV. The claim is stale and will not be entertained or enforced by a court of equity, because (1) the defendants have had mutual settlements, have transferred property, and their positions were changed during the long silence on the part of the plaintiffs; (2) the defence of the statute of limitations of three years has been interposed by the defendants. To avoid these defences the complainants say they did not discover the alleged fraud till recently when they examined the deeds. But these deeds were recorded, and they were bound by the knowledge which the record disclosed. *Brant* v. *Virginia Coal Co.*, 93 U. S. 326; *Sullivan* v. *Portland and Kennebec Railway*, 94 U. S. 806.

V. The accounts showing the disputed charges and the balance of $2715.58 due the complainants having been received soon after the 26th of November, 1877, by the plaintiffs, and having been retained by them without objections until in June or July, 1878, should be held as conclusive. Between merchants at home an account which has been presented, and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence a stated account. *Wiggins* v. *Burkham*, 10 Wall. 129; *Chappedelaine* v. *Decheneaux*, 4 Cranch, 306; *Freeland* v. *Heron*, 7 Cranch, 147; *Lockwood* v. *Thorne*, 11 N. Y. 170; *S. C.* 62 Am. Dec. 81; *Richmond M'f'g Co.* v. *Starks*, 4 Mason, 296; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96.

Opinion of the Court.

VI. The plaintiffs are estopped by accepting and acquiescing in the statement of the accounts and by receiving and by receipting in full for the balance shown thereby $2715.58.

After this "account stated" had been prepared, and, on the 26th of November, 1877, forwarded to the complainants, and by them retained, without objection, for nearly a year, they, on the 10th day of September, 1878, received the balance shown to be due them by that "account stated" to wit, $2715.58, in full discharge and release of the defendants, Kilbourn and Olmstead. This concludes them. See *Vedder* v. *Vedder*, 1 Denio, 260; *United States* v. *Child*, 12 Wall. 232.

VII. Stewart was a partner during all the time the purchases complained of were progressing, and he is interested in proportion to his share in the speculation. His sale of the property did not carry with it the claim based on the misconduct of the defendant: if any there was, such a claim cannot be assigned.

The objection of want of parties is taken in the pleadings. The absence of a necessary party is fatal, and the bill must be dismissed. See *Alexander* v. *Horner*, 1 McCrary, 634; *Robertson* v. *Carson*, 19 Wall. 94.

Mr. J. H. Rallston for Hillyer.

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

It is argued on behalf of Kilbourn, Latta and Olmstead that Stewart was an indispensable party to the cause, and that the bill should have been dismissed because he was not made such. Title to the real estate purchased by Sunderland, Hillyer and Stewart was placed in Latta in trust as matter of convenience, and it appears that in December, 1872, Stewart sold all his interest to Sunderland, evidencing the transaction by a memorandum in writing, in form of a bill of sale, which is not produced, but the fact is admitted by stipulation, and that he subsequently executed a more formal assignment, which is given in the record. Stewart testifies that Sunderland "was,

with the knowledge and consent of the firm of Kilbourn & Latta, substituted in my place, and from that day I ceased to have any interest whatever in the transactions or business." On the 1st of November, 1883, the appearance of Stewart was entered by counsel, with a disclaimer "of all right and cause of action on his part against the defendants, or any of them, on account of any of the matters set forth or involved in this cause." Under these circumstances we regard this objection as untenable.

The point is also pressed that the remedy at law was plain, adequate and complete, and jurisdiction in equity therefore wanting. We do not understand counsel to repudiate the stipulation, or to suggest multifariousness or any objection arising upon the rather unusual mode pursued to secure a conclusion in four cases rolled into one, but to contend that the determination of all the matters in issue belongs on the law side of the court. The defendants fully answered the bill, and raised no such objection, and, the cause being at issue, and evidence taken, it was ordered on the 23d of February, 1883, by consent, to be heard by the general term in the first instance. On the 24th of March, 1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law.

We have had occasion recently to remark that where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defence. *Reynes* v. *Dumont*, *ante*, 354. By stipulation several suits had in effect been consolidated with the intention, by consent, of adjusting the conflicting claims between Sunderland and Hillyer jointly and Sunderland alone, and Kilbourn, Latta, and Olmstead and Latta alone, and the parties had proceeded in their pleadings upon that theory, and taken all the evidence, and had the cause set down for hearing. It is then suggested that Sunderland and Hillyer and Sunderland cannot maintain their suit in equity, but must be remitted to actions at law. We do not agree with this view.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it,

is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relation towards each other, and, in the course of the transactions between them, from thirty to forty different lots of ground were bought for the complainants in upwards of fifteen distinct purchases. As to five of these purchases fraud is specifically charged. A considerable amount of complainants' money was in defendants' hands, and a counter-claim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts and advances. The transactions were all parts of one general enterprise, and the claims of a character involving trust relations. Before the severance of the connection between the parties, Kilbourn & Latta dissolved, and the amounts due from Kilbourn & Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counter-claims of Kilbourn & Latta or of Latta, all sprang from one series of operations, and required an accounting on both sides, and that accounting, until disentangled by the investigation of the court, was apparently complicated and difficult. "There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law," 1 Story's Eq. Jur. § 450; and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the District in sustaining the jurisdiction.

Complainants proceeded upon the liability of the defendants to account for the unauthorized appropriation of moneys received as complainants' agents, the amount of which they sought to reduce by excessive charges for the care and management of complainants' property; and also for certain differences between what was paid by complainants for property purchased

through defendants at one price, though obtained by defendants at another. The different amounts claimed are sufficiently set forth in the statement of the case.

By the decree the court awarded in favor of the complainants and against all the defendants, the sum of $3316 as received from complainants in the purchase of lot 17, square 158, under circumstances requiring its return, and the sum of $8000 for excessive charges; and in favor of the complainants and against the defendant Latta the sum of $2500 for overcharges; and disallowed all the other items. The correctness of these allowances and disallowances is questioned upon these appeals respectively.

We affirm the conclusions reached by the Supreme Court of the District in disposing of the various amounts alleged to have been so received as to justify a decree against the defendants in respect to them.

As to lot No. 17 in square No. 158, the direction of the complainants to the defendants was, "we are willing to give 50 cents a foot for any property you can get in that square." This was the maximum price, and lot 17 at that rate would have amounted to $8316. The defendants succeeded in purchasing it for $5000, and then charged it to the complainants at the maximum. Clearly, the money so received must be accounted for to the complainants from whom it was obtained by a violation of fiduciary relations.

The claim for profits on square 156, of $14,601, rests on different ground. That property had been purchased by a real estate association in October, 1871, for speculative purposes, and conveyed to Kilbourn by Thomas Young, the vendor, as trustee for the association. Evidence is given by which it is attempted to show that Kilbourn & Latta had been guilty of dereliction of duty as between themselves and the real estate association, and it is argued that they did not account to their associates in that concern for their half of the profits. But with all this these complainants have nothing to do. The profits which Kilbourn & Latta were entitled to as between themselves and the real estate association, and the commissions which they received from the latter can hardly be

held as to be accounted for to these complainants, in the absence of an agreement that the benefit of all contracts defendants had with others should be shared with them.

As to square No. 115, Kilbourn & Latta, before their connection with complainants, had made an offer for the square, which was accepted; and, while the title was being put in marketable shape, in order that the sale might be consummated, their agency for complainants was entered upon. Kilbourn & Latta's bargain for the lot was $40,000, but there was no agreement, as we have said before, that the complainants should have the benefit of all defendants' outstanding contracts, and, as they were contented with their purchase, it is difficult to see upon what ground they can recover here. The relations between the parties were such that Kilbourn & Latta should have disclosed that they were acting as principals in this sale, but the complainants suffered no pecuniary loss for want of such disclosure, since they took the property at their own price. Their remedy, if they were deceived, lay in throwing up the bargain, but they did not do so, and could not treat it, as is well said, (3 Mackey, 525,) "as a contract fulfilled and as a contract broken." The same remarks apply to square 155, and to lot 10 in square No. 158, the bargains having been made before the sales to complainants; and as to lot 8, and half of lot 9 in square No. 158, the defendants deny the receipt even of commissions.

It may be that the money of complainants enabled the defendants to obtain considerable profit in several ventures, but the case made affords no substantial ground for the interposition of the court on that account.

In relation to the alleged overcharges for care and management, the services rendered are set forth in the opinion of the Supreme Court of the District with much particularity, and the grounds for liberality in the premises strongly urged. We do not care to repeat what has been so well stated there. The firm of Kilbourn & Latta was dissolved December 31, 1876, in possession at the time of a large amount of complainants' money, as against which charges were entered on the firm's books December 12, 1876, for "care and management" from

May, 1872, of the property of Sunderland and Hillyer, of $16,526.67, and of the property of Sunderland, of $5973.33. Similar charges were made by Latta after the dissolution, against Sunderland and Hillyer, to the amount of $5677.85, and against Sunderland, of $1672.85. The court found the complainants entitled to recover the sum of $8000 against all the defendants, and the sum of $2500 against Latta individually. We think the sum of $1235.77 should also be allowed against Latta. His account with Sunderland and Hillyer showed a balance due them, June 20, 1878, of $5480.93, and his account with Sunderland showed an indebtedness from the latter, August 7, 1878, of $4245.16, and, as counsel for complainants concede the propriety of applying this sum on the amount due Sunderland and Hillyer, a balance of $1235.77 is left, for which Latta should account, with interest from August 7, 1878. The court ruled adversely to the claim of Sunderland against Latta, for overcharges, of $1672.85, in respect to services rendered, and to the claim of Sunderland against all the defendants for $1000 commission on sale of Stewart's house. We accept these results, but we are of opinion that Sunderland should be awarded, against all the defendants, a portion of the $5973.33 charged for services rendered him, and, applying the rule adopted by the District Supreme Court, we decide that he should be decreed the sum of $2986.66 in respect of this item, with interest from December 12, 1876.

In answer to the defences of laches and limitation the complainants contend that the alleged bad faith of defendants was not discovered by them until a short time before the bill was filed, and that they had no intelligible information of the excess in charges for care and management until late in June, 1878.

Reasonable diligence is of course essential to invoking the activity of the court, but what constitutes such diligence depends upon the facts of the particular case. Where a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery, and mere submission to an injury after the act inflicting it is completed

cannot generally, and in the absence of other circumstances, take away a right of action, unless such acquiescence continues for the period limited by the statute for the enforcement of such right. *DeBussche* v. *Alt*, 8 Ch. D. 286, 314. We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that although, reposing confidence in their agents, they may have neglected availing themselves of some source of knowledge they might have sought, the defendants cannot be allowed to say that complainants ought to have suspected them, and are chargeable with what they might have found out upon inquiry aroused by such suspicion.

And we are satisfied from the evidence that this suit was commenced as against each and all the defendants within the statutory period, after information of the charges for care and management reached the complainants, and that the accounts were so rendered, that the rule of acquiescence ordinarily obtaining as between merchants is not applicable here.

On the 10th of September, 1878, Sunderland gave Latta a receipt for $2715.58 as "Received of Kilbourn and Olmstead, on account of the late firm of Kilbourn & Latta," signed "Sunderland and Hillyer" and "Thomas Sunderland," that $2715.58 being the amount of complainants' money in their hands, for which defendants admitted their liability, and this is resorted to as conclusive evidence, or at least as of persuasive force, upon the question of the alleged overcharges. In view of the form of the receipt and the testimony as to the facts attending its being signed, we do not attribute that weight to it insisted upon by counsel.

We need not discuss the evidence bearing upon the alleged contract between the parties. Necessarily, the agent for the buyer cannot be the agent for the seller at the same time. But we think that, under the pleadings, the stipulations, and the evidence, a decree was properly passed below and should not be disturbed here for any reason arising upon the record in its bearing upon the original terms of the arrangement, nor have we been convinced by the earnest argument of counsel for complainants that the setting aside of the decree first rendered, and the rendition of another decree in some respects

different, entitles him to a reversal, as the court had power to take the course it did, and upon a consideration of the whole case we are sufficiently satisfied with the result, except in the particulars indicated.

The decree is

Affirmed, except so far as it fails to allow the sum of $1235.77, in favor of Sunderland and Hillyer against Latta individually, and also the sum of $2986.66, in favor of Sunderland against Kilbourn, Latta and Olmstead; and, as to the non-allowance of those sums, it is reversed, with directions to modify said decree by adding them, with interest, in conformity with this opinion; the costs of this court to be paid by Kilbourn, Latta and Olmstead; and it is so ordered.

Mr. Justice Field dissented.

STILLWELL AND BIERCE MANUFACTURING COMPANY *v.* PHELPS.

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

No. 209. Argued March 18, 1889. — Decided April 15, 1889.

When, under a contract to furnish, and to put in complete operation in the purchaser's mill, machinery of a certain description and quality, for a price payable partly upon the arrival of the machinery at the mill and partly after the completion of the work, the machinery furnished and set up does not, when tested, comply with the requirements of the contract, the purchaser, upon giving notice to the seller that, if the latter does not "put the mill in repair so that it will do good work," the former will do so, is entitled to deduct, in an action for the unpaid part of the price, the reasonable cost of altering the construction and setting of the machinery so as to conform to the contract.

Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law.

Statement of the Case.

THIS was an action by an Ohio corporation against a citizen of Delavan in the State of Wisconsin, upon a contract in writing, by which the plaintiff agreed "to furnish and put in complete operation for the second party, in his flouring mill at Delavan aforesaid, one first-class seventy-five barrel capacity roller-mill complete," including certain machinery specified; "the first party to use all machinery, belting, etc., etc., now in said flouring mill that is in proper condition for use, except what is now in use on the rye and feed side of said mill; all of said mill, machinery, fixtures and apparatus to be new and first-class in every way and of latest pattern, except as above specified, and to be completed and put in complete running order within ninety days from the date hereof;" and the defendant agreed to pay the plaintiff "for the said mill, fixtures, etc., complete as above specified, and put in complete operation in his flouring mill at Delavan aforesaid," the sum of $9000, as follows: $3000 "upon the arrival of said mill and machinery at his mill in Delavan," $4000 "when said mill is completed and in running order to the satisfaction of the second party," and the remaining $2000 "within ninety days after the completion of the said mill as aforesaid, the first party to start the mill and see that it is in complete running order."

The complaint alleged the plaintiff's performance of the contract on its part, the defendant's payment of $3272.47, and his refusal to pay the balance of $5727.53, which the plaintiff sought to recover, with interest. The defendant in his answer set up by way of defence, and also under a counter-claim for $11,000, delay on the part of the plaintiff, and defects in the manufacture and design of the machinery furnished, whereby the defendant had been put to great expense to complete it so as to comply with the requirements of the contract, and had been deprived of the use of his flouring mill and injured in his business. The plaintiff filed a replication, denying all the allegations in the counter-claim.

At the trial, the plaintiff introduced evidence tending to show that the machinery was put in the defendant's flouring mill in compliance with the terms of the contract, except for a delay of several weeks, in part chargeable to the defendant's

fault, and was tested in February, 1884, with satisfactory results.

On the question of the damages to which the defendant was entitled for the delay, the plaintiff called as a witness one Geissner, who testified that he was the owner and manager of a roller flouring mill of about seventy-five to one hundred barrels capacity in an adjoining county, and was personally familiar with roller mills and the milling business; but had never seen the defendant's mill, or been in Delavan, and knew nothing from personal observation or knowledge of the extent of the custom work of the mill, its business, or product, or of the water-power.

He was then asked to state the rental value of the mill in question, in his judgment, during the period in question. The question was objected to, "because the witness had never seen and had no personal knowledge of the property in question, and was therefore incompetent to testify as to rental value." The court sustained the objection, and the plaintiff excepted to the ruling.

The witness was then asked to state such rental value, "upon the supposition that the said mill had a good water-power and all the business it could attend to, as claimed by the defendant, and a capacity of manufacturing seventy-five barrels per day." To this question the same objection was made, and sustained by the court, and the plaintiff excepted as before.

The defendant then introduced evidence tending to show that the machinery and work furnished by the plaintiff did not comply with the contract, and did not and could not operate satisfactorily, and that his flouring mill with the machinery constructed and placed therein by the plaintiff did not and would not do as good work as other roller mills of like capacity; that it was necessary, in order to put it in condition to do such work, to expend the sum of $2772, including $1100 for the cost of new machinery; and that the defendant did this after his attorneys had served upon the plaintiff's attorney, and the plaintiff had neglected to comply with, a notice in these words: "If your clients do not within ten days

Statement of the Case.

proceed to put the mill in repair so that it will do good work, Mr. Phelps will employ the best millwrights he can obtain and put the mill in order and charge the expense to your clients."

The court, at the plaintiff's request, gave to the jury the following instructions: "The plaintiff was entitled to a fair test of the machinery put into the defendant's mill, and nothing short of that would justify its condemnation. Such a test requires an ample power to operate the machinery to the best advantage; and this means the whole of the machinery, if the jury find that the machinery was designed and intended to be operated together. It also contemplates competent management by a miller who thoroughly understood such machinery and was able to manipulate and handle it so as to secure the best results of which it was capable."

The court also instructed the jury as follows: "If the plaintiff broke this contract by failing to furnish the defendant such a mill as it was bound to furnish, then the defendant had the right to give the plaintiff notice that it was required to remedy the defects, and on its failure to do so the defendant could then proceed and correct the defects himself, so that the mill should be such as he was entitled to have under the contract, and charge the reasonable and necessary expenses of the work to the plaintiff. The limit to which the defendant could go in that direction is this: He would have the right to make the mill completely answer the demands of the contract, and nothing more, that is, a first-class complete roller mill of the designated capacity, capable of doing as good work as other first-class roller mills of similar grade and capacity would do on the same kind of stock. He would only have the right to incur and make the plaintiff chargeable with such expenses as were reasonable and necessary to put the mill in that condition. If the system put into the defendant's mill could have been perfected by alterations in matters of detail so as to make it first-class, complete, capable of doing the work contemplated by the contract, then the additional work on the mill should have been limited to such alterations; but if it could not be thus perfected without more radical changes and additions, then the defendant had the right to proceed so far

as actual necessity required, making the expense of the work as moderate and reasonable as the circumstances permitted."

The plaintiff excepted to this portion of the instructions, for the reason that "the same authorizes the jury to allow the defendant, and to deduct from the claim of the plaintiff, as a part of the expense of changing the mill over so as to make it conform to the contract, the cost of the new machinery put into the mill, amounting to $1100."

The jury returned a verdict by which "they find the issue herein in favor of the defendant, but that the defendant is not entitled to recover damages against the plaintiff in excess of the plaintiff's claim against the defendant." Judgment was rendered on the verdict, and the plaintiff sued out this writ of error.

Mr. G. W. Hazleton for plaintiff in error.

I. Under contracts of the description of that in dispute in this case, where the thing furnished is to be satisfactory to the purchasing party and he neglects to return or to offer to return it, but takes it into possession and uses it either in the shape in which it is, or for the purpose of making it over into something different, he thereby obligates himself to pay for it at the contract price, and is not at liberty to recoup the cost of such reconstruction in an action for the price. *McCarren* v. *McNulty*, 7 Gray, 139; *Brown* v. *Foster*, 113 Mass. 136; *Wood Reaping Machine Co.* v. *Smith*, 50 Mich. 565; *Hallidie* v. *Sutter Street Railroad*, 63 California, 575; *Hoffman* v. *Gallaher*, 6 Daly, 42; *Singerly* v. *Thayer*, 108 Penn. St. 291; *Silsby Manuf. Co.* v. *Chico*, 24 Fed. Rep. 893; *McClure* v. *Briggs*, 58 Vermont, 82; *Balt. & Ohio Railroad* v. *Brydon*, 65 Maryland, 198; *McCormick Machine Co.* v. *Chesrown*, 33 Minnesota, 32; *Gray* v. *Central Railroad of New Jersey*, 11 Hun, 70.

The defendant being under no legal duty to accept the machinery, which could be enforced, — in other words, having the power to accept or reject, — the case stands as if the plaintiff in error had left with the defendant an article at a given

Citations for Defendant in Error.

price to examine and test subject to approval. *Witherby* v. *Sleeper*, 101 Mass. 138; *Fairfield* v. *Madison Manufacturing Co.*, 38 Wisconsin, 346; *Dewey* v. *Erie Borough*, 14 Penn. St. 211; *S. C.* 53 Am. Dec. 533; *Spickler* v. *Marsh*, 36 Maryland, 222; *Prairie Farmer Co.* v. *Taylor*, 69 Illinois, 440.

II. But if it be held that the contract in this case is subject to a different rule from that laid down in the cases already cited, in other words, that these cases do not state the law, then we claim that the doctrine invoked by the defendant ought not to be applied to this case: 1st. Because the notice served does not convey any intimation of such expenditures as were charged: 2d. Because such alleged damages were manifestly not within the contemplation of the parties: 3d. Because the rule invoked by the defendant is not the proper test and measure of damages in such case. *White* v. *Brockway*, 40 Michigan, 209; *Merrill* v. *Nightingale*, 39 Wisconsin, 250; *Boothby* v. *Scales*, 27 Wisconsin, 626; *Bonnell* v. *Jacobs*, 36 Wisconsin, 59.

III. It has long been the settled doctrine of the State of Wisconsin that a party may return or offer to return an article which does not comply with the terms of the warranty, and recover back what he has paid. *Woodle* v. *Whitney*, 23 Wisconsin, 55.

IV. A question is raised as to the admissibility of Geissner's testimony to show the rental value of the mill. The plaintiff in error submits that this evidence ought not to have been excluded. *Butler* v. *Mehrling*, 15 Illinois, 488; *Alfonso* v. *United States*, 2 Story, 421; *Sturgis* v. *Knapp*, 33 Vermont, 486; *Whitbeck* v. *N. Y. Central Railroad Co.*, 36 Barb. 644; *Whitney* v. *Thatcher*, 117 Mass. 523; *Cliquot's Champagne*, 3 Wall. 114.

Mr. John T. Fish, for defendant in error, cited: *Snyder* v. *Western Union Railroad Co.*, 25 Wisconsin, 60; *Clark* v. *Baird*, 9 N. Y. (5 Selden) 183; *Teerpenning* v. *Corn Exchange Insurance Co.*, 43 N. Y. 278; *Lincoln* v. *Saratoga & Schenectady Railroad*, 23 Wend. 425; *Brill* v. *Flagler*, 23 Wend. 354; *Norman* v. *Wells*, 17 Wend. 136; *Lamoure* v. *Caryl*, 4 Denio,

370; *Transportation Line* v. *Hope*, 95 U. S. 297; *Stone* v. *Covell*, 29 Michigan, 359; *Clark* v. *Rockland Water Power Co.*, 52 Maine, 68; *Westlake* v. *St. Lawrence Ins. Co.*, 14 Barb. 206; *Tucker* v. *Mass. Central Railroad Co.*, 118 Mass. 546; *Pennsylvania Company* v. *Roy*, 102 U. S. 451.

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

The principal position taken in the argument for the plaintiff is that the defendant, having received and retained the machinery furnished under the contract sued on, was bound to pay the contract price; and in support of this position cases were cited, holding that under a contract to manufacture or to furnish a chattel satisfactory to the purchaser, the purchaser, if he takes possession of and uses it, thereby conclusively accepts it as satisfactory, and binds himself to pay the whole contract price.

Considering the instructions given at the plaintiff's own request, and the grounds on which the plaintiff excepted to the other instructions of the court, it is, to say the least, doubtful whether this point is open. But, assuming it to be open, it clearly cannot be sustained, and the cases cited are inapplicable.

The plaintiff's agreement was not for a sale of the machinery, subject to a condition that it should be satisfactory to the purchaser. But it was an agreement, not only to furnish machinery of a certain description and quality, but also to set it up and put it in complete operation in the defendant's mill. The machinery was to be erected on the defendant's land and made part of his mill; and one instalment of the price was to be paid on the delivery of the machinery there, and before the plaintiff had completed the work to the satisfaction of the defendant. In such a case, it would be most unreasonable to compel the defendant, in order to entitle him to avoid paying the whole contract price, or to recover damages for the plaintiff's breach of contract, to undergo the expense of taking out the machinery, and the prolonged interruption of his business

during the time requisite to obtain new machinery elsewhere. The rule of damages, adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties, and is in accordance with the decisions upon similar contracts. *Benjamin* v. *Hillard*, 23 How. 149; *Railroad Co.* v. *Smith*, 21 Wall. 255; *Marsh* v. *McPherson*, 105 U. S. 709, 717; *Cutler* v. *Close*, 5 Car. & P. 337; *Thornton* v. *Place*, 1 Mood. & Rob. 218; *Allen* v. *Cameron*, 3 Tyrwh. 907; *S. C.* 1 Cr. & M. 832.

The notice given by the defendant to the plaintiff "to put the mill in repair so as to do good work" was sufficient to cover all alterations necessary to accomplish that end.

No error is shown in the exclusion of Geissner's testimony as to the rental value of a mill which he had never seen and knew nothing of. Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law. *Perkins* v. *Stickney*, 132 Mass. 217, and cases cited; *Sorg* v. *First German Congregation*, 63 Penn. St. 156.

Judgment affirmed.

BUTLER v. BOSTON AND SAVANNAH STEAMSHIP COMPANY.

SAME v. SAME.

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

Nos. 244, 340. Argued April 10, 11, 1889. — Decided April 22, 1889.

The provision in Rev. Stat. § 4283, limiting the liability of the owner of a vessel, applies to cases of personal injury and death, as well as to cases of loss of or injury to property.

Statement of the Case.

When proceedings have been properly begun in admiralty by the owner of a vessel to limit his liability under Rev. Stat. § 4283, and monitions have issued and been published, it becomes the duty of all claimants, whether for loss of property or injury to the person, or loss of life, to have the liability of the owner contested in that suit, and an allegation that the owner himself was in fault does not affect the jurisdiction of the court to entertain the cause of limited liability.

The steamboat inspection act of February 28, 1871, 16 Stat. 440, c. 100, Rev. Stat. Title LII, does not supersede or displace the proceeding for limited liability in cases arising under its provisions.

Whether the act of June 26, 1884, 23 Stat. 53, c. 121, § 18, is intended to be explanatory of the intent of Congress in its legislation concerning limited liability of shipowners, *quære.*

In the absence of an allegation to the contrary, it will be presumed in a limited liability case in admiralty that the captain and the first mate of a sea-going coast-wise steamer were licensed pilots.

The law of limited liability was enacted by Congress as part of the maritime law of the United States, and is coëxtensive in its operation with the whole territorial domain of that law.

While the general maritime law, with slight modifications, is accepted as law in this country, it is subject under the Constitution to such modifications as Congress may see fit to adopt.

The Constitution has not placed the power of legislation to change or modify the general maritime law in the legislatures of the States.

The limited liability act (Rev. Stat. 4282-4285) applies to the case of a disaster happening within the technical limits of a county in a State, and to a case in which the liability itself arises from a law of the State.

Whether a law of a State can have force to create a liability in a maritime case, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such liability, is not decided.

The City of Norwich, 118 U. S. 468, affirmed as to insurance money.

The court, in its opinion, stated the case as follows:

The two cases are so intimately connected, both in the proceedings and in the questions arising therein, that it will be most convenient to consider them together. They arose out of the stranding, sinking and total loss of the steamship City of Columbus, on Devil's Bridge, near Gay Head, at the western extremity of Martha's Vineyard, and near the mouth of Vineyard Sound, on the 18th of January, 1884. Most of the passengers and cargo were lost, and amongst the passengers lost was Elizabeth R. Beach, a single woman, of Mansfield,

in the State of Connecticut. The appellants represent her, Nathaniel Beach being appointed administrator of her estate in Connecticut, Butler being appointed ancillary administrator in Massachusetts, and the other two appellants being, one an aunt, and the other a niece of the deceased, dependent on her for support. The appellees, The Boston and Savannah Steamship Company, were the owners of the ship.

Soon after the disaster occurred, and early in February, 1884, one Brown and one Vance commenced each of them an action at law against the steamship company, in the Superior Court of the county of Suffolk, in Massachusetts, to recover damages for losses alleged to have been sustained by them by means of the stranding and sinking of the vessel. Thereupon the steamship company, on the 18th of February, 1884, in order to obtain the benefit of the law of limited liability, filed a libel in the District Court of the United States for the District of Massachusetts, against the said Brown and Vance, and against all other persons who had suffered loss or damage by said disaster. This is one of the cases now before us on appeal. The libel was in the usual form of libels in causes of limited liability. It set forth the ownership of the vessel, the business in which she was employed, namely, as a passenger and freight steamship between Boston and Savannah, her sea-worthiness, her being well and thoroughly officered and manned and furnished and equipped as the law required. It stated that on the 17th of January, 1884, she left Boston on a voyage to Savannah, having on board about 83 passengers and considerable merchandise, a list of the former, as far as known, and a schedule of the latter, being annexed to the libel. It stated that whilst prosecuting said voyage, and while on the high seas, to wit, in or near Vineyard Sound, the steamship struck on the rocks near and off the shore at Gay Head, in Martha's Vineyard, in the District of Massachusetts, about half past three in the morning of January 18th, 1884, and in a very few minutes thereafter heeled over, filled with water, and sunk, becoming a total wreck and loss; that most of the passengers and crew, about 100 in number, were drowned and lost, those surviving claiming to have suffered great injury;

and that all the property and effects of the passengers and crew, and all the cargo on board, (except a small part, saved in a damaged condition, and of little value,) together with said steamship, its machinery, tackle, apparel and furniture, were destroyed and lost.

The libel propounded other articles, as follows, to wit:

"Fifth. All said great loss of life, injury and damage to persons on board, and loss of and damage to property, were occasioned and incurred without the privity or knowledge of the libellant, the owner of said steamship.

"Sixth. The libellant further alleges, that, as it is informed and believes, certain persons or corporations, owners or insurers of property on board, and lost or damaged by and at the loss of said steamship as aforesaid; certain other persons, who claim to have been on board said steamship at the time of the loss aforesaid, and to have suffered in consequence thereof injuries and damage to their persons and property; and still other persons, claiming to represent persons drowned and lost in said disaster, and claiming to be entitled to recover and receive large sums of money on account of the death of and injury to said persons so represented by them — all make, or may hereafter make, claim that the striking upon the rocks, and sinking and wreck of said steamship, and the loss of life, damage to persons and property aforesaid, were occasioned and incurred from the fault and neglect of the libellant, or its officers and agents, and that the libellant is liable and responsible to pay to them the loss and damages arising as aforesaid; all of which claims and allegations the libellant denies, and, on the contrary, it alleges that all such losses and damages were occasioned or incurred without its neglect, fault, privity, or knowledge, and, as it is informed and believes, without the neglect or fault of its officers or agents, or any of them."

"Eighth. The losses and damage to persons and property incurred and occasioned by the said stranding, sinking, and loss of said steamship, and the alleged claims and liabilities made against the libellant, by reason thereof, greatly exceed the amount or value of the interest of the libellant, as owner, in said steamship, her machinery, tackle, apparel, and furni-

ture, immediately after said loss, and in her freight then pending. Upon and after the happening of said loss, said steamship, her machinery, tackle, apparel, and furniture became a wreck and total loss, and, the libellant is informed and believes, were then practically worthless, and the libellant's interest therein became and was of little or no value. The gross freight then pending on the voyage of said steamship to Savannah was of the value of about $1000.

"Ninth. The libellant, while not admitting but denying that it is under any liability for the acts, losses, and damages aforesaid, and desiring and claiming the right in this court to contest any such liability of itself or of said steamship, claims and is entitled to have limited its liability, as owner, therefor, (if any such liability shall hereafter be found to exist,) to the amount, or value of its interest, as owner, in such steamship after said loss, and her freight then pending.

"Tenth. Said steamship, in her damaged and wrecked condition, now lies sunken near the shore at Gay Head, Martha's Vineyard, within this district, and within the jurisdiction and process of this honorable court."

The libellant thereupon claimed and petitioned that, in case it should be found that there was any liability for the acts, losses and damages aforesaid, upon said steamship City of Columbus, or the libellant as owner thereof, (which liability the libellant did not admit, but expressly and wholly denied, and desired in that court to contest,) such liability should in no event exceed the amount or value of the interest of the libellant, as owner, in said steamship and her freight then pending, as by law provided; and to that end the libellant prayed that all claims for loss, damage, or injury to persons or property by reason of the premises might be heard and determined in that court, and apportioned according to law, and that due appraisement might be ordered and made of the ship, her machinery and furniture, and of her pending freight at the time of the loss, offering to pay the appraised value into court or give proper stipulation therefor, and that monition in due form should issue against said Brown and Vance and any and all persons claiming damages by reason of the premises,

citing them to appear, etc., and that all actions and suits concerning the matters set forth might be restrained and enjoined.

Upon the filing of this libel a monition was duly issued and published, and an injunction against actions and suits was granted, issued and published. The monition was returnable to the first day of July, 1884.

Notwithstanding these proceedings the appellants, on the 27th of September, 1884, filed a libel against the steamship company, in the same District Court for the District of Massachusetts, to recover damages for the death of said Elizabeth R. Beach. This is the other suit now before us on appeal. After stating the engagement of passage by Miss Beach on the steamship from Boston to Savannah, the character of the vessel as a coast-wise sea-going steamship in the coasting trade, under enrolment and license, and the circumstances of the stranding and loss, and the drowning of Miss Beach, the libel of the appellants averred and charged that the disaster was caused by negligence on the part of those employed by the steamship company in managing the ship, and by inefficiency in the discipline of the officers and crew, and that no proper measures were taken to save the passengers. The libel further alleged that at the time of the disaster the second mate, one Harding, was in charge of the ship, and was not a pilot for those waters; that it was a part of his duty to take charge of the ship alternately with the first mate; that it was an omission of duty on the part of the owner to entrust to the second mate the charge of the ship without the aid of a special pilot; and that no pilot was on duty on the ship at the time of the accident. The libel further alleged that "there was not proper apparatus on the vessel for launching the boats;" "that the ship was not properly constructed in respect to bulkheads and otherwise;" and that there was unfitness, gross negligence or carelessness on the part of the servants and agents of the respondents engaged in navigating the ship, and in not taking proper measures to save the passengers, and as displayed in the inefficiency of the discipline of the officers and crew of the vessel; and that in respect to these matters there was negligence and carelessness on the part of the owner.

Statement of the Case.

The libel further set out a statute of Massachusetts of the following purport, to wit:

"If the life of a passenger be lost, by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat, or stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties, or, if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin."

The libel further alleged that after the vessel struck, said Elizabeth R. Beach suffered great mental and bodily pain upon the vessel and was afterwards washed into the sea and drowned; that the value of her clothing and baggage lost was $150; and that by virtue of the premises and under the general admiralty jurisdiction of the United States the libellants were entitled to recover $50,000, and by virtue of the statute of Massachusetts, $5000.

The steamship company, thereupon, on the 10th day of October, 1884, filed an exception and plea to this libel, setting up in bar the record and proceedings of the cause of limited liability previously instituted by them in the same District Court, and then pending.

To meet this exception, the appellants, on the 16th of December, 1884, filed an amendment to their libel, by way of replication, in which they claimed the benefit of the Steamboat Inspection Act, passed February 28, 1871, (Title LII of the Revised Statutes of the United States,) which makes many regulations respecting the steam machinery and apparatus of steam vessels of the United States in the merchant service, navigating the waters of the United States, and respecting

their construction and manner of lading and accommodating passengers and merchandise, and the officers and crews with which they are to be manned, and requires sea-going steamers in the coasting trade when under way and not on the high seas, to be under the control and direction of pilots licensed by the steamboat inspectors, imposes penalties for loss of life through negligence and inattention, and gives damages to the full amount against the vessel and her master and owner to persons injured, if the injury happens through any neglect or failure to comply with the provisions of the law, or through any known defects or imperfections of the steaming apparatus, or of the hull. Rev. Stat. Title LII, *passim*, §§ 4401, 4493. The appellants averred that the City of Columbus was subject to this law, and when the catastrophe happened was within the waters of the State of Massachusetts, and not upon the high seas, and not under the control of a licensed pilot. They further averred that there was connivance, misconduct, or violation of law on the part of the owner in not providing or procuring the vessel to be under the control and direction of a licensed pilot, and that there was misconduct, negligence and inattention to duty on the part of the captain, second mate, or other persons employed on the vessel, by which connivance, misconduct and negligence the life of said Elizabeth R. Beach was destroyed.

On the same day, the 16th of December, 1884, the appellants appeared to the libel of the steamship company in the cause of limited liability, and filed a pleading which they entitled an Answer, Petition and Exceptions, and by which they set up substantially the same matter as had been averred in their libel and the amendment thereto; and in addition, they alleged that at the time of the disaster the steamer and her freight were substantially insured, and that the owners had received, or were entitled to receive, a large amount of money for said insurance, and would thereby be substantially indemnified for the loss of vessel and freight.

Afterwards, on the 19th of January, 1885, the appellants moved in the same cause that the steamship company be ordered to pay into court the said insurance money. To this

motion the company filed a written reply in which they set up the fact that in pursuance of an order of the court they had entered into stipulation to pay into court the amount of the appraised value of their interest in the ship and freight. They further averred that, in pursuance of a covenant made at the time of their purchasing the said steamship, in the mortgage given for the purchase money, all the insurance procured by them had been assigned and made payable to the vendors and mortgagees, for whose benefit and security the policies were kept on foot; and said parties had collected the insurance money, and applied it in part payment of the mortgaged notes, and the libellants, The Boston and Savannah Steamship Company, had not collected or received any part of it. To this answer the appellants filed an exception in the nature of a demurrer.

Upon these pleadings the parties agreed upon a statement of facts, which, after stating the titles of the two causes, was as follows, to wit:

"STATEMENT OF AGREED FACTS.

"In the above entitled causes the following facts are agreed by the Boston and Savannah Steamship Company and John Haskell Butler, administrator, et al., party excepting to said libel of said company:

"First. All the allegations contained in the eleventh, twelfth, thirteenth, fourteenth, nineteenth, twenty-third and twenty-fourth articles of the answer, petition and exceptions of said John Haskell Butler, administrator, et al., in said suit, are true.

"Second. Except as relieved or affected by the Limited Liability Act of 1851 Rev. Stat. 4283–5 and the Rules of the United States Supreme Court thereunder, the libellant, ship-owner, is liable for all loss and damage caused by the stranding of said steamship 'City of Columbus.'

"Third. In respect to the cause of the disaster alleged, the respondents claim, in addition to the concession by libellant, the B. and S. Steamship Company, of negligence on the part of their agents and servants, as above agreed, that at the time of disaster the second mate was in charge of the ship; that he was not a pilot for the waters upon which the ship was then

going, and was not licensed as a pilot by the inspectors of steamboats; and that no pilot was on duty on said ship at the time of the disaster; and, further, that the disaster was owing to the unfitness, gross negligence, or carelessness of the servants or agents of the libellant, who were engaged in navigating the ship at the time of the disaster, so that the case was within § 6 of c. 73 of the Public Statutes of Massachusetts. The libellant denies all these allegations, and claims that they are immaterial to the issues of the cause, if true; and that the captain was in charge of the ship at the time of the disaster.

"Fourth. Said loss and damage were without the privity and knowledge of the libellant, the Boston and Savannah Steamship Company, the sole owner of said steamship.

"Fifth. Said steamship was a coast-wise, sea-going vessel, under enrolment, and was, at and before the time of loss, subject to all the laws and rules of navigation applicable to such vessels; and at the time of loss was on a voyage from Boston to Savannah, Georgia, and proceeding through Vineyard Sound, stranding on Devil's Bridge, off and near Gay Head, Martha's Vineyard. And to this extent the respondents, Butler et als., qualify any admission in their answer to the third article of the libel of the company; and the company qualify any averment pertinent thereto in said article.

"Sixth. After the filing of the libel or petition in this cause, the court caused due appraisement to be had of the amount or value of the interest of the libellant, as owner, in such ship and her freight for the voyage, and thereupon made an order for the giving of a stipulation, with sureties for the payment thereof, into court, whenever the same shall be ordered; and upon due compliance with this order the court issued a monition, February 28, 1884, against all persons claiming damages for any such loss, embezzlement, destruction, damage or injury, citing them to appear before the said court and make due proof of their respective claims at or before July 1, 1884, and public notice of such monition was given as required; and thereafter, on the application of said owner, the court made an order to restrain the further prosecution of all and any suit or suits against said owner in respect of any such claim or

claims, all as provided in the admiralty rules of the United States Supreme Court.

"Seventh. The Boston and Savannah Steamship Company is a corporation organized under the laws of the State of Massachusetts, and is located at Boston, in said State."

The following additional statement was agreed to in the action of the appellants, to wit:

"1. Except as relieved or affected by the Limited Liability Act of 1851, (Rev. Stat. §§ 4283–5,) and the Rules of the United States Supreme Court thereunder, the respondent, ship-owner, is liable for all loss and damage caused by the stranding of said steamship 'City of Columbus.'

"2. The respondent claims that the captain was in charge of the ship at the time of the disaster.

"3. Said loss and damage were without the privity and knowledge of the respondent, the Boston and Savannah Steamship Company, the sole owner of said steamship.

"4. Said steamship was a coast-wise, sea-going vessel, under enrolment, and was, at and before the time of loss, subject to all the laws and rules of navigation applicable to such vessels; and at the time of loss was on a voyage from Boston to Savannah, Georgia, and proceeding through Vineyard Sound, stranding on Devil's Bridge, off and near Gay Head, Martha's Vineyard."

The two causes were argued together upon the pleadings and these statements of fact; and on the 10th of April, 1885, the following decrees were made, to wit:

In the suit of the appellants the following decree was made:

"This cause was heard upon libel and respondent's exceptions thereto, and upon agreed facts; and it appearing to the court that the record alleged in said exceptions exists, it is thereupon ordered, adjudged and decreed that the exceptions be sustained, and the libel dismissed with costs."

In the limited liability cause the following decree was made:

"It is found and decreed by the court that the libellant is entitled to the limitation of liability for loss of life, and other damage, as claimed in said libel; and that evidence tending to establish the facts, claimed by the respondents in clause three

of the agreed facts on file, is immaterial, and therefore inadmissible, and that the allegations in the libellants' answer to respondents' motion that insurance money be paid into court are true; and it is thereupon ordered, adjudged and decreed by the court that the said respondents' exceptions to the libellants' answer to said respondents' motion that insurance money be paid into court, be overruled, and their said motion denied; and that the exceptions of said respondents to the libel be overruled, and their petition be dismissed."

These decrees were affirmed by the Circuit Court, and from the decrees of the latter court the present appeal was taken.

Mr. Eugene P. Carver and *Mr. Frank Goodwin* for appellants.

I. The limitation-liability act, Rev. Stat. §§ 4282–4287, does not apply to a claim for loss of life of a passenger, or for injuries suffered by him through negligence.

The law has a special regard for the rights of passengers carried by common carriers. It holds the carrier to the highest possible degree of care, and requires him to make good all damages suffered through want of it. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451. A statute in derogation of this fundamental principle should be so expressed as plainly to show that this great rule is in terms and purpose departed from. This act does not in terms apply to passengers: and when the object of its enactment is considered, viz.: the diminution of the risks of ship-owners engaged in the transportation of cargoes, it is plain that it applies only to loss of property, and does not apply to persons at all.

Neither by the civil law nor the common law was there or is there a limitation of liability. The principle of such limitation appears to have arisen in the Middle Ages, and the origin thereof is set forth by Judge Ware in the case of *The Rebecca*, 1 Ware, 187; and Judge Ware's exposition has been accepted by the Supreme Court in *Norwich Co.* v. *Wright*, 13 Wall. 104. That the courts of the United States, down to the act of 1851, did not recognize the rule of the ancient or general

maritime law, but refused to adopt it either in admiralty or common law, see *Del Col* v. *Arnold*, 3 Dall. 333; *The Amiable Nancy*, 1 Paine, 111; *Pope* v. *Nickerson*, 3 Story, 465; *Hall* v. *Washington Insurance Co.*, 2 Story, 176; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 435.

The history of the subject shows that the scope of the act of Congress is confined to advancing the interests of commerce and trade, — the transportation of merchandise.

The first act on the subject was the Massachusetts act of 1818, derived from the English statute 7 Geo. II, c. 15. This was followed by a statute of Maine. The continuity between the acts of Massachusetts and Maine and the act of Congress, forming one chain in a system of legislation, is also recognized and enforced by the Supreme Court of the United States in *Norwich Co.* v. *Wright*, 13 Wall. 104.

This limited liability act is not to be extended, even in respect to goods, by construction. Mr. Justice Curtis held that it does not protect a vessel when the fire, which had burned up the goods, destroyed them after they had been landed from the vessel, and were on the wharf, in a case where there had been no delivery to consignee. Its application, in respect to fire, is only to goods lost or damaged through fire happening to or on board of the vessel. *Salmon Falls Manf. Co.* v. *The Tangier*, 6 Am. Law Reg. 504; *King* v. *Am. Trans. Co.*, 1 Flippin, 1; *The Egypt*, 25 Fed. Rep. 320; *The Mamie*, 5 Fed. Rep. 813; *S. C.* 105 U. S. 773; *S. C.* 110 U. S. 742; *Gibson* v. *Shufeldt*, 122 U. S. 27, 32.

In *Carroll* v. *Staten Island Railroad*, 58 N. Y. 126, the Court of Appeals of New York hold that the steamboat act of February 28, 1871, 16 Stat. 440, c. 100, is not to be construed in the light of the limited liability act of 1851; that "a narrow construction, in favor of ship-owners, of a statute enacted to secure the safety of passengers, is not justified on the ground that their common law liability as carriers of goods had, by a prior statute, made for the purpose of assimilating our legislation on the subject to that of England, been to some extent limited." See also *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1; *Chamberlain* v. *Western Transportation*

Co., 44 N. Y. 305; *Wallace* v. *Providence and Stonington Steamship Co.*, 14 Fed. Rep. 56; *The Garden City*, 26 Fed. Rep. 766.

The liability of owners is not restricted by act of Congress providing for the security of passengers on steamboats, and their liability is not confined to the acts of omission or commission therein declared to be negligent. The act does not operate to take away any common law liability. *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282; *Swarthout* v. *New Jersey Steamboat Co.*, 48 N. Y. 209; *Carroll* v. *Staten Island Railroad*, 58 N. Y. 126; *Navigation Co.* v. *Dwyer*, 29 Texas, 376.

There are a few decisions beside that of Judge Benedict in *The Epsilon*, 6 Ben. 378, in which the limited liability act has been extended beyond cases of property; and, with the exception of the Rhode Island case, *Rounds* v. *Providence &c. Steamship Co.*, 14 R. I. 344, they are, all of them, District Court cases, or the decisions of District Court judges; and this Rhode Island case, together with most of the others, merely imports to follow the decision of Judge Benedict in *The Epsilon* as the authority upon the questions. The cases are: *In re Long Island &c. Trans. Co.*, 5 Fed. Rep. 599; *The Alpena*, 8 Fed. Rep. 280; *The Amsterdam*, 23 Fed. Rep. 112; *Briggs* v. *Day*, 21 Fed. Rep. 727; *Craig* v. *Continental Ins. Co.*, 26 Fed. Rep. 798.

An examination of these cases will show that the distinction between injury to a passenger and injury to a member of the public, toward whom the ship owed no peculiar obligation, has not always been observed in following the decision in *The Epsilon*. *The Epsilon* was not the case of a passenger, but of a man killed by the explosion of the vessel's boiler, while he was on land, standing on a pier. There is nothing in the case to show that other persons on board were passengers. See *Ex parte Phœnix Ins. Co.*, 118 U. S. 610; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, 397. The decision in *The Epsilon* rests on two grounds: (1) The words of the statute: (2) The Continental Codes.

1. As to the words of the statute:

Argument for Appellants.

The words of the United States statute of 1851, c. 43, § 3, 9 Stat. 635, from which § 4283 of the Revised Statutes is taken, are as follows: "That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending." The differences between this expression of the law and that of § 4283 are apparently mostly formal; but there is one change which may be substantial.

The form in the Revised Statutes omits the plural of owner, and the word "ship," and comprehends the persons offending, under the phrase, "by any person." But one substantial change seems to have been made. Instead of the word "loss," in the phrase, "act, matter or thing, loss, damage or forfeiture," in the act of 1851, we have in the Revised Statutes the word "lost" substituted. Omitting the mere punctuation mark after the word "thing," we get as the present expression of the law, "thing lost;" and if this was an intentional change, it shows the more clearly the intention to apply the act to things, and not to persons. Indeed, the adjective "lost" can have no signification, except as connected with "thing."

The rule of construction in such cases has been declared in *United States* v. *Bowen*, 100 U. S. 508, as follows: "The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." In that case the word "such" had been interpolated in the revision, which altered the meaning of the statute as it stood prior to the revision; but, as the

language of the revision was plain, the court construed the law as it read in the revision. So, also, in *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54. And so here, the word "lost" as here used is entirely plain. There is nothing doubtful in the language as it stands. And furthermore, and in addition, we say, that in the light of the history of these statutes it is fairly inferrible that this was an intentional change. But, however that may be, the meaning of the revision is plain. See, further, *The Montana*, 22 Fed. Rep. 715; *Thomassen* v. *Whitwill*, 12 Fed. Rep. 891; *The Marine City*, 6 Fed. Rep. 413; *McDonald* v. *Hovey*, 110 U. S. 619; *Pentlarge* v. *Kirby*, 20 Fed. Rep. 898.

2. As to the Continental Codes, it is sufficient to refer to the language of the court in *The Lottawanna*, 21 Wall. 558, where this court says: "*To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed;* but we must have regard to our own *legal history*, Constitution, legislation, usages and adjudications as well. . . . The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; *the limitations of responsibility of ship-owners for the negligence and misconduct of their captains and crews;* and many other things of a character truly maritime."

In *Norwich Co.* v. *Wright*, 13 Wall. 104, this court says of this law, that its great object was to encourage ship-building, and to induce capitalists to invest money in this branch of industry. See, also, *Moore* v. *Am. Trans. Co.*, 24 How. 1; *Simpson* v. *Story*, 145 Mass. 497. That was the object of the law, and not the encouragement of the transportation of human beings. Respecting the latter traffic Congress has legislated in an opposite direction, passing stringent laws for preserving the security of passengers on steam-vessels. Rev. Stat. §§ 4424–4426, 4463–4500; 22 Stat. 346, c. 441; Id. 186, c. 374; *Hart-*

ranft v. *Du Pont*, 118 U. S. 223; *The Strathairly*, 124 U. S. 558; *The Hazel Kirke*, 25 Fed. Rep. 601; *The Rosa*, 25 Fed. Rep. 601; *The Idaho*, 29 Fed. Rep. 187; *The Pope Catlin*, 31 Fed. Rep. 408; *Oyster Police Steamers*, 31 Fed. Rep. 763.

The purpose of the act of 1851 being as above shown, and the method of carrying it out being also as above shown to be in accordance with the general maritime law, let us examine how that purpose is provided for by the statute.

The Revised Statutes of the United States provide (§ 4284) as follows: "Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any *property* whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and [*owner*] [owners] of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

Section 4285: "It shall be deemed a sufficient compliance, on the part of such owner, with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any *property, goods, or merchandise*, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

So it is only in case of damage to "*property*" that any parties may take "appropriate proceedings in any court" for the purpose of apportioning the sum for which the owner may be liable; and it is only in the case of destruction, etc., of "*property, goods, or merchandise*," that the owner of the vessel shall be allowed to make the transfer through a court of Admiralty.

Is not this fairly conclusive upon the question? Thus it is

certain that the libel of this company cannot be sustained as against these passengers; and it would seem to be very clear that if Congress had intended that the ship-owner should plead the act in bar of proceedings instituted against him by a passenger, the act would have provided a means to enable him to take "appropriate proceedings" for an apportionment, and for the surrender of his vessel as well, as in the case of injury to goods or damage to property by collision. *Walker* v. *Boston Insurance Co.*, 14 Gray, 288; *The Scotland*, 105 U. S. 24; *Peoples' Ferry Co.* v. *Beers*, 20 How. 393; *The St. Lawrence*, 1 Black, 522; *Insurance Co.* v. *Dunham*, 11 Wall. 1.

Whenever the Supreme Court has applied the general maritime law to cases arising before them, it will be observed that they have limited themselves to that. The growth of admiralty jurisprudence within this country has been in the direction of a freedom from the confined limits within which, owing to the well-known jealousy of the courts of common law in England, the law of the admiralty was in that country restricted. But, while our admiralty law has expanded and developed, and this by the application of the general maritime law, our Supreme Court has carefully kept it within the boundaries of the law and usages of this country, and has not imported the modern codes into our system. *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Wheat. 409; *United States* v. *La Vengeance*, 3 Dall. 297; *United States* v. *The Sally*, 2 Cranch, 406; *United States* v. *The Betsey and the Charlotte*, 4 Cranch, 443; *The Samuel*, 1 Wheat. 9; *The Octavia*, 1 Wheat. 20; *Hobart* v. *Drogan*, 10 Pet. 108; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344; *Rich* v. *Lambert*, 12 How. 347; *The Genesee Chief*, 12 How. 443; *Ward* v. *Peck*, 18 How. 267; *Dupont* v. *Vance*, 19 How. 162; *The China*, 7 Wall. 53; *The Merrimac*, 14 Wall. 199; *Sherlock* v. *Alling*, 93 U. S. 99; *The Scotia*, 14 Wall. 170; *The Alabama and The Gamecock*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The Virginia Ehrman and The Agnese*, 97 U. S. 309; *The North Star*, 106 U. S. 17.

In none of these cases have the modern codes been imported into our system of laws. The court has aimed to apply the general maritime law of the world, when it could do so with-

out infringing upon the law and usages of this country. Beyond that it has in no case undertaken to go.

But if the act limiting liability could otherwise be held to apply to loss of life or injury to passengers, the act of Congress of 1871, 16 Stat. 440, c. 100, would take this case out of its operation. This is the same act of 1871 as that passed upon in *Carroll* v. *Staten Island Railroad Co.* (*supra*).

Section 51 thereof, (Rev. Stat. § 4401,) provides that "every coast-wise sea-going steam vessel, subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

This provision (as well as all the other provisions of this act) does not restrict the common law liability, or diminish it.

The lost steamship was a coast-wise, sea-going steam vessel, under enrolment, subject to all the laws and rules of navigation applicable to such vessels; and at the time of the loss was on a voyage from Boston to Savannah, and was wrecked in Vineyard Sound, upon the shore of Martha's Vineyard, Massachusetts, and when the catastrophe happened she was within the waters of Massachusetts, and was not upon the high seas. If there was an omission in Vineyard Sound to have a pilot in charge, that would likewise be an infringement of the act. But if the omission to have a pilot in charge did not come under the act, yet such omission would be none the less fault or negligence at the common or by the maritime law.

One of the issues raised upon the agreed statement of facts is, whether the ship was under the control and direction of a licensed pilot at the time of the disaster. And it there appears that the claim of the company is that the captain was in charge of the ship at that time, and not the second mate, who is claimed not to have been a pilot. And it further there appears that the ship was a coast-wise, sea-going steam vessel, under enrolment, and on a voyage from Boston to Savannah, and while proceeding through Vineyard Sound stranded on Devil's Bridge, off and near Gay Head, Martha's Vineyard. Thus it appears that she was not proceeding on the high seas, but

within the waters of Massachusetts, so that a pilot should have been in charge under the act of 1871. So proceeding, if she was not under the control and direction of a licensed pilot, there was an infringement of the act of 1871.

Then, again, it is conceded that there was negligence on the part of those employed by the company in the grounding and wrecking, and that the steamship proceeded nearer the shore than was prudent or skilful. If, as the company contend, the captain was in charge of the ship, the case falls equally within the provisions of the law, as is above set forth. The effect of the act of 1871 upon the limited liability act does not appear to have been argued or considered in *The Garden City*, 26 Fed. Rep. 766, although both acts are considered in that case.

II. A statute of the State of Massachusetts, providing for recovery in the case of loss of life, is relied on. That law, as contained in the Public Statutes of Massachusetts, c. 73, § 6, is, and at the time of the disaster was, as follows: "If the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin."

The tort here complained of is a marine tort, and, therefore, cognizable by a court of Admiralty. So also is the breach of contract between the carrier and the passenger the breach of a maritime contract. *Chamberlain* v. *Chandler*, 3 Mason, 242; *The City of Brussels*, 6 Ben. 370; *Sherlock* v. *Alling*, 93 U. S. 99.

Upon either basis, therefore, the statute providing for recovery can be relied on and enforced.

Argument for Appellants.

Courts of Admiralty enforce other statutes in respect to matters which are maritime, and as such come within the admiralty jurisdiction; and no reason is perceived why statutes of the kind here relied upon should not likewise be enforced by those courts.

Familiar illustrations of this are the cases of state statutes in favor of material men, and for pilotage: *The Lottawanna*, 21 Wall. 558; *The America*, 1 Lowell, 176; *The California*, 1 Sawyer, 463; *The Glenearne*, 7 Fed. Rep. 604. See also *The Shady Side*, *The Morrisania*, 23 Fed. Rep. 731; *Woodruff* v. *One Covered Scow*, 30 Fed. Rep. 269; *The Craigendoran*, 31 Fed. Rep. 87; and statutes of the United States for tonnage dues, *The George T. Kemp*, 2 Lowell, 485; and the case of the common law lien of a shipwright, *The B. F. Woolsey*, 7 Fed. Rep. 108; *The Marion*, 1 Story, 68; *The Julia L. Sherwood*, 14 Fed. Rep. 590; *The Two Marys*, 10 Fed. Rep. 919; *S. C.* 16 Fed. Rep. 697, which arise outside of the admiralty law as much so as does a right or a remedy conferred by a statute, but also come within the province of a court of Admiralty to enforce.

But whatever may be regarded as the law touching the operation of state statutes providing for recovery for loss of life, when the disaster from which the death results occurs out of the jurisdiction of the court, or where the defendant is not an inhabitant of the State which enacted the statute, the only question which arises here is, as to the application of a Massachusetts statute to an inhabitant of that State, and in respect to a disaster which occurred within the limits of the State. The Boston and Savannah Steamship Company is a Massachusetts corporation, and the disaster was within the limits of that State, and that fact is averred by this company in the tenth article of their libel, and the contract for carriage was made at Boston, Mass. See *Ex parte McNeill*, 13 Wall. 236; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Broderick's Will*, 21 Wall. 503; *Holland* v. *Challen*, 110 U. S. 15; *Holmes* v. *O. & C. Railway*, 5 Fed. Rep. 75; *The Highland Light*, Chase, Dec. 150; *The Garland*, 5 Fed. Rep. 924; *The E. B. Ward, Jr.*, 17 Fed. Rep. 457; *S. C.* 23 Fed. Rep. 900; *Armstrong* v. *Beadle*,

5 Sawyer, 484; *In re Long Island Transportation Co.*, 5 Fed. Rep. 599; *Hrebrik* v. *Carr*, 29 Fed. Rep. 298; *Ladd* v. *Foster*, 31 Fed. Rep. 827; *The Manhasset*, 18 Fed. Rep. 918; *Oleson* v. *The Ida Campbell*, 34 Fed. Rep. 432; *Sherlock* v. *Alling*, 93 U. S. 99; *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Buford* v. *Holley*, 28 Fed. Rep. 680; *Lorman* v. *Clarke*, 2 McLean, 568; *Robostelli* v. *New York, New Haven &c. Railroad*, 34 Fed. Rep. 719; *Ex parte Gordon*, 104 U. S. 515.

Since the decision of this court in *The Harrisburg*, 119 U. S. 199, it would seem that damages for loss of life cannot be recovered under the general maritime law independently of a statutory provision.

The thirteenth article of the libel of Butler *et al.*, and the twenty-third article of the answer, petition and exceptions of Butler *et al.*, aver that the deceased suffered great mental and bodily pain and misery; for which in both of the said pleadings damages are claimed. The proceedings in the cases at bar are *not* wholly for loss of life.

The Supreme Court of New Hampshire, in a recent case decided in March, 1888, but not yet reported in N. H. Reports, *Clark* v. *City of Manchester*, has held that in death by drowning, an inference may always be drawn that the deceased suffered pain both mental and physical, even if there be not any evidence of the circumstances surrounding the death, and especially if the water was stagnant, muddy or slimy. [Other points were argued by counsel, which, in view of the opinion of the court, have become unimportant.]

Mr. Charles Theodore Russell, Jr., for appellee.

Mr. Justice Bradley delivered the opinion of the court.

We will first consider the principal point taken in the cause of damage, instituted by the appellants, to which the owners of the steamship pleaded the pendency of the proceedings in the cause of limited liability; and will then discuss the questions presented in both causes, and those which are peculiar to the cause last named.

Opinion of the Court.

In the former cause the principal point raised was, that the law of limited liability does not apply to personal injuries, and hence that the appellants were not bound to litigate their claim in the limited liability cause; but had a right to file a separate and independent libel. The appellants in their brief say:

"The single question thus presented is, whether the act limiting the liability of ship-owners applies to damages for personal injury and damages for loss of life, and thus deprives those entitled to damages of the right to entertain suit for recovery, provided that the ship-owner has taken appropriate proceedings by libel or petition to limit his liability; in other words, whether the said act extends to all damages for personal injury, and damages for loss of life."

It is virtually conceded that if the limited liability act applies to damages for personal injury, and damages for loss of life, the proceedings taken by the steamship company by their libel for limited liability were a bar to the appellants' action; and that the controversy between the parties should have been settled in that cause. We shall, in the first place, therefore, examine that question.

If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. The statute declares that "the liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, [loss,] damage or forfeiture, done, occasioned or incurred, without the privity or knowledge

of such owner, or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." (Rev. Stat. 4283. The word "loss" in the statute of 1851 is printed "lost" in the Revised Statutes, evidently by mistake.) This is the fundamental section of the law. On this section the whole provision turns. And nothing can be more general or broad than its terms. The "*liability* . . . shall in no case exceed," etc. It is the liability not only for loss of goods, but for any injury by collision, or for any act, matter, loss, damage or forfeiture whatever, done or incurred.

Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretence was disallowed by the decision in *Norwich Company* v. *Wright*, 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect ship-owners in regard to injuries to goods and not in regard to injuries to passengers, would be of very little service in cases which would call for its application.

The section of the law which follows the main section in the original act, namely, § 4 of the act of 1851, (constituting the two sections of 4284 and 4285 of the Revised Statutes,) has been referred to for the purpose of showing that the legislature had in view injuries to property only. That section provides that if there are several owners of merchandise damaged or lost on the voyage, and the value of the ship and freight is not sufficient to pay them all, the proceeds shall be divided *pro rata* between them, and gives to either party the right to

take the proper proceedings in court to procure distribution to be made. The section is an appendix to the principal section which limits the liability, and is added to it for the purpose of enabling the parties interested to carry out and secure the objects of the statute in the most equitable manner. It has respect to the legal proceedings to be had for carrying the act into effect. It prescribes the rule, namely, *pro rata* distribution. Mention is only made, it is true, of owners of property lost or injured; but surely that cannot have the effect of doing away with the broad and general terms of the principal enactment, stated with such precision and absence of reserve. It is more reasonable to interpret the fourth section as merely instancing the owners of lost property for the purpose of illustrating how the proceeds of the ship and freight are to be distributed, in case of their being insufficient to pay all parties sustaining loss. The observations of Chief Justice Durfee, in delivering the opinion of the Supreme Court of Rhode Island, in the case of *Rounds* v. *Prov. & Stonington Steamship Co.*, 14 R. I. 344, 347, seem to us very sensible and to the point. That was a case of injury to the person. The Chief Justice says: "There would be no doubt upon this point were it not for the next two sections, which make provision for the procedure for giving effect to the limitation. These sections, if we look only to the letter, apply only to injuries and losses of property. The question is, therefore, whether we shall by construction bring the three sections into correspondence by confining the scope of § 4283 to injuries and losses of property, or by enlarging the scope of the two other sections so as to include injuries to the person. We think it is more reasonable to suppose that the designation of losses and injuries in §§ 4284 and 4285 is imperfect, a part being mentioned representatively for the whole, and consequently that those sections were intended to extend to injuries to the person as well as to injuries to property, than it is to suppose that § 4283 was intended to extend only to the latter class of injuries, and was inadvertently couched in words of broader meaning. The probable purpose was to put American ship-owners on an equality with foreign ship-owners in this regard, and in the great maritime

countries of England and France the limitation of liability extends to personal as well as to property injuries and losses."

We may also refer to the opinion of Judge Benedict in the case of *The Epsilon*, 6 Ben. 378, as containing a very full and able discussion of the question. It was the first decision made upon this particular subject.

We have no hesitation in saying that the limitation of liability to the value of the ship and freight is general; and that when the proceeds of the latter are insufficient to pay the entire loss, the object of the fourth section of the old law (the 4284th of the Revised Statutes) is mainly to prescribe a *pro rata* distribution amongst the parties who have sustained loss or damage. We think that the law of limited liability applies to cases of personal injury and death as well as to cases of loss of or injury to property.

This conclusion is decisive of the controversy arising on the libel of the appellants. For if the law applies to the case of personal injuries, it was then the duty of the libellants to have appeared in the cause of limited liability instituted by the owners of the vessel, and to have contested there the question whether, in the particular case, the owners were or were not entitled to the benefit of the law. Had the action of the appellants been first commenced, it would have been suspended by the institution of the limited liability proceedings; and the very object of those proceedings was, not only to stop the prosecution of actions already commenced, but to prevent other suits from being brought. Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, for that is one of the principal issues to be tried in such a cause. The beneficent object of the law in enabling the ship-owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, and to adjust the liability to the value of the ship and freight, has been commented on in several cases that have come before this court, notably in the cases of *Norwich Company* v. *Wright*, 13 Wall. 104, and *Providence and New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. It is unnecessary to enter again upon the discussion here.

It is contended, however, that the act of February 28, 1871, entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," 16 Stat. 440, supersedes or displaces the proceeding for limited liability in cases arising under its provisions. We do not see the necessity of drawing any such conclusion. The act itself contains no provision of the kind. It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st section of the act, (Rev. Stat. § 4401,) it is provided that all coast-wise sea-going steam vessels "shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." By the 43d section (Rev. Stat. § 4493) it is declared that whenever damage is sustained by a passenger or his baggage, the master and owner, or either of them, and the vessel, shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. But it does not alter the course of proceeding if the claim of limited liability is set up by the owner. If, in those proceedings, it should appear that the disaster did happen with his privity or knowledge, or, perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability; that is all. We say "perhaps," for it has never yet been decided, at least by this court, that the owner cannot claim the benefit of limited liability when a disaster happens to a coast-wise steamer without his fault, privity, or knowledge, even though some of the requirements of the steamboat inspection law may not have been complied with. The act of Congress, passed June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine," etc., 23 Stat. 53, c. 121, has a section (§ 18) which seems to have

been intended as explanatory of the intent of Congress in this class of legislation. It declares that the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. The language is somewhat vague, it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner. But it is unnecessary to decide this point in the present case. The pendency of the proceedings in the limited liability cause was a sufficient answer to the libel of the appellants.

The question then arises whether the defence made by the appellants in the cause of limited liability instituted by the owners of the steamship is a good defence as set forth in the pleadings and the agreed statement of facts. The main allegation relied on by the appellants to bring the case within the steamboat inspection law is, that the second mate was in charge of the vessel at the time of the accident, and that he was not a licensed pilot. The libellant owners deny this, and claim that it is immaterial if true. There is no proof on the subject. But suppose it were admitted to be true, how could the owners have prevented the second mate from being in charge? By virtue of his office and the rules of maritime law, the captain or master has charge of the ship and of the selection and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas. It is not alleged that the captain himself and the first mate were not regularly licensed pilots. They usually are such on all sea-going steamers; and in the absence of any allegation to the contrary, it will be presumed that they were so licensed.

The other allegations, "that there was not proper apparatus on the vessel for launching the boats," and "that the ship was not properly constructed in respect to her bulkheads and other

wise," are too vague and indefinite to form the basis of a judgment. Besides, these allegations are denied, and no proof was offered on the subject.

The several allegations that the disaster was owing to the unfitness, gross negligence, or carelessness of the servants or agents of the steamship company, who were engaged in navigating the ship at the time of the disaster, which allegations were made for the purpose of showing that the case came within the Massachusetts statute were also denied, and not sustained by any proof. The bearing and effect of that law, however, are proper to be more fully considered.

We have decided in the case of *The Harrisburg*, 119 U. S. 199, that no damages can be recovered by a suit in admiralty for the death of a human being on the high seas or on waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor. The maritime law, of this country at least, gives no such right. We have thus far assumed that such damages may be recovered under the statute of Massachusetts in a case arising in the place where the stranding of the City of Columbus took place, within a few rods of the shore of one of the counties of that commonwealth; and have also assumed that the law of limited liability is applicable to that place. Of the latter proposition we entertain no doubt. The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law. *Norwich Co.* v. *Wright*, 13 Wall. 104, 127; *The Lottawana*, 21 Wall. 558, 577; *The Scotland*, 105 U. S. 24, 29, 31; *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578, 593. In *The Lottawana* we said: "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." (p. 577.) Again, on page 575, speaking of the maritime jurisdiction referred to in the Constitution, and the system of law to be administered

thereby, it was said: "The Constitution must have referred to a system of law coëxtensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." In *The Scotland* this language was used: "But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases." (p. 31.) Again, in the same case, p. 29, we said: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana*, . . . the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law." And in *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, it was said: "The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule, administered in courts of Admiralty in all countries except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law." (p. 593.)

These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has

restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522, 526, 527; *The Lottawana*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted.

It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coëxtensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends — on the sea and the great inland lakes, and the navigable waters connecting therewith. *Waring* v. *Clarke*, 5 How. 441; *The Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Jackson* v. *The Magnolia*, 20 How. 296; *Commercial Transportation Co.* v. *Fitzhugh*, 1 Black, 574.

The present case, therefore, is clearly within the admiralty and maritime jurisdiction. The stranding of the City of Columbus took place on Devil's Bridge, on the north side of and near Gay Head, at the west end of Martha's Vineyard, just where Vineyard Sound opens into the main sea. Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the navigable waters of the United States, and no state legislation can prevent the full operation of the maritime law on those waters.

It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever

force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea. Not only is that law the common right of the people of the United States, but the national legislature has regulated the subject, in greater or less degree, by the passage of the navigation laws, the steamboat inspection laws, the limited liability act, and other laws. We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a county of Massachusetts, and notwithstanding the liability itself may have arisen from a state law. It might be a much more serious question, whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion.

The question relating to the insurance money received for the loss of the ship and freight has already been settled by our decision in the case of *The City of Norwich*, 118 U. S. 468, and requires no further discussion here. This case is governed by that, so far as the claim to the insurance money is concerned.

The decrees in both cases are affirmed.

HULING *v.* KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY.

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

No. 230. Argued and submitted April 1, 2, 1889. — Decided April 22, 1889.

In proceedings commenced under a state statute for condemnation of land for a railroad, a published notice in compliance with the terms of the statute, specifying the section, township and range, county and State, in which it is proposed to locate the railroad, is sufficient notice to a non-resident owner of land therein, and such publication is "due process of law," as applied to such a case.

When, after notice to the owner as required by law, land has been condemned for a railroad by commissioners regularly appointed and duly sworn, who discharged their duties in the manner required by law, the question whether one of the commissioners was or was not a freeholder, as directed by the statute, is not open for consideration collaterally in an action of trespass by the owner against the railroad company for entering on the land after condemnation.

TRESPASS. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. Eppa Hunton (with whom was *Mr. Albert Young* on the brief) for plaintiffs in error.

Mr. George W. McCrary and *Mr. Wallace Pratt* for defendant in error submitted on their brief.

MR. JUSTICE MILLER delivered the opinion of the court.

This action was brought in the court below by the plaintiffs in error against the Kaw Valley Railway and Improvement Company, as defendants, in the nature of an action of trespass on land. It was in fact to recover for the value of land taken by the railroad for its right of way, and for damages to adjacent lands, houses, fences and property, incident to the taking. The land was a part of a quarter-section in Jackson Township, Wyandotte County, Kansas. The railway company answered by setting up proceedings which they had taken under the

laws of Kansas for the condemnation of the land for the use of the railroad, and the payment of $725 into the treasury of that county in accordance with law, that being the amount which the commissioners who conducted the condemnation proceedings had allowed the plaintiffs. The defendants set out these proceedings in full, and relied upon them, as a sufficient defence for taking possession of and using the land.

The parties waived a jury, and the case was tried by the court, who found for the defendant, the railway company, and entered a judgment against the plaintiffs for the costs. We are called upon to review that judgment.

The record of the case is a very singular one, as there is no special finding of facts by the court, but a general finding in favor of the defendants. Instead, however, of a finding of facts, there is a bill of exceptions, which itself contains the entire history of the case, including the pleadings, the motions, the evidence, the judgment of the court and all that is in the record besides. The only point raised by this bill of exceptions was as to the admission of the testimony of L. H. Wood, who acted as one of the commissioners by appointment of the district judge of Wyandotte County, in which the land lay. The deposition of Wood was directed to the question whether he was a freeholder of Wyandotte County, and, although he declared that at the time he was appointed as commissioner he was the owner of considerable real estate, upon further examination he stated that the title to it was in some other person, who held it as trustee for him. This attempt to raise the question of whether he was a freeholder within the meaning of the statute of Kansas on that subject was ruled out entirely by the exclusion of all his testimony on the trial, and this constitutes the principal assignment of error in the case.

Article 9 of chapter 23 of the Compiled Laws of Kansas, page 224, entitled "Appropriation of lands for the use of railway and other corporations," provides two modes of doing this. The first of these modes is by an application to the board of county commissioners, which is the governing body of the county, to lay off along the line of the proposed road as located by the company a route for such railroad. Upon this

application being made in writing, the board of county commissioners shall forthwith proceed to lay off such route, and have the same carefully surveyed, and appraise the value and assess the damages to the interest of each of the owners of the land so taken; all of which they shall embody in a written report and file it in the office of the county clerk in such county. The county clerk shall immediately file a copy of this report in the office of the treasurer of the county; and, if the company shall pay the amount of this appraisement into the treasurer's office, this shall be certified upon the copy of the report under his hand and seal of office, and he shall pay over the amounts to the persons, respectively, entitled to them. Upon the filing of a copy of this report, and a certificate of the payment of the money, in the office of the register of deeds for the proper county, the company shall have the right to occupy the lands so embraced within such route for the purposes necessary for the construction and use of its road. These proceedings, it is declared, shall vest in the company, its successors and assigns, the perpetual use of the lands as soon as the railroad has been constructed.

Section 86 of this article provides that before the county commissioners shall proceed to lay off any railroad route, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in the county. It also provides that an appeal may be had from the determination of the board of county commissioners as to the value of the lands and other damages to the District Court of the county, which appeal shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work, if the company shall pay the amount as aforesaid and execute a bond with sufficient security to pay all damages which may be adjudged to be paid by the said court.

Another mode of appropriating this land, by the exercise of the right of eminent domain, for the use of railroads, is provided by § 87 of the same article. In this case, the railroad company, instead of applying to the board of county commissioners, may apply to the judge of the District Court of the

county through which the railroad is to be built, who shall appoint three commissioners, who shall be freeholders and residents of the county, to make the location, appraisement and assessment of damages, instead of the county commissioners. This appointment shall be made in writing under the hand of the district judge, upon the written application of the corporation or other persons, and the application for and certificate of appointment shall be recorded in the office of the register of deeds of the proper county. Such commissioners being duly sworn, shall perform all their duties in the manner and under the same regulations and restrictions as are provided in the case where they are performed by the county commissioners, and the subsequent proceedings, including the right of appeal, shall be the same.

In the case now before us, the proceeding was had under the latter provision of the statute. The transcript on its face seems to be regular in every particular, showing a full compliance with all the requirements of the statute on the subject. There was the proper publication made in the newspaper, and, indeed, so far as the face of the record is concerned, no objection seems to be made to it, except that it is very urgently argued that the notice published was not sufficient because it did not apprise the party of what land was to be taken; and, if in that respect it was a sufficient compliance with the statute, it is then insisted that the statute itself was void as authorizing the taking of private property without due process of law.

In regard to this objection, we do not see how the notice is deficient, if any notice short of one actually served upon the party can be sufficient. With regard to the description of the property, the notice gives all that could be known at the time it was published. As the commissioners had the power to determine the precise location of the road, that location could not be described with more precision than it is in the newspaper publication set out in the proceedings. It is directed to all persons owning lands on the line of the railroad as the same is now or may be located through section 23, township 11, range 25, in the county of Wyandotte and State of

Kansas; and it notified persons owning land in that section that the commissioners duly appointed would, on Monday, the 22d of May, 1882, proceed to lay off the route for said road through said section and appraise the value and assess the damages to each quarter-section through and over which the railroad might be located. To the plaintiffs in this case, who are the owners of a quarter-section of land in section 23 of that township, this was a sufficient warning that the road might run through their land at that point, and sufficient notice of the time and place where this matter would be determined, as also the amount to which they would be entitled for the appropriation of their land. If this notice had been read by the plaintiffs, it was a clear and distinct notification to them that it would be determined at that time whether any, and how much, of their land in section 23 would be taken for the railroad, and the value to be set upon it by the commissioners; and we think that this was all the notice they had a right to require. Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters.

The owner of real estate, who is a non-resident of the State within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to

the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union.

It is, therefore, the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is "due process of law" as applied to this class of cases. *Harvey* v. *Tyler*, 2 Wall. 328; *Secombe* v. *Railroad Co.*, 23 Wall. 108; *Pennoyer* v. *Neff*, 95 U. S. 714, 722, 743, 744; *Hagar* v. *Reclamation District*, 111 U. S. 701; *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406.

Conceding that these proceedings subjected the land in controversy to the jurisdiction of the commissioners appointed by the district judge of Wyandotte County, the question as to whether one of those commissioners was a freeholder or not is not open to consideration in this suit. The commissioners were regularly appointed by the proper officer, and took the proper oath, and have discharged their duties in the manner required by law. The railroad company has paid the money and taken possession of the land which was condemned by those commissioners. The plaintiffs cannot recover in the present action without a holding in this collateral proceeding that all that was done by those commissioners is void by reason of this want of qualification in one of their number. The proper time for these plaintiffs to have taken this objection to Mr. Wood as a commissioner was either at the time of his appointment, or at the time he proceeded to act as commissioner. If it be objected that they could not be supposed to have any notice of the application for the appointment of these commissioners, and of the time and place when the judge would act on that application, the law presumes that they had notice,

and might have attended at the time the commissioners entered upon their duties. If this objection had been then taken, it might have been sustained, or it could have been taken by way of appeal from the proceedings of the commissioners; but to permit such an objection as this to prevail at this time, and thus defeat the whole of the proceedings upon this narrow ground, is a proposition unsupported by sound principle or by authority. It is a collateral attack upon a proceeding which has been completed according to the forms of law. There is no more reason why this want of qualification should, when shown at this stage of the proceeding, invalidate it all, than there is why the discovery, after a judgment and after that judgment has passed beyond the control of the court, that one of the jurors was disqualified, should make absolutely void the verdict and judgment. It is only one of those cases frequently occurring in the administration of the law, in which it is better that errors not pointed out at the proper time should be disregarded, than that, by attempts to correct them, evils much worse should follow than those incident to the error. *Commr's of Leavenworth Co.* v. *Espen*, 12 Kansas, 531; *Venard* v. *Cross*, 8 Kansas, 248; *Cooper* v. *Reynolds*, 10 Wall. 308; *Voorhees* v. *Bank of the United States*, 10 Pet. 449.

The judgment of the Circuit Court is affirmed.

UNION TRUST COMPANY *v.* SOUTHERN INLAND NAVIGATION AND IMPROVEMENT COMPANY.

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

No. 191. Argued March 11, 12, 1889. — Decided April 22, 1889.

County of Warren v. *Marcy*, 97 U. S. 96, affirmed to the point that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit.

The conveyance by the trustees of the Internal Improvement Fund of Florida, on the 10th February, 1871, to the Southern Inland Navigation and Improvement Company was subject to such decree as the court might render in a suit commenced in the Circuit Court of the United States for the Northern District of Florida against said trustees and others on the 3d of November 1870; and as the Navigation and Improvement Company was a party to that suit, and as the decree of December 4, 1873, in that suit, rescinded the agreements which the company had with the trustees in respect of lands constituting a part of the trust fund and restored to that fund the lands conveyed or attempted to be conveyed to the company by the trustees, the said deed of February 10, 1871, and the mortgage by that company to the Union Trust Company of March 20, 1871, based upon it, are invalid as against the present trustees of the Internal Improvement Fund.

In equity. Decree dismissing the bill. The case is stated in the opinion.

Mr. J. C. Cooper for appellant. *Mr. William Fullerton* was with him on the brief.

Mr. Wayne McVeagh for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This suit arises out of certain transactions connected with the execution of the act of the General Assembly of Florida, approved January 6, 1855, providing for and encouraging a liberal system of internal improvements in that State. Laws of Florida, 1854–1855, c. 610. By that act, so much of the five hundred thousand acres of land granted to Florida by the act of Congress of March 3, 1845, as remained unsold; the proceeds of the sale of such as were on hand and unappropriated; all proceeds thereafter accruing from similar sales; and all the swamp lands or lands subject to overflow, granted to Florida by the act of Congress approved September 28, 1850, with all the proceeds accrued and to accrue from their sale, were set apart and declared a distinct and separate fund, to be called "The Internal Improvement Fund of the State of Florida." The general object and scope of the act are stated in *State of Florida* v. *Anderson*, 91 U. S. 667, 670, 676, where it was said that these lands and their proceeds "were vested in the gov-

ernor, the comptroller, treasurer, attorney general and register of state lands, and their successors in office, in trust to dispose of the same and invest their proceeds, with power to pledge the fund for the payment of the interest on the bonds (to the extent of $10,000 per mile) which might be issued by any railroad companies constructing roads on certain lines indicated by the act. The companies, after completing their roads, were to pay, besides interest on their bonds, one per cent per annum on the amount thereof, to form a sinking fund for the ultimate payment of the principal. The act declared that the bonds should constitute a first lien or mortgage on the roads, their equipment and franchises; and, upon a failure on the part of any railroad company accepting the act, to provide the interest and the payments to the sinking fund as required thereby, it was made the duty of the trustees to take possession of the railroad and all its property, and advertise the same for sale at public auction." In the same case it was said that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration, and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. See also *Railroad Companies* v. *Schutte*, 103 U. S. 118; *Littlefield* v. *Improvement Fund Trustees*, 117 U. S. 419; *Vose* v. *Reed et. al., Trustees*, 1 Woods, 647; *Vose* v. *Trustees of Improvement Fund*, 2 Woods, 647.

On the 3d of November, 1870, Francis Vose brought a suit in equity in the Circuit Court of the United States for the Northern District of Florida, against said trustees and others. Among the defendants were the Florida Canal and Inland Transportation Company, the Southern Inland Navigation Company (described in some parts of the bill and in some of the interrogatories annexed as the Southern Inland Navigation and Improvement Company), the New York and Florida Lumber, Land and Improvement Company and M. S. Mickles, agent of the last-named company. The object of that suit was to obtain an injunction and decree protecting the Internal Improvement Fund against waste and misappropriation by the

trustees, to the injury of Vose and others, who held unpaid bonds issued by the Florida Railroad Company in conformity with the act of 1855. The bill charged that the trustees had violated the law of their trust by misappropriating money received by them, leaving unpaid past-due coupons, by neglecting to collect the amount due the sinking-fund created by the act of 1855, and by illegally conveying millions of acres of land to corporations that had no right to receive them, and that unless restrained they would continue to waste and misapply, to the irreparable injury of the plaintiff Vose and others, the fund entrusted to them for the use and purposes indicated in the act. Among other allegations in the bill was one to the effect that "on the 28th day of July, 1868, the said trustees by resolution of that date, attempted to secure to the said Southern Inland Navigation and Improvement Company forty thousand acres, or thereabouts, of the said trust lands, and that about the 1st of March, 1870, they entered into an agreement with the said New York and Florida Lumber, Land and Improvement Company, by which they undertook to convey one million one hundred thousand acres of the same for the nominal price of 10 cents an acre, and that this vast domain was and is to be selected from the most valuable of the said trust lands."

On the 6th of December, 1870, the Circuit Court issued an injunction to the trustees and their successors, commanding them, among other things, to desist "from selling or donating or disposing of the land belonging to said trust otherwise than in strict accordance with the provisions of said act of 1855," and "from selling said lands for scrip or state warrants of any kind, or for aught other than current money of the United States." This injunction was duly served upon the trustees within a few days after it was issued.

On the 6th of February, 1871, an order was made reciting the service of subpœna in chancery upon the "defendants" in conformity with the rules and practice of the court, and the bill was taken for confessed (except as to the defendant Walker) for want of an answer, plea, or demurrer. The trustees of the Internal Improvement Fund subsequently appeared and were permitted to file their answer, controverting

the principal allegations of the bill. On the 10th of February, 1871, four days after the bill had been taken for confessed, a majority of the trustees, "for and in the consideration of the sum one dollar to them in hand paid," conveyed to the Southern Inland Navigation and Improvement Company one million three hundred and sixty thousand six hundred acres of land; and, shortly thereafter, March 20, 1871, the latter company mortgaged the above and other lands obtained from the trustees of the Internal Improvement Fund, to secure the payment of bonds for a very large amount which the mortgagor company proposed to issue.

By a decree rendered December 4, 1873, in the suit brought by Vose, it was among other things adjudged that "the contracts or agreements, entered into by the trustees of the Internal Improvement Fund with the corporation known as the Southern Inland Navigation and Improvement Company, be rescinded, and the same are hereby declared to be null and void, and the lands undertaken to be conveyed or contracted to be conveyed shall be restored to the said Internal Improvement Fund, and be subjected to sale by the agents appointed by decree of this court, rendered during the term in accordance with the provisions of said decree."

Subsequently, in May, 1875, the Southern Inland Navigation and Improvement Company filed its petition in the Vose suit, praying that the decree of December 4, 1873, be vacated, and it be permitted to file such pleadings as were necessary for the defence of its interests. The grounds upon which this relief was asked were that the company had not been made a party to the suit nor served with a subpœna. These grounds were controverted in an answer filed by Vose to the petition. The questions thus raised were heard by Mr. Justice Bradley, March 26, 1877, who found that the Southern Inland Navigation and Improvement Company was duly made a party to the bill filed by Vose, was served with process of subpœna thereon, and failed and neglected to appear and answer the bill. Its prayers to vacate the order or decree of December 4, 1873, and to permit it to file necessary pleadings in that suit was denied.

The present suit was instituted April 12, 1883, by the Union Trust Company of New York against the Southern Inland Navigation and Improvement Company and the trustees of the Internal Improvement Fund. Its object is to obtain a decree adjudging that the said trustees have no right, title or interest in the lands embraced in the mortgage of February 10, 1871; that the same are subject to said mortgage; and that the property so mortgaged be sold to pay the amount found to be due upon any outstanding bonds secured by that mortgage. The principal defence rests upon the above proceedings, orders and decrees in the Vose suit. The bill was dismissed with costs, and from the decree of dismissal the present appeal was prosecuted.

The argument at the bar covered several questions of an interesting character, which we do not deem it necessary to determine, as the decree below must be affirmed upon the ground that the deed of February 10, 1871, by the Trustees of the Internal Improvement Fund to the Southern Inland Navigation and Improvement Company — under which deed the present plaintiff, as mortgagee of the grantee, claims title — was made in violation of the injunction previously issued and served upon said trustees in the suit instituted by Vose. That suit, as we have seen, had for its object the protection of the rights of Vose and other holders of railroad bonds in the lands and money under the control of the trustees of the Internal Improvement Fund. The injunction bound the trustees, and they and all other parties to the suit, who were before the court, were concluded by the decree subsequently rendered in respect to the disposition of the lands that were the subject matter of the litigation. In *County of Warren* v. *Marcy*, 97 U. S. 96, 105, it was said to be a general rule that "all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit." While this rule was said not to apply to negotiable securities, purchased before maturity, nor to articles of ordinary commerce sold in the usual way, it was held to be applicable in cases relating to land. And in support of this view was

cited the case of *Murray* v. *Ballou*, 1 Johns. Ch. 566, 576, in which Chancellor Kent laid it down as an established rule that "a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." Here the Southern Inland Navigation and Improvement Company accepted a conveyance of the lands in question from the trustees of the Internal Improvement Fund, after service of the subpœna, and a copy of the injunction, upon the trustees, its grantors. That company, therefore, took its titles *pendente lite*, and its mortgagee, the Union Trust Company, was bound by the final decree rendered in the case to the same extent that it is bound.

It is, however, suggested that the Southern Inland Navigation and Improvement Company was not a party to the Vose suit, and consequently was not bound by that part of the decree of December 4, 1873, adjudging that the contracts or agreements entered into by the trustees with that company "be rescinded, and the same are declared null and void, and the lands undertaken to be conveyed, or contracted to be conveyed, shall be restored to the said Internal Improvement Fund, and be subjected to sale by the agents appointed by the court." To this suggestion there are two answers. *First.* The question whether the Southern Navigation and Improvement Company was a party defendant to the Vose suit, and therefore affected by the decree *pro confesso*, passed February 6, 1871, was determined adversely to it by the order of March 26, 1877, denying its application to have the order of December 4, 1873, set aside. From the order of March 26, 1877, no appeal was prosecuted; and in this collateral proceeding that order is to be taken as conclusively establishing the fact that the Southern Inland Navigation Company was a party to the Vose suit, was served with process of subpœna therein, and neglected to appear and answer the bill. *Second.* The relief granted in the Vose suit in respect to the agreement or contracts which the Southern Inland Navigation and Improvement Company claimed to have with the trustees of the Internal Improvement Fund was within the general scope of

Counsel for Parties.

that suit, and was fairly covered by the prayer for such relief as might be deemed just and equitable. Besides, if that company was a party to the Vose suit, and we have seen that it was, the decree, so far as it rescinds the agreement or contracts it had with the trustees, and restores to the Internal Improvement Fund the lands covered by these contracts, was not void. If erroneous, it could only be avoided by an appeal. It cannot be questioned in this collateral proceeding.

It results from what has been said that the conveyance by the trustees to the Southern Inland Navigation Company was subject to such decree as the court might render in the Vose suit; and as the decree of December 4, 1873, rescinded the agreements which the latter had with the former in respect to lands constituting a part of the trust fund, and restored to that fund the lands conveyed, or attempted to be conveyed, to that company by the trustees, the conveyance of February 10, 1871, and the mortgage of March 20, 1871, based upon it, is invalid as against the present trustees of the Internal Improvement Fund of Florida.

Decree affirmed.

SYNNOTT *v.* SHAUGHNESSY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 176. Submitted January 25, 1889. — Decided April 22, 1889.

In a suit in equity to set aside a conveyance of a silver mine in Idaho, as induced by false and fraudulent concealment and misrepresentations, the court, after stating the pleadings and the facts, *holds*, that neither the law nor the equities are with the plaintiffs.

In equity. Decree dismissing the bill, from which the plaintiffs appealed. The case is stated in the opinion.

Mr. J. G. Sutherland and *Mr. John R. McBride* for appellants.

No appearance for appellee.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

On the 24th of May, 1882, John Synnott and Peter Welch commenced an action in one of the territorial courts of Idaho Territory against Michael Shaughnessy, to have annulled the sale of the Eureka Silver Mine, situated in Mineral Hill mining district, Alturas County, in that Territory, and to compel him to reconvey the same to them as vendors. In their complaint the plaintiffs alleged that on the 5th day of July, 1881, they were the owners each of an undivided one half, and in the lawful possession, of the Eureka silver-mining claim, particularly describing it by metes and bounds, which they had located in June, 1880, and upon which they had developed a small seam or vein of galena ore, worth about $1000; that this vein was all of the ore which had been discovered by them, or either of them, upon the mining claim up to that time, and that they were ignorant of the existence of any other vein or body of ore, and believed that all the value that was then attached to the mining claim arose from the developments they had made upon the claim and the ore they had discovered, and did not exceed $2500; that on or about the 3d of July, 1881, the defendant by his agents or employés, had discovered upon a part of the Eureka mining claim, remote from the places where the plaintiffs had been at work, a large and valuable vein, or body of ore, from eighteen inches to four feet in thickness, extending about seventy feet continuously along said vein, the existence of which rendered the mine worth at least $100,000, and of the existence of which these plaintiffs were wholly ignorant; that the defendant, by his agents and servants, intending to cheat and defraud these plaintiffs, fraudulently and falsely concealed and suppressed from them the knowledge of the existence of such vein or ore body, and misrepresented the facts concerning the same, and fraudulently and falsely represented to them that no other ore body or vein of ore existed in the mining claim, except such as was known to these plaintiffs; that such false and fraudulent statements were made by the defendant, his agent and employés, in order to enable him to purchase the mining claim at a price far below

its real value; that by means of such false and fraudulent concealment and misrepresentations these plaintiffs, who believed the same to be true, were made to believe that no other body or vein of ore existed in the mining claim than that which was known to them, and that the real value of the claim was not more than $2200; that immediately prior to the discovery of the ore vein or ore body by the defendant, these plaintiffs had employed one Henry Porter as an agent to find for them a purchaser of their claim at the sum of $2500, and agreed to pay him ten per cent of that sum if he should make a sale thereof at the price mentioned; that during such employment of Porter, and while he was endeavoring to obtain a purchaser for the mine, he, himself, first made the discovery of the aforesaid ore vein and ore body, which was unknown to these plaintiffs; that upon such discovery Porter concealed the same from the plaintiffs, and falsely and collusively and for a consideration paid to him by the defendant, to wit, $1000, informed the defendant of the existence of such large vein or ore body, and then and there, in violation of his employment by these plaintiffs, and in fraud of their rights, entered into the employment of the defendant, and undertook and agreed to assist him in concealing from them the knowledge of the existence of the ore body he had discovered, and in obtaining the mining claim from them at the price of $2200, which was greatly below its real value; that by reason of those false, fraudulent and collusive acts of Porter, as well as the misrepresentations and concealments of the defendant, these plaintiffs were induced to part with their property for the sum of $2200, and to execute and deliver to the defendant a quit-claim deed of the Eureka mining claim, dated on the 5th day of July, 1881, which was afterwards duly recorded; that by reason of such conveyance thus fraudulently obtained from them, and if the same be not declared fraudulent, null and void, they will sustain great pecuniary loss and damage, to wit, $100,000; that since the conveyance to the defendant of the mining claim he has been in the possession of the same, and has extracted and taken therefrom a large quantity of ore and has made large profits therefrom, to wit, over $3000; and that the plaintiffs are ready and

willing and hereby offer to repay to the defendant the sum of $2200, the purchase price of the mining claim, together with interest from July 5, 1881, upon a reconveyance of the mining property to them.

The prayer for relief was, (1) That the deed of July 5, 1881, be declared fraudulent, null and void, and set aside by the court, and the defendant be decreed to reconvey the mining claim and premises to the plaintiffs upon their paying him the purchase price thereof, together with lawful interest from the date of the purchase; (2) that the defendant be decreed to account to the plaintiffs for the net proceeds of the ore extracted by him from the mining claim since his purchase thereof, and upon such accounting be decreed to pay the same to the plaintiffs; (3) that the defendant, his agents and employés, be enjoined and restrained from interfering with the mining claim, or extracting or clearing away any of the ore therefrom; (4) that the plaintiffs be put in possession of the mining claim by the process of the court; (5) That the defendant be decreed to pay the costs of this action; and (6) for other and further relief.

The answer of the defendant denied specifically all the material allegations of the complaint, and set out in detail the circumstances attending the purchase of the mine, which, if proved, would establish his good faith in such purchase, and the absence of any fraudulent acts on the part of himself or any of his agents connected with such transactions.

The cause having been heard upon the pleadings and proofs, the court found the facts in favor of the defendant, and entered a decree in his favor. Upon appeal to the Supreme Court of the Territory, that decree was in all respects affirmed; and an appeal from the latter decree brings the case here.

The findings of fact by the trial court, and which were adopted by the Supreme Court of the Territory, are twenty in number, and elaborately set out all the facts and circumstances attending the sale of the mine. The material facts, as gathered from these findings, stated briefly, are as follows:

For some time prior to the 5th of July, 1881, the plaintiffs,

Synnott and Welch, had owned the Eureka mine, and had lived in a cabin near by. They had done considerable work in developing it, and had found a small vein of ore, from which they had extracted, through several tunnels, about $1000 worth of ore, then lying on the premises. They were desirous of selling the claim, and entered into an agreement with one Porter, to pay him a commission of ten per cent on the sale thereof, in case he realized from such sale $2500.

Under these arrangements Porter first applied to one John Gilman to purchase the claim, but no agreement was reached between them. Porter then, on the morning of July 5, 1881, tried to induce one E. A. Wall (who afterwards acted as the agent of the defendant Shaughnessy) to purchase the claim. He informed Wall that he had a verbal option of purchase at the price of $2000, and that his terms would be a commission of $500, or one fourth of the claim, if Wall should purchase it. In the same interview he stated to Wall that he thought he could show him something on the claim that would induce him to buy it. Porter then having disclosed to Wall that he had a further appointment with Gilman to resume negotiations regarding the claim, Wall declined to have any further conference, or to make any terms for the purchase, so long as negotiations with Gilman continued.

Porter then met Gilman, and they inspected the claim together. Porter showed him float ore which he had discovered at two places on the claim, one of which was on and about the path which Synnott and Welch had usually travelled from their cabin to their work on the claim, and the other at a point about fifty yards from that path. After this inspection Gilman went immediately to Synnott and Welch, and had further negotiations with them, but they failed to agree on any terms. Synnott and Welch then informed Porter that they were willing to sell the claim for $2000, but that in that case could not allow him any commission.

On the evening of that day Porter again went to Wall, and resumed negotiations. They went together over the Eureka claim, and Porter showed Wall the float ore he had found, and insisted on having one fourth of the claim for his option

and for showing the float ore. Wall informed him that if he bought the claim it would be for the defendant Shaughnessy, who might prefer to be the sole owner, and proposed that if Porter would allow him ten days to decide he would either allow him one fourth of the claim or pay him $1000, to which Porter agreed, and at the end of that period, and after the purchase, the $1000 was paid to Porter accordingly. After their examination of the claim Wall went with Porter to the cabin of Synnott and Welch and informed them that he would buy the claim for $2000, to which they assented. Wall then told them to come down to his office at Bullion and make out their deed, and they agreed to do so. After Wall and Porter had left, Gilman returned and resumed negotiations with Synnott and Welch, finally offering them $1800 and one tenth of the proceeds of the claim, or $2200 in money for the whole. He also informed them of the fact that Porter had discovered float ore on the place. After Gilman had gone away, Porter returned to the cabin of Synnott and Welch, and the three went together to Wall's office. On the way they informed Porter of the offer made by Gilman, and intimated that they would expect the same from Wall, because they were poor, and could not afford to lose the $200, or pay any commission. On their arrival at Wall's office, Porter informed Wall of Gilman's offer, whereupon Wall told them that he would pay $2200 for the claim, adding with some asperity, that Gilman should not have it at any price. The deed from Synnott and Welch to Shaughnessy for $2200 was then drawn and executed and attested, and was acknowledged the following day.

The day after the sale Porter did some work on the claim at one of the points where he had found float ore, and on the following day Wall, as agent of the defendant, put miners at work at one of the places where float ore had been observed, and in the course of a few days, by an open cut 20 by 25 feet, discovered a body of ore in place, which, when taken out, weighed 23 tons, and netted the defendant about $800.

The ore exposed by Synnott and Welch was taken out and sold by the defendant, netting him about $90.

The defendant afterwards expended about $23,000 in devel-

oping the claim, and discovered a large and valuable lode. He has sold ore from it to the amount of about $3000. At the time this suit was brought he had opened negotiations for the sale of the claim at $150,000.

The plaintiffs in error rest their case upon two propositions, viz.: (1) The defendant, with knowledge of the existence of a large "body of ore" in this claim, by his agent, who made the purchase, wilfully misled the plaintiffs in relation thereto, and induced them to sell for a price which they would not have sold for had they been truly informed of the facts. (2) The defendant, by his agent (Wall), entered into an agreement to pay the agent of the plaintiffs (Porter) a sum of money to conceal from his principals his knowledge of the existence of a valuable body of ore, which he had informed the defendant's agent of, and then procured a conveyance from the plaintiffs of the claim in fraud of their rights.

These two propositions, in our opinion, are clearly negatived by the 12th, 14th and 15th findings of fact, which are as follows:

"12. The evidence in the case does not show or tend to show that Wall or Porter or any other person had discovered or knew of the existence of any vein or lode of ore in place on the Eureka mining claim, other than such as had been found by and was known to Synnott and Welch, in their excavations, at any time prior to the sale and execution of the deed."

"14. No false or fraudulent representations concerning the Eureka mining claim were ever made to said vendors or any one else by the defendant, or by any agent or employé of his.

"15. No concealment of any material fact concerning said mining claim was ever made by the defendant or by any agent or employé of his. Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode on said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale."

In the assignment of errors, however, it is insisted that these findings are not responsive to the allegations of the complaint. It is said that the trial court did not make any

findings on the following material issues: (1) It did not find as to the value of the ore body discovered in the Eureka mining claim by Porter, and by him shown to Wall at the time the purchase was made by the latter for the defendant; (2) it did not find as to the knowledge of the existence and extent of such ore body by Wall, at the date last mentioned; (3) it failed to find whether Porter discovered any ore body, as alleged, and, if so, when, and what was its value and extent; what concealments were practised by him upon the plaintiffs, if any; what knowledge defendant or his agent had of these concealments; whether plaintiffs were offered or received the value of the claim at the time of the sale thereof; what the defendant paid Porter the $1000 for; what the contract was between Porter and Wall; and what were Porter's relations to the vendors at the time of the sale.

We do not think there is much force in this contention. It will be observed that the basis of this assignment of error is the assumption that Porter, as the agent of the plaintiffs, prior to the day the mine was sold, had discovered a valuable body of ore, the knowledge of which he concealed from the plaintiffs, and imparted to the defendant.

This assumption, as shown by the findings, to which we are restricted, is entirely without foundation. Neither Porter nor the defendant or his agent, Wall, ever discovered any vein or lode of ore on the claim at any time prior to the sale thereof by the plaintiffs. The counsel for appellants contend that the court, in finding that Porter or Wall discovered no "vein" or "lode," did not find that they discovered no "ore body." We deem it sufficient to say that the context of the complaint shows that those terms were used synonymously by the pleader, in the common parlance of miners, and not with reference to any technical distinction. The only indications of any such ore body or vein that had been found were simply a few small pieces of ore known as "float" ore, which did not of necessity indicate the existence of any large ore body. Further, the fact that Porter had found "float" ore on the claim was made known to the plaintiffs before they made the deed for the claim. Such purely surface indications, open to all ordinary

observers, and situated on or near the path along which the plaintiffs travelled in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation. The fact, however, that there was no such discovery of an actual vein or body of ore demonstrates that there could have been no such fraudulent and collusive concealment and misrepresentation, as to its limit and extent, as is charged in this complaint. It required not only a considerable excavation, but also a great outlay of money and great labor on the part of the defendant to develop the existence of a vein of ore.

This virtually disposes of both propositions advanced by the plaintiffs in support of their contention. That the defendant paid Porter $1000, there is no question. But that such sum was paid him to conceal from the plaintiffs his knowledge of the existence of a large ore body on the claim could not have been true; for the findings state that he possessed no such knowledge. It is presumable that the plaintiffs, as men of ordinary intelligence, must have known that Porter was to receive from the defendant, or his agent, Wall, a commission for his work in the transactions connected with the sale of the mine; for the findings show that they did not pay him anything out of the sum received from such sale, as their agent, and informed him beforehand that while they were willing to sell the claim for $2000, in that case they could not allow him any commission. It really could make no difference to the plaintiffs what he was paid, since they received for the claim all they had asked for it, and in reality $200 more than they had, a few hours before, agreed to take, and within $50 of what they would have got if Porter had made the sale under their first agreement with him.

There are no other features of the case that call for special mention. In no aspect of it do we think either the law or the equities are with the plaintiffs.

The judgment of the Supreme Court of Idaho is, therefore,

Affirmed.

THE CHINESE EXCLUSION CASE.

CHAE CHAN PING *v.* UNITED STATES.

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

No. 1446. Argued March 28, 29, 1889. — Decided May 13, 1889.

In their relations with foreign governments and their subjects or citizens, the United States are a nation, invested with the powers which belong to independent nations.

So far as a treaty made by the United States with any foreign power can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal. *The Head Money Cases*, 112 U. S. 580, and *Whitney* v. *Robertson*, 124 U. S. 190, followed.

The abrogation of a treaty, like the repeal of a law, operates only on future transactions, leaving unaffected those executed under it previous to the abrogation.

The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, and not such as are personal and untransferable in their character.

The power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty, which cannot be surrendered by the treaty making power.

The act of October 1, 1888, 25 Stat. 504, c. 1064, excluding Chinese laborers from the United States, was a constitutional exercise of legislative power, and, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States.

A certificate issued to a Chinese laborer under the fourth and fifth sections of the act of May 6, 1882, 22 Stat. 58, c. 126, as amended July 5, 1884, 23 Stat. 115, c. 220, conferred upon him no right to return to the United States of which he could not be deprived by a subsequent act of Congress.

The history of Chinese immigration into the United States stated, together with a review of the treaties and legislation affecting it.

THE court stated the case as follows in its opinion:

This case comes before us on appeal from an order of the Circuit Court of the United States for the Northern District of California refusing to release the appellant, on a writ of *habeas corpus*, from his alleged unlawful detention by Captain Walker,

master of the steamship Belgic, lying within the harbor of San Francisco. The appellant is a subject of the Emperor of China and a laborer by occupation. He resided at San Francisco, California, following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steamship Gaelic, having in his possession a certificate, in terms entitling him to return to the United States, bearing date on that day, duly issued to him by the collector of customs of the port of San Francisco, pursuant to the provisions of section four of the restriction act of May 6, 1882, as amended by the act of July 5, 1884. 22 Stat. 58, c. 126; 23 Stat. 115, c. 220.

On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steamship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of Congress, approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled and his right to land abrogated, and he had been thereby forbidden again to enter the United States. 25 Stat. 504, c. 1064. The captain of the steamship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the Circuit Court of the United States for the Northern District of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued directed to the master of the steamship, commanding him to have the body of the appellant, with the cause of his detention, before the court at a time and place designated, to do and receive what might there be considered in the premises. A writ was accordingly issued, and in obedience to it the body of the appellant was produced before the court. Upon the hearing which followed, the court, after finding the facts substantially as stated, held as conclusions of law that the appellant was not entitled to enter the United States, and was not unlawfully restrained of his liberty, and ordered that he be remanded to the custody of the master of the steamship from

which he had been taken under the writ. From this order an appeal was taken to this court.

Mr. George Hoadly and *Mr. James C. Carter* argued the case orally for appellant. They also filed a brief, prepared by *Mr. Hoadly*, citing: Woolsey, Internat. Law, 5th ed. § 63; Field, Code of Internat. Law, § 318; Bluntschli, Das Moderne Voelkerrecht der Civiliserten Staaten, § 381; *Head Money Cases*, 112 U. S. 580, 598; *Chew Heong* v. *United States*, 112 U. S. 536, 592; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 493; *McClurg* v. *Kingsland*, 1 How. 206; *Townsley* v. *Sumrall*, 2 Pet. 182; Langdell on Contracts, 2d ed. 62; Poste's Gaius, Lib. 3, 372; Dig. 9, 5, 15, 22, 25; Sandar's Justinian, Lib. 3, Tit. 14, 2d ed. p. 419; 1 Parsons on Contracts, 429; *Thomas* v. *Thomas*, 202 Q. B. (N. S.) 851; *Dartmouth College* v. *Woodward*, 4 Wheat. 655; *Shuey* v. *United States*, 92 U. S. 73; *Loring* v. *Boston*, 7 Met. 409; *Janvrin* v. *Exeter*, 48 N. H. 83; 2 Bl. Com. 37; *Bank of Augusta* v. *Earle*, 13 Pet. 595; 4 Madison's Writings, 478–480, 526; Virginia Report of 1799–1800, 204–205, Richmond, 1850; *Fletcher* v. *Peck*, 6 Cranch, 87; *Knapp* v. *Thomas*, 39 Ohio St. 377, 381; *United States* v. *American Bell Telephone Co.*, 128 U. S. 450; Von Holst on Const. 40; 9 Kentucky Resolutions of 1798, Jefferson's Writings, 466, Riker's ed. 1853–6; Virginia Resolutions of 1798, 4 Elliot's Debates, 528, 531; Mass. Resolutions, Feb. 30, 1799; N. H. Resolutions, June 15, 1799; The Debates on the Virginia Resolutions in the Virginia Legislature; The Debates on the Alien and Sedition Law in Congress; Story, Conflict Laws, §§ 41, 46; *Munn* v. *Illinois*, 94 U. S. 142; *Mugler* v. *Kansas*, 123 U. S. 661; *Barbier* v. *Connolly*, 113 U. S. 31; *New York* v. *Miln*, 11 Pet. 102, 139; *United States* v. *Cruikshank*, 92 U. S. 542; *Presser* v. *Illinois*, 116 U. S. 266; Magna Charta; *Dauphin* v. *Key*, McArthur & Mackay, 203; 1 Hare Const. Law, 550; *Cummings* v. *State*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 377; *Pierce* v. *Carskadon*, 16 Wall. 234; *Blair* v. *Ridgly*, 41 Missouri, 63; *S. C.* 97 Am. Dec. 248; *In re Yung Sing Hee*, 36 Fed. Rep. 437; *In re Look Tin Sing*, 21 Fed. Rep. 905, 910; *In re Wy Shing*, 36 Fed. Rep. 553; *Kilham* v. *Ward*, 2 Mass. 236.

Mr. Carter also filed a brief "designed to present in a short compass the main propositions elaborated and illustrated in the more copious brief prepared by Mr. Hoadly."

I. It appears by the record that the appellant when brought before the court below in pursuance of the writ of *habeas corpus* was restrained of his liberty in not being allowed to land from the steamer Belgic — in other words, that he was *imprisoned* upon that vessel. The judgment of the court was that he had no right to land, and was therefore not unlawfully restrained of his liberty. If he had such right, it will not be denied that the judgment was erroneous and should be reversed.

II. Inasmuch as it did not appear to the court below that the petitioner was held under any sentence, judgment, writ or other judicial process of any court, it became instantly manifest that he was deprived of his liberty *without due process of law*, unless some other matter appeared showing that he was not entitled to the protection of the common constitutional safeguard to personal liberty.

(1) It is, at least, in general true that whenever upon the hearing, upon a return to a writ of *habeas corpus* any man is held a prisoner upon any other ground or pretence than the command of some writ or other judicial process, order, or judgment, he must instantly be discharged. It is only by the authority of *law* manifested through the mandate of some *court* or *judicial* officer that one man can be held a prisoner by another.

(2) There is no distinction in this respect, between citizens and the subjects of other nations. Liberty is the birthright and inalienable possession of all men, as *men*. For this proposition an American lawyer disdains to cite authority. Neither the fundamental law of the United States, nor of any one of the States, recognizes any such distinction.

III. The special matter which the judgment of the court below determined as sufficient to take the case of the appellant out of the operation of the principles above mentioned, was, that the appellant was a Chinese laborer who had been a resident of the United States, but who had departed there-

from, and was, under the provisions of the act of Congress, approved October 1st, 1888, forbidden to return to the United States. This matter was wholly insufficient to justify the detention of the appellant.

(1) The inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied. But the United States, while a sovereign government, is yet one which can exercise only those powers of sovereignty which are enumerated in and delegated by the instrument which created it, and such other incidental powers as are necessary and proper in order to carry into execution those thus enumerated. That the power of prohibition above mentioned is one, in terms, delegated, will not be asserted. That it is necessary or proper in order to carry into execution some power expressly delegated may be asserted, but is by no means conceded. Such a proposition may well await the solemn determination of this court when some case arises which depends solely upon it. Its establishment is not necessary in order to maintain the case of the appellant.

(2) Whatever power Congress may have to prohibit the immigration of other foreign citizens or subjects, it had none to prohibit the *return* to this country of the appellant. He had a *vested right* to return, which could not be taken from him by any exercise of mere *legislative* power.

(*a*) That he had a lawful right to *be* in the United States when the writ issued cannot be denied. He had been a peaceable resident of California for twelve years preceding June 2d, 1887. He had come here under a treaty between the United States and his own nation, which declared "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and immigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*." Burlingame Treaty, Art. V. He could not have been *ejected* from the United States by any mere legislation. However the power "to regulate commerce with foreign nations" may authorize congressional

legislation to prevent the *entry* of foreign subjects, no one, it is believed, will assert that any power is conferred upon Congress to command them to surrender any residence they may have acquired under such invitations and guaranties, and *depart* from the country. The "Alien Law" of 1798 has been feebly sustained as an exercise of lawful power; but that did not assert the right of compelling an alien *friend* to leave the country, and the only defence of it which has been allowed as plausible was that it was a measure in preparation for *anticipated war*, and, therefore, an exercise of the war power.

(*b*) If, therefore, the appellant had a *right of residence* here, it is extremely clear that it is a right which could not be taken away by mere *legislation*. Such taking away could not be effected without first taking away his liberty. It is very certain that he never himself surrendered the right, unless his departure from the country under all the guaranties supplied by the acts of 1882 and 1884 is to be deemed such a surrender; and such an assertion may safely be left unanswered. It follows, therefore, that the appellant had the right to land when the writ issued.

(*c*) It will be observed that the right of the appellant *to return* to the United States is based, so far as above insisted upon, not upon any *contract* between him and that government, but upon a title or right to *be* in that country when the writ issued — a title or right fully acquired by, and vested in him by his coming here under the permission of the laws and treaties under which he came. It was granted to him by *law;* but, when once granted, could not be taken away by mere law, for two reasons: (1), because it was a *valuable* right like an estate in lands, and the taking of it away would necessarily involve the taking away of his *liberty;* and (2), because, whatever sovereign powers may, in general, do in the way of banishing aliens, no power to do that has been delegated to the Congress of the United States.

(3) But another, and perhaps more clearly demonstrable basis for the asserted right of the appellant to return, is that which refers the acquisition of it to a *contract.*

That there was a contract between the appellant and the

United States by which the latter became bound to permit his return is very clear.

The provisions of acts of 1882 and 1884 (22 Stat. 58; 1884, 23 Stat. 115) contained an *offer* on the part of the United States to every Chinese laborer then in this country, if he should leave the country and comply with the conditions therein for such case specified, to permit him to return. That offer was accepted and the conditions were fully complied with by the appellant. This created a perfect contract, binding upon the United States.

(*a*) The *consideration* was perfect. It was that the appellant would give up his actual residence in the United States, with all the rights and benefits which such residence conferred upon him, undertake the expense and hazard of a journey abroad, and procure certain documentary evidence. The circumstance that these things were of no benefit to the United States is wholly immaterial. The *sacrifice* by the appellant completely answers the conception of consideration.

(*b*) As it was not a case of *mutual* promises, but the promise was only on the side of the United States, it was a *unilateral* contract, and the promise was one which would not become binding until the full *performance* of the consideration. It was fully performed.

(4) The contract being thus fully *executed* by the appellant, he *completely acquired* the right which it was agreed he should have upon its execution. No *muniment* of title was necessary in order to complete the investiture. It was as perfectly vested as the title to real property is vested by the execution and delivery of a deed.

(5) It may possibly be urged that the making of contracts are *executive* acts, not within the ordinary contemplation of legislation, and that the laws in question should not be deemed as containing *offers*, but as being pieces of simple legislation, subject to repeal at any time, and that all persons should take notice of this fact and consider that they acted at their peril; and that in the present case the Chinese laborers were bound to know that in leaving the country they took the peril of a repeal of the laws. Such a suggestion would be an entire perversion of the real fact.

(*a*) The making through the instrumentality of laws of *offers* for contracts is perfectly familiar. Laws making provision for sales of public lands, for giving rewards for the apprehension of criminals, for the furnishing of supplies to the public, and for the construction of public works, are common instances. That offers *may* be thus made is plain; the only question in a particular case is whether an offer was *intended.*

(*b*) States, as well as individuals, are moral agents, and the common rules of morality and good faith are as binding upon them as upon individuals; and when one man declares to another that he will, in case such other will do or suffer a certain thing, bestow upon the latter an *advantage*, and thus tempt him to act or suffer upon the faith of the promise, he will not be heard to say that he did not *intend* to make an offer.

(*c*) The question is, *was it contemplated* by the acts of Congress of 1882 and 1884 that the Chinese laborers would *act* upon the assurance therein contained? If it was, those acts must be deemed to have intended the making of offers. The contrary supposal would impute to Congress the deliberate intention of holding out expectations which it knew would be acted upon without meaning to make them good.

(*d*) The answer to the above question cannot be doubtful. It declares that the exclusion from the country *shall not apply* to Chinese laborers now resident in it and who may wish to go away with intent to return; provides documentary evidence establishing their indentity in the shape of a formal certificate; and declares that such certificate "*shall entitle* the Chinese laborer to whom the same is issued to return to, and re-enter the United States." It is not in this court that any argument is necessary to show that these statutes *contemplate* that individuals affected by them will act upon the faith of the assurance which they contain.

(6) If we have succeeded in establishing that the appellant had a vested right to return, acquired by *contract*, we need spend no time in asserting that it could not be taken away by a mere exercise of legislative power. *The Sinking Fund Cases*, 99 U. S. 700.

(7) There are, indeed, exceptions to the doctrines above mentioned. The existence of war, or pestilence, might have justified the refusal of permission to land. Anything which, by the rules of law, destroys or suspends the operations of a contract, would have been effective upon the one in question. But no such ground is suggested in the present case. The exclusion act of 1888, and that alone, was invoked by way of justification.

IV. The act of 1888, so far as respects Chinese laborers of the class of which the appellant is one, is unconstitutional, as being a bill of attainder, or *ex post facto* law. If the appellant had a right to return, the depriving him of such right is *punishment*, and this cannot be inflicted except by judicial sentence.

Mr. Harvey S. Brown and *Mr. Thomas D. Riordan* also filed a brief for appellant.

Mr. Solicitor General, *Mr. G. A. Johnson*, Attorney General of California, *Mr. Stephen M. White* and *Mr. John F. Swift* for appellees.

Mr. Justice Field delivered the opinion of the court.

The appeal involves a consideration of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress.

It will serve to present with greater clearness the nature and force of the objections to the act, if a brief statement be made of the general character of the treaties between the two countries and of the legislation of Congress to carry them into execution.

The first treaty between the United States and the Empire of China was concluded on the 3d of July, 1844, and ratified in December of the following year. 8 Stat. 592. Previous to that time there had been an extensive commerce between the two nations, that to China being confined to a single port. It was not, however, attended by any serious disturbances between our people there and the Chinese. In August, 1842, as the result of a war between England and China, a treaty was concluded stipulating for peace and friendship between them, and, among other things, that British subjects, with their families and establishments, should be allowed to reside for the purpose of carrying on mercantile pursuits at the five principal ports of the empire. 6 Hertslet's Commercial Treaties, 221; 3 Nouveau Recueil Général de Traités (1842), 484. Actuated by a desire to establish by treaty friendly relations between the United States and the Chinese Empire, and to secure to our people the same commercial privileges which had been thus conceded to British subjects, Congress placed at the disposal of the President the means to enable him to establish future commercial relations between the two countries "on terms of national equal reciprocity." Act of March, 1843, c. 90, 5 Stat. 624. A mission was accordingly sent by him to China, at the head of which was placed Mr. Caleb Cushing, a gentleman of large experience in public affairs. He found the Chinese government ready to concede by treaty to the United States all that had been reluctantly yielded to England through compulsion. As the result of his negotiations the treaty of 1844 was concluded. It stipulated, among other things, that there should be a "perfect, permanent and universal peace, and a sincere and cordial amity" between the two nations; that the five principal ports of the empire should be opened to the citizens of the United States, who should be permitted to reside with their families and trade there, and to proceed with their vessels and merchandise to and from any foreign port and either of said five ports; and while peaceably attending to their affairs should receive the protection of the Chinese authorities. Senate Document No. 138, 28th Cong. 2d Sess.

The treaty between England and China did not have the effect of securing permanent peace and friendship between those countries. British subjects in China were often subjected not only to the violence of mobs, but to insults and outrages from local authorities of the country, which led to retaliatory measures for the punishment of the aggressors. To such an extent were these measures carried, and such resistance offered to them, that in 1856 the two countries were in open war. England then determined, with the co-operation of France, between which countries there seemed to be perfect accord, to secure from the government of China, among other things, a recognition of the right of other powers to be represented there by accredited ministers, an extension of commercial intercourse with that country, and stipulations for religious freedom to all foreigners there, and for the suppression of piracy. England requested of the President the concurrence and active co-operation of the United States similar to that which France had accorded, and to authorize our naval and political authorities to act in concert with the allied forces. As this proposition involved a participation in existing hostilities, the request could not be acceded to, and the Secretary of State in his communication to the English government explained that the war-making power of the United States was not vested in the President but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken. But as the rights of citizens of the United States might be seriously affected by the results of existing hostilities, and commercial intercourse between the United States and China be disturbed, it was deemed advisable to send to China a minister plenipotentiary to represent our government and watch our interests there. Accordingly, Mr. William B. Reed, of Philadelphia, was appointed such minister, and instructed, whilst abstaining from any direct interference, to aid by peaceful coöperation the objects the allied forces were seeking to accomplish. Senate Document No. 47, 35th Cong. 1st Sess. Through him a new treaty was negotiated with the Chinese government. It was concluded in June, 1858, and ratified in August of the following year.

12 Stat. 1023. It reiterated the pledges of peace and friendship between the two nations, renewed the promise of protection to all citizens of the United States in China peaceably attending to their affairs, and stipulated for security to Christians in the profession of their religion. Neither the treaty of 1844, nor that of 1858, touched upon the migration and emigration of the citizens and subjects of the two nations respectively from one country to the other. But in 1868 a great change in the relations of the two nations was made in that respect. In that year a mission from China, composed of distinguished functionaries of that empire, came to the United States with the professed object of establishing closer relations between the two countries and their peoples. At its head was placed Mr. Anson Burlingame, an eminent citizen of the United States, who had at one time represented this country as commissioner to China. He resigned his office under our government to accept the position tendered to him by the Chinese government. The mission was hailed in the United States as the harbinger of a new era in the history of China —as the opening up to free intercourse with other nations and peoples a country that for ages had been isolated and closed against foreigners, who were allowed to have intercourse and to trade with the Chinese only at a few designated places; and the belief was general, and confidently expressed, that great benefits would follow to the world generally and especially to the United States. On its arrival in Washington, additional articles to the treaty of 1858 were agreed upon, which gave expression to the general desire that the two nations and their peoples should be drawn closer together. The new articles, eight in number, were agreed to on the 28th of July, 1868, and ratifications of them were exchanged at Pekin in November of the following year. 16 Stat. 739. Of these articles the 5th, 6th and 7th are as follows:

"Article V. The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country

to the other for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country without their free and voluntary consent, respectively.

"ARTICLE VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

"ARTICLE VII. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the government of China; and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside; and, reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States."

But notwithstanding these strong expressions of friendship and good will, and the desire they evince for free intercourse, events were transpiring on the Pacific Coast which soon dissipated the anticipations indulged as to the benefits to follow the immigration of Chinese to this country. The previous

treaties of 1844 and 1858 were confined principally to mutual declarations of peace and friendship and to stipulations for commercial intercourse at certain ports in China and for protection to our citizens whilst peaceably attending to their affairs. It was not until the additional articles of 1868 were adopted that any public declaration was made by the two nations that there were advantages in the free migration and emigration of their citizens and subjects respectively from one country to the other; and stipulations given that each should enjoy in the country of the other, with respect to travel or residence, the "privileges, immunities, and exemptions" enjoyed by citizens or subjects of the most favored nation. Whatever modifications have since been made to these general provisions have been caused by a well-founded apprehension — from the experience of years — that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there. A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of Congress. Report of Committee of H. R. No. 872, 46th Cong. 2d Sess.

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kinds of out-door work, proved to be exceedingly useful. For some years little opposition was made to them except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field.

The competition steadily increased as the laborers came in

crowds on each steamer that arrived from China, or Hong Kong, an adjacent English port. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

The differences of race added greatly to the difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.

In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a

Chinese settlement within the State, without any interest in our country or its institutions; and praying Congress to take measures to prevent their further immigration. This memorial was presented to Congress in February, 1879.

So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific Coast and from private individuals, that Congress was impelled to act on the subject. Many persons, however, both in and out of Congress, were of opinion that so long as the treaty remained unmodified, legislation restricting immigration would be a breach of faith with China. A statute was accordingly passed appropriating money to send commissioners to China to act with our minister there in negotiating and concluding by treaty a settlement of such matters of interest between the two governments as might be confided to them. 21 Stat. 133, c. 88. Such commissioners were appointed, and as the result of their negotiations the supplementary treaty of November 17, 1880, was concluded and ratified in May of the following year. 22 Stat. 826. It declares in its first article that "Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse." In its second article it declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall

be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The government of China thus agreed that notwithstanding the stipulations of former treaties, the United States might regulate, limit, or suspend the coming of Chinese laborers, or their residence therein, without absolutely forbidding it, whenever in their opinion the interests of the country, or of any part of it, might require such action. Legislation for such regulation, limitation, or suspension was entrusted to the discretion of our government, with the condition that it should only be such as might be necessary for that purpose, and that the immigrants should not be maltreated or abused. On the 6th of May, 1882, an act of Congress was approved, to carry this supplementary treaty into effect. 22 Stat. 58, c. 126. It is entitled "An act to execute certain treaty stipulations relating to Chinese." Its first section declares that after ninety days from the passage of the act, and for the period of ten years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. The second makes it a misdemeanor, punishable by fine, to which imprisonment may be added, for the master of any vessel knowingly to bring within the United States from a foreign country, and land, any such Chinese laborer. The third provides that those two sections shall not apply to Chinese laborers who were in the United States November 17, 1880, or who should come within ninety days after the passage of the act. The fourth declares that, for the purpose of identifying the laborers who were here on the 17th of November, 1880, or who should come within the ninety days mentioned, and to furnish them with "the proper evidence" of their right to go from and come to the United States, the "collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer and cleared or about to sail

from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house;" and each laborer thus departing shall be entitled to receive, from the collector or his deputy, a certificate containing such particulars, corresponding with the registry, as may serve to identify him. "The certificate herein provided for," says the section, "shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter."

The enforcement of this act with respect to laborers who were in the United States on November 17, 1880, was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath. This fact led to a desire for further legislation restricting the evidence receivable, and the amendatory act of July 5, 1884, was accordingly passed. 23 Stat. 115, c. 220. The committee of the House of Representatives on foreign affairs, to whom the original bill was referred, in reporting it back, recommending its passage, stated that there had been such manifold evasions, as well as attempted evasions, of the act of 1882, that it had failed to meet the demands which called it into existence. Report in H. R. No. 614, 48th Cong. 1st Sess. To obviate the difficulties attending its enforcement the amendatory act of 1884 declared that the certificate which the laborer must obtain "shall be the only evidence permissible to establish his right of re-entry" into the United States.

This act was held by this court not to require the certificate from laborers who were in the United States on the 17th of November, 1880, who had departed out of the country before May 6, 1882, and remained out until after July 5, 1884.

Chew Heong v. *United States*, 112 U. S. 536. The same difficulties and embarrassments continued with respect to the proof of their former residence. Parties were able to pass successfully the required examination as to their residence before November 17, 1880, who, it was generally believed, had never visited our shores. To prevent the possibility of the policy of excluding Chinese laborers being evaded, the act of October 1, 1888, the validity of which is the subject of consideration in this case, was passed. It is entitled "An act a supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the sixth day of May, eighteen hundred and eighty-two." 25 Stat. 504, c. 1064. It is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

"SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

"SEC. 3. That all the duties prescribed, liabilities, penalties, and forfeitures imposed, and the powers conferred by the second, tenth, eleventh and twelfth sections of the act to which this is a supplement, are hereby extended and made applicable to the provisions of this act.

"SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.

"Approved October 1, 1888."

The validity of this act, as already mentioned, is assailed, as being in effect an expulsion from the country of Chinese

laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. The objection that the act is in conflict with the treaties was earnestly pressed in the court below, and the answer to it constitutes the principal part of its opinion. 36 Fed. Rep. 431. Here the objection made is, that the act of 1888 impairs a right vested under the treaty of 1880, as a law of the United States, and the statutes of 1882 and of 1884 passed in execution of it. It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.

The effect of legislation upon conflicting treaty stipulations was elaborately considered in *The Head Money Cases*, and it was there adjudged "that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." 112 U. S. 580, 599. This doctrine was affirmed and followed in *Whitney* v. *Robertson*, 124 U. S. 190, 195. It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the government in disre-

garding their stipulations, but demand in the interests of the country that it should do so, there can be no question. Unexpected events may call for a change in the policy of the country. Neglect or violation of stipulations on the part of the other contracting party may require corresponding action on our part. When a reciprocal engagement is not carried out by one of the contracting parties, the other may also decline to keep the corresponding engagement. In 1798 the conduct towards this country of the government of France was of such a character that Congress declared that the United States were freed and exonerated from the stipulations of previous treaties with that country. Its act on the subject was as follows:

"*An Act to declare the treaties heretofore concluded with France, no longer obligatory on the United States.*

"Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity; And whereas, under authority of the French government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States." 1 Stat. 578, c. 67.

This act, as seen, applied in terms only to the future. Of course, whatever of a permanent character had been executed or vested under the treaties was not affected by it. In that respect the abrogation of the obligations of a treaty operates,

like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected. The validity of this legislative release from the stipulations of the treaties was of course not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. This subject was fully considered by Mr. Justice Curtis, whilst sitting at the circuit, in *Taylor* v. *Morton*, 2 Curtis, 454, 459, and he held that whilst it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative, of which no nation could be deprived without deeply affecting its independence; but whether a treaty with a foreign sovereign had been violated by him, whether the consideration of a particular stipulation of a treaty had been voluntarily withdrawn by one party so as to no longer be obligatory upon the other, and whether the views and acts of a foreign sovereign, manifested through his representative, had given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty or to act in direct contravention of such promise, were not judicial questions; that the power to determine them has not been confided to the judiciary, which has no suitable means to execute it, but to the executive and legislative departments of the government; and that it belongs to diplomacy and legislation, and not to the administration of existing laws. And the learned justice added, as a necessary consequence of these conclusions, that if Congress has this power, it is wholly immaterial to inquire whether it has, by the statute complained of, departed from the treaty or not; or, if it has, whether such departure was accidental or designed; and if the latter, whether the reasons therefor were good or bad. These views were reasserted and fully adopted by this court in *Whitney* v. *Robertson*, 124 U. S. 190, 195. And we may add to the concluding observation of the learned justice, that if the power mentioned is vested in Congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. This court is not a censor of the morals

of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination. Congress has the power under the Constitution to declare war, and in two instances where the power has been exercised — in the war of 1812 against Great Britain, and in 1846 against Mexico — the propriety and wisdom and justice of its action were vehemently assailed by some of the ablest and best men in the country, but no one doubted the legality of the proceeding, and any imputation by this or any other court of the United States upon the motives of the members of Congress who in either case voted for the declaration, would have been justly the cause of animadversion. We do not mean to intimate that the moral aspects of legislative acts may not be proper subjects of consideration. Undoubtedly they may be, at proper times and places, before the public, in the halls of Congress, and in all the modes by which the public mind can be influenced. Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses; but the province of the courts is to pass upon the validity of laws, not to make them, and when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain.

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its in-

dependence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of *The Exchange*, 7 Cranch, 116, 136, speaking by Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 413, speaking by the same great Chief Justice: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to

be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then in effecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate." The same view is expressed in a different form by Mr. Justice Bradley, in *Knox* v. *Lee*, 12 Wall. 457, 555, where he observes that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and interstate commerce, all which subjects are expressly or impliedly prohibited to the state governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country. The President is charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as questions of national concern; and the government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion and domestic violence."

The control of local matters being left to local authorities, and national matters being entrusted to the government of the

Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances,

and never denied by the executive or legislative departments. In a communication made in December, 1852, to Mr. A. Dudley Mann, at one time a special agent of the Department of State in Europe, Mr. Everett, then Secretary of State under President Fillmore, writes: "This government could never give up the right of excluding foreigners whose presence it might deem a source of danger to the United States." "Nor will this government consider such exclusion of American citizens from Russia necessarily a matter of diplomatic complaint to that country." In a dispatch to Mr. Fay, our minister to Switzerland, in March, 1856, Mr. Marcy, Secretary of State under President Pierce, writes: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war." "It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise." In a communication in September, 1869, to Mr. Washburne, our minister to France, Mr. Fish, Secretary of State under President Grant, uses this language: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested. Strangers visiting or sojourning in a foreign country voluntarily submit themselves to its laws and customs, and the municipal laws of France, authorizing the expulsion of strangers, are not of such recent date, nor has the exercise of the power by the government of France been so infrequent, that sojourners within her territory can claim surprise when the power is put in force." In a communication to Mr. Foster, our minister to Mexico, in July, 1879, Mr. Evarts, Secretary of State under President Hayes, referring to the power vested in the constitution of Mexico to expel objectionable foreigners, says: "The admission that, as that constitution now stands and is interpreted, foreigners who render themselves harmful or objectionable to the general govern-

ment must expect to be liable to the exercise of the power adverted to, even in time of peace, remains, and no good reason is seen for departing from that conclusion now. But, while there may be no expedient basis on which to found objection, on principle and in advance of a special case thereunder, to the constitutional right thus asserted by Mexico, yet the manner of carrying out such asserted right may be highly objectionable. You would be fully justified in making earnest remonstrances should a citizen of the United States be expelled from Mexican territory without just steps to assure the grounds of such expulsion, and in bringing the fact to the immediate knowledge of the Department." In a communication to Mr. W. J. Stillman, under date of August 3, 1882, Mr. Frelinghuysen, Secretary of State under President Arthur, writes: "This government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores." Wharton's International Law Digest, § 206.

The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. As to paupers, it makes no difference by whose aid they are brought to the country. As Mr. Fish, when Secretary of State, wrote, in a communication under date of December 26, 1872, to Mr. James Moulding, of Liverpool, the government of the United States "is not willing and will not consent to receive the pauper class of any community who may be sent or may be assisted in their immigration at the expense of government or of municipal authorities." As to criminals, the power of exclusion has always been exercised, even in the absence of any statute on the subject. In a despatch to Mr. Cramer, our minister to Switzerland, in December, 1881, Mr. Blaine, Secretary of State under President Arthur, writes: "While, under the Constitution and

the laws, this country is open to the honest and industrious immigrant, it has no room outside of its prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers who may have become a pest or burden, or both, to their own country." Wharton's Int. Law Dig., *supra.*

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. Thus in *The Head Money Cases*, the court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are "capable of enforcement as

between private parties in the courts of the country." "An illustration of this character," it adds, "is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." 112 U. S. 580, 598. The passage cited by counsel from the language of Mr. Justice Washington in *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that "if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it." Of this doctrine there can be no question in this court; but far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.

During the argument reference was made by counsel to the alien law of June 25, 1798, and to opinions expressed at the time by men of great ability and learning against its constitutionality. 1 Stat. 570, c. 58. We do not attach importance to those opinions in their bearing upon this case. The act vested in the President power to order all such aliens as he should judge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machination against the government, to depart out of the territory of the United States within such time as should be expressed in his order. There were other provisions also distinguishing it from the act under consideration. The act was passed during a period of great political excitement, and it was attacked and defended with great

zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States.

Order affirmed.

NEW YORK AND COLORADO MINING SYNDICATE AND COMPANY *v.* FRASER.

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

No. 204. Argued March 14, 1889. — Decided April 15, 1889.

Unless the fact upon which a reversal of a judgment is claimed appears in the record sufficiently to be passed upon, the judgment will not be reversed.

In an action to recover for goods sold and delivered, a copy of an itemized account of them may be handed to a witness to refresh his memory in regard to the matters contained in it.

Evidence that a witness is familiar enough with gold mills to know what they can perform and what they can earn, but that he has only seen one silver mill, being the one in controversy, lays no foundation for his testimony as to the fair rental value of that silver mill.

In the absence of other and better evidence, the rental value of a silver mill may be shown by proof of the amount of ore delivered and milled.

The declarations of the defendant's agent as to matters within the scope of his authority were properly admitted in evidence.

When the exception to the refusal of a request to instruct the jury shows no evidence tending to prove the facts which the request assumes to exist, there is nothing before the court for consideration.

The legal rate of interest upon the cost of a silver mill may be taken by a jury as its fair rental value, in the absence of other evidence concerning that value.

In estimating damages resulting from the stoppage of a mill, the jury may take into consideration the wages of the men thrown out of work while the mill was idle.

This writ of error was brought to review a judgment entered upon a verdict for $10,500 in favor of the defendants in error. The case originated in five different suits, brought by them against the plaintiff in error in the Circuit Court of the

United States for the District of Colorado, the first on a promissory note made by it for $1000, and also for $2531.78 for the price of goods, wares and merchandise sold and delivered by them to it. The other four were suits on promissory notes given by the defendant to the plaintiffs for $1500, $2000, $1500 and $4000, respectively. Afterwards, upon motion of the defendant, these several suits, by order of the court, were consolidated into one. In obedience to this order, the plaintiffs filed a consolidated complaint setting forth these causes of action, the first five being the promissory notes just mentioned, and the sixth being for the goods, wares and merchandise stated as the second cause of action in the first of the afore-mentioned suits.

The defendant in its answers, original and amended, denied the alleged sale and delivery of the goods as set forth in the sixth cause of action, admitted that it had made the promissory notes sued on and that they were unpaid, but denied its liability thereon. The other defence consisted in the allegation of a special contract between the parties, plaintiffs and defendant, previous to the execution of the notes, and as consideration therefor, whereby the former agreed to manufacture and to sell to the defendant, for and at the price agreed, a roasting cylinder and the necessary apparatus connected therewith, described in the plea, and also to manufacture for and deliver to the defendant a twenty-stamp dry-crushing silver mill and its connected apparatus; and to erect and put the same in their places so as to be run and operated at the mine owned by the defendant in the county of ———, State of Colorado, known as the ——— mine; all of which (cylinder, mill and connections) the plaintiffs warranted, when put in their proper places, under the directions of one Angus McKay, would properly and satisfactorily and in all ways subserve the purposes for which they were purchased by the defendant. The plea further alleged that the cylinder, mill and apparatus, when erected and put in their places, were defective in many particulars, so as to be unfit for the uses for which they were designed, and that by reason of these defects the consideration of the notes failed; and, that to remedy the

same and make the mill operate with efficiency, the company was put to large expense for material and new machinery, and was subjected to great loss and damage by the long period of delay in the operations of the mill. The expenses and the special damage thus sustained were pleaded as a failure of consideration, set-off, counter-claim and recoupment.

On the trial the plaintiff introduced as a witness William J. Chalmers, who testified as to the execution by the defendant of the promissory notes sued on, and further testified in answer to questions asked as follows:

"Q. Has the firm [meaning the plaintiffs] now any account, not including these notes, against the defendant?

"A. Yes, sir.

"Q. [Paper shown witness.] Look at that account and see whether this is a copy of the account?

"A. Yes, sir.

"Q. State whether the articles mentioned in that account were ordered by the defendant. And if so, when?"

To which question counsel for defendant objected on the ground that the items could not be proved wholesale by the list, but the objection was overruled by the court; to which ruling of the court defendant then and there excepted.

And thereupon the witness proceeded:

"A. They were ordered at various times, by letter and verbally, between the 25th day of July and December 30, 1882."

The witness then proceeded to read the paper handed him, showing an itemized statement of account aggregating $2531.78. Said witness further testified as follows:

"Q. You may reckon the interest [on said account] from January 1, 1883, up to this time, at six per cent.

"A. $233.59."

To which question and answer the defendant objected on the ground that it was immaterial, but the objection was overruled by the court; to which ruling defendant then and there excepted.

The defendant introduced as a witness one George K. Sabin, who testified that his occupation for the past twenty years had been mining, and that he was in the employ of the defendant

as superintendent at the time of the erection of the mill in controversy, and so continued until the mill was shut down. He further testified *inter alia*, as follows:

"I have been engaged in mining twenty years, and am acquainted with stamp mills, quartz mills and mining machinery.

"Q. What was the fair rental value of this mill and its attachments? And in giving your answer you can give it at so much per month, year or such other division of time as may be most convenient and intelligible."

To this question counsel for plaintiffs objected on the ground that it was not the proper measure of damages, and further, because the witness had not shown himself competent to speak on the subject; and the objection was sustained on the last-mentioned ground by the court; to which ruling and decision of the court the defendant then and there excepted.

"Q. Have you been engaged about mills enough to know what work they perform — what they can do — what they can earn?

"A. I have of gold mills. This was the first silver mill I was connected with.

"Q. Do you know their cost?

"A. I think I do know something of their cost; have been engaged in their construction. The cost of this mill was about $75,000, inclusive of the machinery and everything connected with it.

"Q. What was the fair rental value per month of this mill and its attachments?"

To this question counsel for plaintiffs objected on the ground that the witness had not shown himself competent, and the objection was sustained by the court; to which ruling the defendant then and there excepted.

The said witness further testified that the defendant company operated a mine near this mill from which the ore was procured to run through said mill.

"Q. Was there sufficient quantity of ore in this mine accessible to employ the mill and keep it running to its full capacity?

"A. Yes, sir.

"Q. How long have you been mining and been acquainted with ores?

"A. I have been mining since 1860.

"Q. Have you, during the same time, been acquainted with the milling of ores?

"A. Yes, sir. This mill at Columbus was the first silver mill I had been with; had been engaged in gold ores.

"Q. You have been acquainted to some extent with silver ores and silver mills?

"A. Yes, sir.

"Q. What was the value of these ores delivered at the Columbus mill in this raw state, as taken from the mine ready to be melted; what was the value for milling purposes?"

To this question counsel for plaintiffs objected, and the objection was sustained by the court; to which ruling the defendant then and there at the time duly excepted.

"Q. Do you know of any silver mills of the same kind in that neighborhood?

"A. No, sir; there are none in that immediate neighborhood.

"Q. At what distance away do you know of any?

"A. Up in Leadville. I do not know of any in operation now. There was one in operation the other side of Leadville a year ago, in Soda Creek.

"Q. Do you know of any silver mills being rented at Leadville?

"A. I do not know of any being rented in the State anywhere."

The defendant also introduced as a witness A. E. Smith, who, being duly sworn, testified that for twelve years he had been running stamp-mill works and quartz mills, and manufacturing assayers' supplies; that he had been in the employ of defendant, as foreman of the mill at Columbus, Colorado, from March, 1882, to December, 1883, and that he had aided in the erection of the mill in controversy. He also testified, in answer to questions as to the capacity and work of said mill, as follows, to wit:

"A. In the month of September (1882) we milled 721 cars of ore, which averaged 1200 pounds each, which makes an aver-

age of 13 tons a day. In October we run 977 cars, which averaged 1200 pounds each, averaging 19 tons a day and a fraction, and in November 117 cars, 22 tons per day; in December 902 cars, 18 tons a day.

"Q. Can you state the amount of ore that was milled during the months of March and April following?"

To this question counsel for plaintiffs objected on the ground that it was immaterial, irrelevant and incompetent, and the objection was sustained by the court; to which ruling and decision defendant excepted.

"Q. Can you give the amount of ore that was milled during the month of January?"

To this question counsel for plaintiffs objected on the ground last above given, and the court sustained the objection; to which ruling and decision of the court the defendant then and there excepted.

"Q. What was the capacity of that mill per day upon that ore from September 4 to December 31, 1882, but for the defects in the cylinder and conveyers which have been described?

"A. We run 30 tons a day afterward.

"Q. With the mill in good working order, what would have been its capacity?

"A. 30 tons per day.

"Q. What was the worth of milling that ore per ton?"

Plaintiffs' counsel objected to this question on the ground that it was immaterial and not the proper measure of damages.

By the court (to the witness):

"What was the cost?

"A. About six dollars per ton and a few cents."

The witness further testified as to the expense of operating the mill, the number and wages of the men, and cost of fuel, the number of days the mill was idle, wholly or partially, by reason of the defects complained of, the saving of wages by diminution of the working force when the mill was idle, and the extent to which employés were turned to other labor while the mill was not running, and was then further interrogated by counsel for defendant:

"Q. What wages would you have been compelled to pay to

other men had you employed them to do that same work for which you paid these men, during the time the mill was stopped?"

To this question counsel for plaintiffs objected, and the objection was sustained by the court; to which ruling and decision of the court defendant then and there excepted.

The defendant also introduced as a witness one H. A. Hurlbut, who testified that he was a managing director of the defendant company in 1881 and 1882, and also testified, among other things, that one Riotti was a mining expert and a metallurgist, upon whom the defendant relied as to the best method of extracting silver from the ore; that upon his recommendation the white roasting furnace had been selected, and that defendant had employed the plaintiffs as machinists to erect it; that the defendant relied on said Riotti as to the proper process for the separation of the ores, but relied solely on the plaintiffs for the mechanical construction and erection of the machinery; and further, in answer to questions, testified:

"Q. What was Riotti directed or authorized to do about the specifications?

"A. He was authorized to give the draughtsman the incline of the hill — the room there was into the base of the retaining wall — the relative positions of where the stamps and the roasting cylinder were to be and where the furnace should be placed in position, and to give relative positions and distances.

"Q. Had he anything to do with the mechanical construction of the mill?

"A. No, sir."

The plaintiffs recalled, in rebuttal, the witness William J. Chalmers, who further testified:

"Hurlbut said that Riotti had been engaged by the New York parties as consulting engineer, as they wanted to hold some one responsible for the working of the ores. We were notified to comply with Riotti's directions. In looking over the original plan of the furnace the conveyors were shown in the plan, but Riotti said he preferred . . . desired us to follow the drawing in making the furnace. This drawing showed the conveyors, as afterwards put in the mill. We

changed the original specifications; they were never accepted by the company, they refusing to accept them. We had the acceptance of Riotti of the plans."

At the conclusion of the testimony the defendant requested the court in writing to give to the jury the following instructions on the right of defendant to recoup damages in said cause:

"If the plaintiffs undertook to supply and put up, so it should be complete and in good running order, the mill or machinery mentioned in defendant's second defence, and entered upon the performance of such agreement, and if the machinery supplied proved defective and mechanically inadequate for the purpose intended, or was not complete nor executed in proper manner, or if the work was unskilfully performed, then, in this action, the defendant would be entitled to recover from the plaintiffs the damages actually sustained by reason of such failure of the plaintiffs to perform their agreement; and, in measuring the damages, if any, sustained by defendant, you may consider the loss of the use of the mill and machinery, either wholly or partially, resulting from such defects and unskilful performance; and any sums paid out by defendant in remedying defects and making repairs in such mill and machinery in consequence of such defects."

Which instructions the court refused to give, and to such decision and refusal the defendant then and there at the time duly excepted.

"In estimating defendant's damages in consequence of plaintiffs' breach of their undertaking, if you find there was such a breach, you may also consider the necessary and immediate loss of profits incurred by the defendant during the period when the said defendant was, by reason of the alleged defects, deprived of the use of such mill and machinery."

Which instructions the court refused to give, and the defendant excepted.

After the conclusion of the evidence and the argument of counsel in said cause the court, of its own motion, instructed the jury as to the law of said cause, and on the question of the measure of defendant's damages, the court gave certain in-

structions, to the giving of which, and to each several proposition therein contained, defendant at the time duly excepted.

Mr. Henry Edwin Tremain, (with whom were *Mr. Mason W. Tyler* and *Mr. James C. Spencer* on the brief,) for plaintiff in error, cited: *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, and authorities cited; *Booth* v. *Spuyten Duyvil Rolling Mills*, 60 N. Y. 487; *Hadley* v. *Baxendale*, 9 Exch. 341; *Horne* v. *Midland Railway Co.*, L. R. 8 C. P. 131; *Cutting* v. *Grand Trunk Railway*, 13 Allen, 381; *Simpson* v. *London & Northwestern Railway*, 1 Q. B. D. 274; *Pickford* v. *Grand Junction Railway*, 12 M. & W. 766; *Wilson* v. *Lancashire & Yorkshire Railway*, 9 C. B. (N. S.) 632; *Hinckley* v. *Pittsburg Steel Co.*, 121 U. S. 264, and cases cited; *United States* v. *Behan*, 110 U. S. 338, and cases cited; *Fletcher* v. *Tayleur*, 17 C. B. 21; *Terra Haute &c. Railroad* v. *Struble*, 109 U. S. 381; *Rhodes* v. *Baird*, 16 Ohio St. 573; *Schile* v. *Brokhaus*, 80 N. Y. 614; *Hinckley* v. *Beckwith*, 13 Wisconsin, 31; *Davis* v. *Talcott*, 4 Barb. 600.

No appearance for defendants in error.

Mr. Justice Lamar delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The first and second assignments of error rest upon the same ground, and may be considered together. They are, first, that it was error for the court, upon the examination of the witness Chalmers, (who was also one of the plaintiffs,) to admit in evidence the paper handed him showing an itemized statement of account aggregating $2531.78. It is contended that evidence of this character, "an unproved copy of an unproved account," was inadmissible to show the alleged sale and delivery of merchandise; and, second, that the court erred in holding such inadmissible testimony to be sufficient evidence of an indebtedness to permit interest on it to be recovered, as testified to. The assumption of fact involved in these assignments, that the paper was admitted in evidence, is not sufficiently supported by the statement in the bill of exceptions.

To obtain a reversal of a judgment it is necessary that the fact, upon which such reversal is claimed, should appear, from the record, sufficiently to be passed upon.

This bill of exceptions falls far short of a distinct statement that the paper was admitted in evidence; on the contrary, we think the import of the language is that it was not admitted, but that it was handed to witness and read and used by him as a memorandum with which to refresh his recollection of the articles mentioned in the account of plaintiffs. We do not think the court erred in allowing this to be done, and permitting his testimony to go to the jury for what it was worth.

The third assignment of error is, that the court erred in refusing to allow the witness Sabin, introduced in behalf of the defendant, to answer the question, "What was the fair rental value per month of this mill and its attachments?"

This ruling of the court was manifestly proper. It appears from the testimony of the witness himself that he knew of no other silver mill in the neighborhood of Columbus; that he knew of none whatever at that time in operation; that he knew of no silver mill that had been rented in Leadville or in the State anywhere; and that this was the first silver mill he had ever been connected with, though he had been engaged in mining for twenty years, and was acquainted with gold mills enough to know what work they can perform and what they can earn. He evidently had no such knowledge of the marketable condition or rental value of such property as would render his opinion of any use to the jury beyond the merest guess or conjecture. His knowledge and experience of mining mills was such as to render him competent to testify as to the cost of construction, the value of machinery and the expense of putting it up; and upon these points his testimony was admitted, and was to the effect, among other things, that the mill cost $75,000.

The fourth, fifth, sixth and seventh assignments of error are based upon the rulings of the court on the objections of the plaintiff to the other questions propounded by the defendant to the witnesses Sabin and Smith.

It does not appear clearly from the bill of exceptions for

what purpose these questions were propounded. Evidence to show that the capacity of the mill was thirty tons a day had been offered and received to prove the rental value of the mill, and perhaps very properly, as that might be a necessary preliminary fact leading up to the determination of its value for the rental. But after the defendant utterly failed to show, by any admissible evidence, that there was any rental value for a mill of that kind, we think the court did not err in holding that such rental value could be shown by proving the value or the amount of ore delivered and milled. If, however, the object of these questions (as counsel contends in his brief) was to prove the actual loss of use of the machinery during the period of stoppage, or the loss of the profits that would have accrued but for the defective machinery, the answers most favorable to defendant could only have tended to show losses too undefined to be subject to computation, and profits too remote and speculative to be capable of ascertainment. The ingenious argument of counsel fails to convince us that the court erred in sustaining the plaintiffs' objections to the questions.

The ninth assignment of error is, that the court admitted the evidence of the declarations of one Riotti, with regard to the placing of the machinery of the mill, to go to the jury. The introduction of this evidence was objected to upon the ground that Riotti was not an agent of the defendant in respect to the matters covered by these alleged declarations.

The objection does not seem to be valid. The witness testified that Riotti was authorized by defendant, in respect of the specifications in the contract between the parties, to give the draughtsman the incline of the hill, the room there was into the base of the retaining wall, the relative positions of where the furnace should be placed in position, and to give relative positions and distances. The witness Chalmers, being recalled, testified that "we were notified to comply with Riotti's directions. In looking over the original plan of the furnace the conveyors were shown in the plan. But Riotti said he preferred . . . desired us to follow the drawing in making the furnace. This drawing showed the conveyors, as afterwards put in the mill."

We think this direction or declaration of Riotti was made with reference to the very matters which, according to the testimony of Hurlbut and Chalmers, were directly within the scope of his authority and duty.

We do not deem it necessary to consider the questions whether the instructions requested by the defendant, as above set forth, and refused, are correct, as abstract propositions of law, with regard to the general principles governing the right of recoupment of damages. The bill of exceptions does not show any evidence tending to prove all the facts which these instructions assume to exist. The counsel for plaintiff in error presses the argument that the effect of the exclusion of the questions above mentioned shut out all evidence of the necessary and immediate loss of profits during the time when, by reason of the alleged breaches of the agreement, the use of the mill and machinery was lost to it. It would, in our opinion, have been error to give instructions applicable to evidence not admitted. The legal principles in those instructions, as requested, were, so far as they were founded on the evidence, substantially put before the jury in the general charge of the court.

The bill of exceptions states only so much of the charge as relates to the question of damages in the cause. The learned judge having, as we are authorized to assume, fairly left to the jury the facts as to the alleged breaches of the contract, instructed them that, if they found the defendant entitled to deduct from the plaintiffs' claim its damages resulting from the delay in the operations of the mill caused by the defective machinery, it was undoubtedly entitled to deduct therefrom the rental value of the mill. Recapitulating the evidence on this point, he then instructed the jury that, in the absence of all evidence as to the rental value, they were at liberty to allow interest on the investment; and that it was shown in evidence that the mill cost $75,000; so that, if they found that the defendant was entitled to damages for delay in running the mill, they would properly allow interest at ten per cent per annum (which was the statutory rate in Colorado, Gen. Stat. Col. 1883, § 1706) for the time of the delay as

proven. He instructed them further, that there was more in the way of damages shown in the wages of the men employed in the mill whose time was lost while the mill was idle, and that for this loss of time, during which they were receiving wages from the defendant, the amount so paid could be added as an element of damages to be deducted from the plaintiffs' demand.

We think the law of the case was fully disclosed to the jury, and that fuller or more specific instructions were not required.

The judgment of the Circuit Court is

Affirmed.

REDFIELD *v.* PARKS.

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

No. 247. Submitted April 15, 1889. — Decided May 13, 1889.

Where the certificate to the transcript of a record, on a writ of error, did not comply with subdivision 1 of Rule 8, and the record was not complete, not containing the pleadings, so that, under subdivision 3 of Rule 8, this court could not hear the case, it was not dismissed, because it had been submitted on both sides, on the merits, and the defendant in error had not moved to dismiss it for non-compliance with the rules, although more than three years had elapsed since the filing of the transcript, but leave was given to the plaintiff in error to sue out a writ of *certiorari*, to bring up the omitted papers.

THE case is stated in the opinion.

Mr. S. F. Clark for plaintiff in error.

Mr. Daniel W. Jones for defendants 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 Eastern District of Arkansas, in an ejectment

suit brought in that court by Jared E. Redfield against William P. Parks and other defendants, in which a judgment was rendered on the 28th of April, 1885, dismissing the complaint on the merits. The plaintiff has brought the writ of error.

The suit appears to have been commenced on April 11, 1882. It appears from the transcript of the record filed in this court that a complaint and several answers were filed, and sundry exceptions, and that the case was tried by the court on the written waiver of a jury, and that the court, having heard the evidence of both parties, found the issues for the defendants. There is a bill of exceptions, which finds certain facts specially and certain conclusions of law in favor of the defendants, and contains exceptions by the plaintiff to those conclusions, and prayers to the court by the plaintiff to find certain conclusions of law, and a refusal by the court so to find, and exceptions by the plaintiff to such refusal.

We find it impossible, under our rules, to hear the case as it stands. The pleadings referred to in the transcript of the record are not set forth. Rule 8, subdivision 1, provides as follows: "1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court." Rule 8, subdivision 3, provides as follows: "3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed."

The transcript of the record was filed in this court on April 5, 1886. The certificate of the clerk of the Circuit Court to the transcript is dated March 8, 1886, and does not comply with Rule 8, subdivision 1, for it only certifies "that the foregoing writing, annexed to this certificate, is a true, correct, and compared copy of the original remaining of record in my office." It does not say, as required by the rule, that the annexed papers are "a true copy of the record, and of the assignment of errors, and of all proceedings in the case." It

is quite apparent that there are papers of record in the court below, a copy of which ought to form part of the transcript. The complaint and answers are necessary to the hearing in this court, and unless a record containing them is filed here the case cannot be heard.

As was said in *Railway Company* v. *Stewart*, 95 U. S. 279, 284, it is the duty of the party who takes a writ of error "to see to it that the record is properly presented here."

In *Keene* v. *Whittaker*, 13 Pet. 459, the Circuit Court had given a judgment for the defendants, on an agreed case, and the record sent here, on a writ of error, contained only the agreed statement of facts and the judgment of the Circuit Court, with the petition for the writ of error and its allowance. At that time the 11th rule of the court was like the present Rule 8, subdivision 1, and the 31st rule was like the present Rule 8, subdivision 3. In view of those rules, and because the record did not contain any of the proceedings in the court below, this court dismissed the case.

The same thing was done in *Curtis* v. *Petitpain*, 18 How. 109, where the certified record consisted of an agreed statement of facts and a judgment.

While the court has undoubtedly the power to dismiss the case as for want of prosecution by the plaintiff in error, because of his failure to see that a proper return was filed, yet, as the transcript was filed here on the 5th of April, 1886, and more than three years have elapsed without the making of a motion by the defendants in error to dismiss the case because of a failure to comply with the rules, and the case has been submitted to us on printed briefs filed on both sides, on the merits, we think that the plaintiff in error ought to have leave to sue out a writ of *certiorari*, to bring into this court the papers omitted from the transcript. For this purpose

A certiorari may, on his application to the clerk, issue, returnable at the next term.

PETERS *v.* ACTIVE MFG. CO.

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

No. 254. Submitted April 16, 1889. — Decided May 13, 1889.

Letters patent No. 281,553, granted to George M. Peters, July 17, 1883, for an "improvement in dies for making dash-frames," are invalid, for want of patentable invention.

IN EQUITY to restrain the infringement of letters patent. Decree dismissing the bill. Plaintiff appealed. The case is stated in the opinion.

Mr. W. Hubbell Fisher for appellant.

Mr. Arthur Stem for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of Ohio, by George M. Peters against The Active Manufacturing Company, a corporation, founded on the alleged infringement of letters patent No. 281,553, granted to said Peters, July 17, 1883, on an application filed December 7, 1880, for an "improvement in dies for making dash-frames." A dash-frame is made of metal, and is to be used in constructing a dash-board for a carriage or other vehicle.

The defences set up in the answer are want of novelty, non-infringement, and also that the devices described and claimed in the patent were, before the alleged invention thereof by Peters, old and well-known in forging, welding, and other metal-working, and that it required no invention to apply or adapt such devices to the old form and construction of dash-frames. Issue was joined, proofs were taken, and the Circuit Court, in its decree, found that the patent was "void for want

of invention," and dismissed the bill. We concur in that conclusion.

The specification of the patent says: "The principal object of my invention is to provide an efficient and useful method of welding the end bars of a metal dash-frame to the bottom rail, and a method by which the bottom rail of the dash is strengthened at the weld and at the portion of said rail to which the dash-foot is to be attached. Another object of my invention is to provide a means by which a recess is formed in the bottom rail, preparatory to punching said rail, to receive the bolt or other attachment which secures the dash-foot to the bottom rail, the operation of forming the recess being performed at the same time that the end-bar is welded to the bottom rail."

The entire operation set forth in the specification, of welding the bars to the rail, of strengthening the bottom rail of the dash, and of forming a recess in the bottom rail at the same time that the welding is done, is described in the specification as effected by one and the same simultaneous action of two opposing dies, an upper die and a lower die, placed face to face. The dies are provided with channels or depressions, one, a, to receive the end-bar of the frame, and the other, a', to receive the bottom rail, the channels, a a', of one die coinciding with like channels in the other die, when the two dies are placed together. From the bottom of the depressions a' in the two dies rise tongues, a^2, which, like the depressions a, coincide with each other when the two dies are placed together, the tongues preferably not rising quite to the face of the dies, so that, when the dies are placed together, a slight space is left between the two tongues. The specification also states that, preferably, the tongues a^2 are so formed that when the dies are placed together the tongues will approach closer to each other at that portion of themselves which forms that part of the web in the lower bar which is to be punched through to receive the bolt or other device by which the dash-frame is connected to the foot or vehicle, than at any other point; in other words, the face of the tongues is inclined. The object of such a formation of the tongues is stated in the speci-

fication to be, to make the web left in the bottom rail thinner in that portion of such rail where perforations are to be made to receive the bolts which secure the dash-foot to the frame, the web being in other portions preferably left of a uniform thickness; and one of the objects of thus making the web thin is to enable it to be more readily punched or otherwise perforated. By means of those dies a recess is formed in either side of the bottom rail, which recess corresponds with the tongues a^2 of the dies.

The four claims of the patent are as follows: "1. The combination, substantially as set forth, of the two dies having opposing angularly-joined depressions, a a', and a tongue, a^2, in the depression a' of either or both dies. 2. The combination, substantially as set forth, of the two dies having opposing angularly-joined depressions, a a', and a tongue, a^2, in the depression a^2 of either or both dies, the depressions a' deepening toward their junctions with the depressions a. 3. The combination, substantially as before set forth, of the dies having opposing angularly-joined depressions, a a', and a tongue, a^2, in either or both of the said depressions, the face of said tongue or tongues being inclined. 4. The combination, substantially as before set forth, of the dies having opposing angularly-joined depressions, a a', and a tongue, a^2, in either or both of the said depressions, the depressions a' deepening toward their junctions with the depressions a, and the face of the tongue or tongues being inclined."

The whole of this alleged invention is based upon the idea, old and well known, that a metallic die, whether of a cameo or intaglio form, will, when impressed upon a piece of heated or yielding metal, leave the latter of the converse form of the die, and that, when two dies are brought together over a piece of heated or yielding metal, the latter will take the shape of the space existing between the contours of the two dies. It is an inevitable consequence of the use of two dies in such a way, on two pieces of metal of proper size, heated to a welding heat, that swaging or welding will take place by the impact of the dies; that, when the dies have tongues and depressions in them, the metal acted on by such tongues and de-

pressions will take the shape, in form and thickness, of the space left between the tongues or the depressions; and that a greater or less thickness of metal will be the result as the face of the tongues is more or less inclined. All this was old and common knowledge, and the whole of the operation resulting from such features is nothing but the well-known action of two dies so shaped as to give the desired conformation to the article acted upon by them.

If it was desired to preserve a channel in the bottom rail of the dash-frame, when the bottom rail was made of channelled iron, it was obvious, and not a matter of invention, that the die must be provided with a tongue to fit into the channel, to prevent the filling up of the channel by the forcing into it of metal by the action of the dies in welding the two pieces together. So, too, if it was desirable to make the welded parts thicker, and thus stronger, at the angle formed by the end-bar and the bottom rail, it was obvious that the bottoms of the recesses in the dies must be deepened at such angle. That is all there is of the alleged invention of Peters.

It appears from the testimony that it was not new, at the time of such alleged invention, to use channelled iron in making dash-frames; or new to weld channelled iron to flat or oval bars of iron; or new to use dies for swaging or welding together two pieces of iron. All that remained to be done in the present case, as in other cases, was to adapt the form of the dies to the shape desired in the article to be acted upon by them. Dies which act upon two pieces of metal which are capable of being welded to each other, and which are brought to a welding heat, necessarily will weld them together by the impact and action of the dies. There is no patentable invention in securing such result of welding or swaging, if there be no patentable invention in the construction and use of the dies to produce a given shape in the article acted upon by them.

The decree of the Circuit Court is

Affirmed.

McKINLEY *v.* WHEELER.

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

No. 233. Argued April 2, 1889. — Decided May 13, 1889.

A corporation, created under the laws of one of the States of the Union, all of whose members are citizens of the United States, is competent to locate, or join in the location of, a mining claim upon the public lands of the United States, in like manner as individual citizens.

Whether such a corporation will not be treated as one person, and as entitled to locate only to the extent permitted to a single individual, *quære.*

A corporation interested in mining may be represented by its officer or agent at any meeting of miners called together to frame rules and regulations in their mining district.

This was an action for the recovery of an undivided interest in a mine. Defendants demurred to the complaint and the demurrer was sustained and the action dismissed. Plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error. *Mr. Hugh Butler* was on the brief for same.

Mr. T. M. Patterson for defendants in error. *Mr. C. S. Thomas* was with him on the brief.

Mr. Justice Field delivered the opinion of the court.

This is an action for the possession of an undivided half interest in a mining claim known as the Vallejo lode, in the mining district of Roaring Forks, in the county of Pitkin, Colorado.

The plaintiff derives whatever interest he possesses by purchase and conveyance from the Josephine Mining and Prospecting Company, a corporation organized and existing under the laws of Colorado, for the purpose of prospecting for valuable mineral deposits in the public domain of the United States in that State. The Vallejo lode was discovered and located

by that company and two persons named Charles Miller and James W. McGee, the location being in their joint name, one half interest for the benefit of Miller and McGee and the other half for the benefit of the members of the corporation. At the time of the discovery and location all the members of the corporation were citizens of the United States, and were severally and individually qualified and competent to enter upon the public domain and acquire title to mineral lands upon it by discovery and location.

The complaint, in addition to these facts, alleges that on the 11th of March, 1884, the plaintiff was and has since been the owner of an undivided half interest in the mining claim mentioned, which is described by metes and bounds as set forth in the original location certificate, and was then and has ever since been entitled to its possession; that on the 20th of October, 1884, the defendants entered upon the premises and wrongfully and unlawfully excluded the plaintiff therefrom, and have ever since thus excluded him, to his damage of one thousand dollars. He therefore prays judgment for the possession of an undivided half interest in the mining claim and for the damage alleged.

To this complaint, the material facts of which are set forth in two counts, the defendants demurred on several grounds, some of which are mere formal objections, but one of which is as follows: "Because the plaintiff bases his title or claim of ownership to an undivided one half of the said Vallejo lode mining claim upon a purchase and conveyance from the Josephine Mining Company, a locator of said claim, and that said company, whether a corporation or partnership, was and is incapable of originally locating a mining claim, in whole or in part, under the statutes of the United States or of the State of Colorado."

After argument the court sustained the demurrer, and entered judgment dismissing the action, with costs against the plaintiff, who has brought the case here on a writ of error.

As thus appears, the sole question presented for our determination is whether a corporation created under the laws of one of the States of the Union, all of whose members are citizens

of the United States, is competent to locate or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens. The question must, of course, find its solution in the enactments of Congress.

Section 2319 of the Revised Statutes provides as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States."

It will be observed that no prohibition is here made against citizens of the United States uniting together for the occupation and purchase of public lands containing "valuable mineral deposits." Nothing is said of partnerships or associations or corporations; it is to citizens that the privilege is granted, and that they may unite themselves in such modes in all other pursuits was, as a matter of course, well known to those who framed as well as to those who passed the statute. There was no occasion for special reference to the subject to give sanction to these modes of uniting means to explore for mineral deposits and to develop them when discovered. Many branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth and the use of powerful machinery, requiring expenditures generally far beyond the means of single individuals. In lode mining especially such excavations extend in most cases hundreds of feet, in many cases thousands of feet into the earth, where, for successful working, the steam engine of great power is as essential an instrument as the pick and the shovel. It was expected, of course, that mining would continue after the passage of the act as before. No change in that respect was needed or asked for. The object of the act of May 10, 1872, 17 Stat. 91, c. 152, § 1, from which the provisions of § 2319 were carried into the

Revised Statutes, was "to promote the development of the mining resources of the United States." It is so expressed in its title, and such development is sought to be promoted by indicating the manner in which claims to mines can be established, and their extent, and by offering a title to the original discoverer or locator who should develop the mine discovered and located, or to his assigns.

At the present day, nearly all enterprises, for the prosecution of which large expenditures are required, are conducted by corporations. They occupy in such cases almost all branches of industry, and prosecute them by means of the united capital of their members with increased success. In many States they are formed under general laws, by a very simple proceeding; — by an instrument signed by the proposed members agreeing to thus unite themselves, stating their number, the object of their incorporation, the proposed capital, the number of shares, the period of duration and the officers under whose direction their business is to be conducted. Such a document being acknowledged by the parties and filed in certain designated offices, a corporation is created. The facility with which they may be thus formed, and the convenience of thus associating a number of persons for business, have led to an enormous increase of their number. They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution. We think, therefore, that it would be a forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred which would impose such a limitation. It is in that respect unlike grants of land for homesteads and settlement, indicating in such cases that the grant is intended only for individual citizens.

The development of the mineral wealth of the country is promoted, instead of retarded, by allowing miners thus to unite their means. This is evident from the fact that so soon as individual miners find the necessity of obtaining powerful

machinery to develop their mines, a corporation is formed by them; and it is well known that a very large portion of the patents for mining lands has been issued to corporations.

If we turn now to other provisions of the Revised Statutes we find that the conclusion which we have reached is justified by their language. Section 2321 provides as follows:

"Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation."

Again, § 2325, in stating the manner and conditions under which a patent for a mining claim may be obtained, provides as follows:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance," etc.

It will be thus seen that the statute itself assumes, what one would naturally infer without reference to it, that citizens of the United States are permitted to enjoy the privilege which is granted to them in their individual capacity, though they may unite themselves into an association or corporation.

The doctrine is well established that rights with respect to property held by citizens are not lost because they unite themselves into corporate bodies. They are subsequently as able to invoke the law for the enforcement of their rights as previously, the court in such cases looking through the name in order to protect those whom the name represents. We have an illustration of this, as applied to corporations, in the construction given to the clause of the Constitution which extends the judicial power of the United States to controversies be-

tween citizens of the States and aliens, and between citizens of different States.

In *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 87, the question arose whether a corporation composed of citizens of one State could sue in the Circuit Court of the United States a citizen of another State, and it was answered in the affirmative. In deciding the question, the court, speaking by Chief Justice Marshall, said: "However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The doctrine of this case has been followed and is now the settled law in the courts of the United States. On the same principle, provisions of law, in terms applicable to persons, securing to them the enjoyment of their property, or affording means for its protection, are held to embrace private corporations. The construction given to the 6th article of the defini-

tive treaty of peace of 1783 between Great Britain and the United States illustrates this. 8 Stat. 83. That article provided that there should be "no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of, the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage either in his person, liberty, or property." An English corporation held in Vermont certain lands granted to it before the Revolution, and the legislature of that State undertook to confiscate them and give them to the town where they were situated. The English corporation claimed the benefit of this article, and recovered the property against the contention that the treaty applied only to natural persons, and could not embrace corporations because they were not persons who could take part in the war, or could be considered British subjects, this court, speaking by Mr. Justice Washington, observing that the argument proceeded upon an incorrect view of the subject, and referring to the case of the *Bank of the United States* v. *Deveaux*, to show that the court, when necessary, will look beyond the name of a corporation to the individuals whom it represents. *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 491. Many other illustrations of the doctrine might be cited.

We are of opinion that the same rule of construction should control in this case, and that, in accordance with it, § 2319 of the Revised Statutes must be held not to preclude a private corporation formed under the laws of a State, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States. There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may perhaps be treated as one person and entitled to locate only to the extent permitted to a single individual. That question, however, is not before us and does not call for an expression of opinion.

The objection to this construction arising from the fact that the section gives force, in the location of claims, to the rules and customs of miners, so far as applicable, when not in con-

flict with the laws of the United States, does not strike us as of great weight. A corporation interested in mining may be represented by an officer or agent, at any meeting of miners called together to frame such rules and regulations in their mining district. Corporations engaged in other business are constantly represented in this way at meetings called in relation to matters in which they are interested. There is nothing in the nature of mining to prevent such a representation of a corporation when rules to control the acquisition and development of mines are to be considered and settled.

It follows that the judgment of the court below must be

Reversed, and the cause remanded, with directions to overrule the demurrer of the defendants, and to take further proceedings in accordance with this opinion.

PICARD *v.* EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

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

No. 246. Argued April 12, 1889. — Decided May 13, 1889.

Legislative immunity from taxation is a personal privilege, not transferable, and not to be extended beyond the immediate grantee, unless otherwise so declared in express terms.

Immunity from taxation does not pass to the purchaser at a sale of "the property and franchises of a railroad corporation" to enforce a statutory lien. *Morgan* v. *Louisiana*, 93 U. S. 217, on this point affirmed.

Although a grant of immunity from taxation by a legislature to a corporation has sometimes been held to be a privilege which may be transferred, the later and better opinion is that, unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term "privileges," it will not be so construed.

The property of the East Tennessee, Virginia and Georgia Railroad Company, situated in the State of Tennessee, is not exempt from taxation under the laws of that State.

THE case is stated in the opinion of the court.

Opinion of the Court.

Mr. George W. Pickle, Attorney General of the State of Tennessee (with whom were *Mr. Albert S. Marks*, *Mr. John J. Vertrees* and *Mr. William O. Vertrees* on the brief) for appellant.

Mr. William M. Baxter for appellee.

Mr. Justice Field delivered the opinion of the court.

This is a suit to enjoin the collection of certain taxes for the years 1883 and 1884, assessed by the Board of Railroad Tax Assessors of Tennessee against the property of the complainant, the East Tennessee, Virginia and Georgia Railroad Company. The property formerly belonged to the Cincinnati, Cumberland Gap and Charleston Railroad Company; and the claim asserted by the bill is, that the property, whilst held by that company, was exempt from taxation, and that such exemption has accompanied it in its transfer to the complainant. That company was incorporated by an act of the legislature of Tennessee, passed November 18, 1853. Among other things the act provided that whenever the company should have completed its road from Cumberland Gap to the East Tennessee and Virginia Railroad, or to the southern boundary line of the State, it should "have all the rights and privileges" conferred by its charter for a period of ninety-nine years. Statutes of Tenn. 1853–4, c. 301, § 6. It also declared that the company should be vested, except as otherwise provided by its charter, with "all the rights, powers and privileges, and subject to all the restrictions and liabilities, of the Nashville and Louisville Railroad Company." An act was passed by the legislature of Tennessee on the 9th of February, 1850, to incorporate a company under this last name, which, among other things, declared "that the capital stock in the said company, the dividends thereon, and the roads and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to the said company shall be forever exempt from taxation in each and every of the said States of Tennessee and Kentucky, and it shall not be lawful for either of the said States, or any corpor-

ate or municipal police or other authority thereof, or of any town, city, county, or district thereof, to impose any tax on such stock or dividends, property or estate." Statutes of Tenn. 1849–50, c. 76, § 40.

It does not appear that any organization of this company was ever perfected. It is stated by counsel that none ever took place; and it would seem that such was the conclusion of this court in *Goodlett* v. *Louisville Railroad*, 122 U. S. 391, 406.

Assuming, however, that its organization was perfected, its rights, powers and privileges were subject to the restrictions specified in the act, and one of these was that the act should "become a law whenever the State of Kentucky may enact the same for the same purpose, with such modifications and amendments" as she may deem right, not inconsistent with its provisions. By this restriction we understand that the act was not to take effect until re-enacted by Kentucky, with such modifications as she might suggest, not inconsistent with it. It is conceded that Kentucky never passed any such act as here mentioned. We are of opinion therefore, that we may properly omit from consideration the act of February 9, 1850, to incorporate the Nashville and Louisville Railroad Company, and the attempt to invest the Cincinnati, Cumberland Gap and Charleston Railroad Company with its "rights, powers, and privileges." If this construction be correct, the Nashville and Louisville Railroad Company never acquired under that act any rights, powers, or privileges, those designated in its charter being subject to restrictions, which were not complied with; and, therefore, whatever right the Cincinnati, Cumberland Gap and Charleston Company possessed, to have its property exempted from taxation, must be found independently of the provision referring to and granting the exemption contained in the charter of the Nashville and Louisville Railroad Company. There is no such exemption from taxation in its own charter. It is, however, contended that provisions in an act of the legislature of the State, chartering the Lexington and Knoxville Railroad Company, passed on the 22d of December, 1853, had the effect of extending such exemption to

the property of the Cincinnati, Cumberland Gap and Charleston Railroad Company, inasmuch as it invests that company with the "rights, powers, and privileges" "of the East Tennessee and Virginia Railroad Company." Statutes of Tenn. 1853–4, c. 325, § 6. The act incorporating this last company declared that its capital stock should be forever exempt from taxation, and that its road, "with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation," should be exempt from taxation for the period of twenty years from the completion of its road, and no longer, and that the road should be commenced within five years after the passage of the act, and be finished within ten years thereafter, otherwise the charter should be void. Statutes of Tenn. 1847–8, c. 120, §§ 30, 31.

The answer avers that the road has never been completed, and no proof was offered to refute this averment. The burden of proof to show the completion was upon the complainant, for until then the exemption claimed could have no existence even while the property remained in the possession of the Cincinnati, Cumberland Gap and Charleston Railroad Company.

Assuming, however, that we are mistaken in the construction given as to the effect of the provisions in the charters of the two companies, the Nashville and Louisville Railroad Company and the East Tennessee and Virginia Railroad Company, and that the references to those companies are to be construed as embodying all "the rights, powers and privileges" which it was intended the Nashville and Louisville Railroad Company should possess if the act creating its charter had been re-enacted by Kentucky, and which it was intended the East Tennessee and Virginia Railroad Company should possess after the completion of its road, our conclusion upon the questions involved would not be affected. It is conceded that the property of the company passed upon sales and conveyances made under a decree rendered in a suit against the company, commenced by the State of Tennessee, to parties who have since conveyed the same to the complainant. That suit was brought to enforce a statutory lien reserved by the State as

security for the loan of her bonds issued to the company, and the sale made under the decree, and confirmed, was of the "property and franchises" of the railroad company.

By this sale and the conveyance which followed, immunity from taxation did not pass. Such immunity is not in itself transferable. It has been held, and the doctrine has been so often repeated that it is no longer an open question, that the legislature of a State may exempt the property of particular persons or corporations from taxation, either for a limited period or perpetually; but to justify the conclusion that such exemption is granted, it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the legislature. The power of taxation is one of the highest attributes of sovereignty, and the suspension of its exercise as to any persons or property is not a matter to be presumed or inferred. It must be declared or it will not be deemed to exist. If the legislature can lay aside a power devolved upon it for the good of the whole people of the State, for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any reasonable construction consistent with the reservation of the power. *The Delaware Railroad Tax*, 18 Wall. 206, 225.

Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation. As we said in *Morgan* v. *Louisiana*, 93 U. S. 217, 223: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to

take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

It is true there are some cases where the term "privileges" has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better opinion is, that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term "privileges," it will not be so construed. It can have its full force by confining it to other grants to the corporation.

The case of *Railroad Company* v. *County of Hamblen*, 102 U. S. 273, was, with the exception of one particular, substantially like the one before us. The claim of exemption founded upon the act of December 22, 1853, referring to the charter of the East Tennessee and Virginia Railroad Company, was not there relied upon. Reliance was, however, placed upon the act chartering the Nashville and Louisville Railroad Company as exempting the property of the Cincinnati, Cumberland Gap and Charleston Railroad Company from taxation. The court held that immunity from taxation did not pass to the purchaser upon the sale of the property under the decree rendered in the suit brought by the State against the company.

The decree below must therefore be

Reversed and the cause remanded with directions to dismiss the bill, and it is so ordered.

ANDRUS v. ST. LOUIS SMELTING AND REFINING COMPANY.

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

No. 260. Submitted April 17, 1889. — Decided May 13, 1889.

A purchaser of land, taking a conveyance from the vendor, with a covenant for peaceable possession, cannot maintain an action for its rental value from the date of conveyance until placed in actual possession, in consequence of being kept out by a trespasser: since he might have required the delivery of such possession to accompany the conveyance and the payment of the purchase money.

On the 27th of March, 1879, the plaintiff below, a citizen of Colorado, purchased for the consideration of $875 a lot or parcel of land in the town of Leadville, Colorado, described in the complaint, and took a conveyance of it from the defendant, the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri. The deed of conveyance contained covenants that the defendant was seized of an estate in fee simple of the premises; that they were clear of all liens and encumbrances; and that it would warrant and defend the grantee in their peaceable possession against all persons lawfully claiming the same or any part thereof.

The complaint alleged, with much repetition and unnecessary verbiage, that prior to the purchase of the land, and pending negotiations for it, the officers, agents and attorneys of the defendant represented to him that the company had secured the actual possession of the premises and obtained a release from all other parties claiming or pretending to claim the right of possession; that it would execute to him a good and sufficient warranty deed containing all the usual covenants, including one for quiet and peaceable possession; and assured him that if he would purchase and pay for the premises it could and would deliver to him immediate possession; that at that time there was a great rush of people to the town of Leadville on account of the report of rich mineral discoveries

in its immediate neighborhood; that there was a great struggle to secure possession of lots and business houses in the town; that there were many conflicting titles and claims to their possession; that amidst the general confusion and struggle and conflicting claims, the plaintiff was unable, after making due inquiry, and using all the diligence in his power, to find out whether the statements of the officers, agents and attorneys of the defendant were true or false; that, therefore, relying upon their truth, and believing that they were made in good faith, he paid the $875 and took the deed of conveyance; that before and at the time he purchased, the defendant represented that it had received a patent from the government of the United States for the premises as well as for a large number of other lots in the town, that no opposition would be made to its right of possession, and that no trouble would, therefore, occur, either in regard to the title or the possession of the premises; that these statements and assurances as to the defendant being able to put the plaintiff into immediate possession, and to having obtained a release from all parties who claimed an adverse title and right to the possession of the premises, and that it would put him into immediate possession, were false and fraudulent, and were made by the agents, officers and attorneys of the defendant to deceive and defraud the plaintiff out of the money paid, knowing at the time that the defendant could not put him in possession of the premises; that when he attempted to enter upon them after his purchase he found that one Sarah Ray was in actual possession, claiming the same by virtue of prior possession and occupation on the public domain of the United States, under a town-site right, and refused to surrender them to him; that soon afterwards the company commenced an action of ejectment against her to recover the possession of the premises, but did not succeed in ejecting her and her tenants before the 22d of February, 1883, until which time the plaintiff was kept out of possession; and that during this period the rent of the premises was worth $400 a month, amounting, during the period mentioned, to $18,733, all of which the plaintiff alleged he lost by the fraud and deceit practised upon him by the

Citations for Plaintiff in Error.

defendant, besides the interest thereon. He therefore prayed judgment thereon for $20,000 and costs.

To this complaint the defendant demurred on the following grounds:

1. That the complaint did not set forth facts sufficient to constitute a cause of action.

2. That several pretended causes of action had been improperly united therein, to wit:

(*a*) A pretended cause of action for breach of a parol contract to put the plaintiff in possession of the land described;

(*b*) For breach of the covenant of quiet enjoyment contained in the plaintiff's deed;

(*c*) For deceit; and that these several causes of action had been improperly blended in one statement.

3. That the complaint was ambiguous, unintelligible and uncertain, in this, that it did not appear how the plaintiff was misled or deceived by the pretended representations stated in the complaint.

The record also disclosed what was called a "substituted demurrer," specifying various particulars in which the complaint was alleged to be unintelligible and uncertain, but as counsel of both parties gave the demurrer above as the one on which the court below passed, it was so considered here. The court below sustained the demurrer, holding "that the complaint and the matters and things therein alleged were not sufficient in law for the said defendant to answer unto." The plaintiff thereupon stating that he would abide by his complaint, it was adjudged that the cause be dismissed with costs. To review this judgment the case was brought to this court.

Mr. T. A. Green, for plaintiff in error, cited: *Upton* v. *Vail*, 6 Johns. 181; *S. C.* 5 Am. Dec. 210; *Barney* v. *Dewey*, 13 Johns. 225; *S. C.* 7 Am. Dec. 372; *Morgan* v. *Bliss*, 2 Mass. 111; *Jones* v. *Emery*, 40 N. H. 348; *Monell* v. *Colden*, 13 Johns. 395; *S. C.* 7 Am. Dec. 390; *Clark* v. *Baird*, 9 N. Y. 183; *Phillips* v. *Bush*, 15 Iowa, 64; *Johnson* v. *McDaniel*, 15 Arkansas, 109; *Fowler* v. *Abrams*, 3 E. D. Smith (N. Y.) 1; *Huston* v. *Plato*, 3 Colorado, 402; *Salem India Rubber Co.* v. *Adams*,

23 Pick. 256; *Norton* v. *Doherty*, 3 Gray, 372; *S. C.* 73 Am. Dec. 578; *Ruff* v. *Jarrett*, 94 Illinois, 475; *Cravins* v. *Grant*, 4 T. B. Mon. 126; *Pritchett* v. *Munroe*, 22 Alabama, 501; *Harlow* v. *Green*, 34 Vermont, 379; *Osborne* v. *Fuller*, 14 Connecticut, 529; *Vincent* v. *Leland*, 100 Mass. 432; *Eames* v. *Morgan*, 37 Illinois, 260; *Applebee* v. *Rumrey*, 28 Illinois, 280; *Caldwell* v. *Kirkpatrick*, 6 Alabama, 60; *S. C.* 41 Am. Dec. 36.

Mr. Charles E. Gast, for defendant in error, cited: *Gardner* v. *Keteltas*, 3 Hill, 330; *S. C.* 38 Am. Dec. 637; *Dudley* v. *Folliott*, 3 T. R. 584; *Hayes* v. *Bickerstaff*, Vaughn, 118; *Grannis* v. *Clark*, 8 Cowen, 36; *Beebe* v. *Swartwout*, 3 Gilman, 162; *Spear* v. *Allison*, 20 Penn. St. 200; *Peabody* v. *Phelps*, 9 California, 213.

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

As appears by the above statement, the gist of the action is the alleged deceit practised upon the plaintiff by the agents, attorneys and officers of the company to induce him to purchase from it a lot in Leadville, by representing that it had obtained a release of the right of all claimants to the land, and could put him into immediate possession; whereas, upon attempting to enter upon the land purchased, he found another in possession, who refused to surrender it, and thus he was kept out of possession from the time of his purchase, March 27, 1879, to February 22, 1883, during which period he lost its rental value.

To this ground of complaint there are two obvious answers. In the first place, the plaintiff could have required the delivery of the possession of the land to accompany the payment of the money. The lot being in the town might have been readily reached, when the ability of the company to give possession could have been at once determined. The plaintiff alleges that he used all diligence in his power to find out whether the representations of the officers, agents and attorneys of the company were true or false, but the inspection of the premises, the most natural and obvious mode of ascertaining

whether they were occupied by another, does not seem to have been resorted to. The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity, nor will industrious activity in other directions, to the neglect of such means, be of any avail.

Besides, it does not appear at what time the party in possession entered upon the land. The complaint only alleges that when — the time not being stated — the plaintiff attempted to take possession, he found another person there, who, for aught that appears, may have gone on the land after the execution and delivery of the deed. There was at the time, according to the allegations of the complaint, a great struggle to obtain possession of lots among the crowd of persons pressing to the town owing to the report of rich gold discoveries within its immediate neighborhood. The claim of right to the land advanced by the occupant was founded only upon her alleged prior possession of it as a part of the public domain of the United States, a claim which would seem, from the result of the ejectment suit against her brought by the company, to have been entirely worthless. The complaint alleges that the defendant represented that it had received a patent from the government of the United States for the premises, as well as for a large number of other lots in the town, and contains no averment that this representation was untrue. It may therefore be fairly presumed, that upon the title thus conferred, the company subsequently evicted the intruder. The possession of a patent of the United States would have justified all the representations alleged, as to title and right of possession, and the purchaser might have called for an inspection of that document if doubtful of the statements of the agents and officers of the vendor.

In the second place, the covenant in the deed for quiet possession merged all previous representations as to the possession, and limited the liability growing out of them. Those representations were to a great extent, if not entirely, mere expressions of confidence in the company's title, and the right of possession which followed it, against all intruders. The

covenant was an affirmance of those statements in a form admitting of no misunderstanding. It was the ultimate assurance given upon which the plaintiff could rely, a guarantee against disturbance by a superior title. That covenant has not been broken. It is a covenant against disturbance by "persons lawfully claiming" the premises or any part thereof. If the occupant holds by a paramount title, and thus lawfully excludes the purchaser from possession, the covenant is broken. But it is not broken by a tortious disturbance. If the occupation is without right, the remedy of the purchaser is to dispossess the intruder. His occupation does not constitute a breach of the covenant. *Beebe* v. *Swartwout*, 3 Gilman, 162, 179; *Kelly* v. *The Dutch Church of Schenectady*, 2 Hill, 105, 111.

False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality and condition of the land, the privileges connected with it, or the rents and profits derived therefrom. *Lysney* v. *Selby*, 2 Ld. Raym. 1118; *Dobell* v. *Stevens*, 3 B. & C. 623; *Monell* v. *Colden*, 13 Johns. 395; *Sanford* v. *Handy*, 23 Wend. 260; *Van Epps* v. *Harrison*, 5 Hill, 63. Such representations by the vendor as to his having title to the premises sold may also be the ground of action where he is not in possession, and has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them. Thus in *Wardell* v. *Fosdick*, 13 Johns. 325, an action for deceit was sustained against the vendor of land which had no actual existence, the court holding that in such case the purchaser might treat the deed as a nullity. The land not being in existence there could be no possession, and of course no eviction, and consequently no remedy upon the covenants, and the purchaser would be remediless if he could not maintain the action. But where the vendor, holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor,

Statement of the Case.

executes a conveyance to the purchaser, with a warranty of title and a covenant for peaceable possession, his previous representations as to the validity of his title, or the right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant, which determine the extent of his liability.

Judgment affirmed.

DUNLAP *v.* NORTHEASTERN RAILROAD COMPANY.

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

No. 256. Argued April 17, 1889. — Decided May 13, 1889.

When, in an action brought by an employé of a railroad company to recover damages for injuries caused by the negligence of other employés, the defence of contributory negligence is set up, the plaintiff is entitled to have the question submitted to the jury unless no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish.

This court will not, by a technical construction of an obscure record, preclude itself from correcting an error committed in the trial below, if a construction can be given to it which will give jurisdiction.

This was an action on the case brought by Dunlap against the Northeastern Railroad Company to recover for injuries received during the month of August, 1882, by reason of a train belonging to defendant leaving the track, while Dunlap was acting as engineer.

The Code of Georgia (1882, pp. 509, 762) provides as follows:

"§ 2083. *Liability of railroad companies as carriers.* — Railroad companies are common carriers, and liable as such. As such companies necessarily have many employés who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employés as to passengers for injuries received from the want of such care and diligence."

"§ 3036. *Injury by co-employé.* — If the person injured is

himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to recovery."

It was contended on behalf of the plaintiff that the accident happened in consequence of the road-bed being defective to such an extent and under such circumstances as to render defendant liable; while defendant claimed that plaintiff was guilty of contributory negligence, because he was running faster than twenty miles an hour, the superintendent having instructed him not to exceed that speed; because he made use of intoxicating drinks while on duty; and because the rules of the company limited speed to ten miles an hour before crossing trestles and bridges, while the place of the accident was near a trestle and plaintiff was running at a greater rate than ten miles an hour.

Evidence was adduced tending to sustain plaintiff's contention, and to refute that of defendant, as to a rate of speed exceeding twenty miles an hour, and the use of intoxicating liquors; and also to show that plaintiff was a locomotive engineer in the employment of the Richmond and Danville Railroad, and during the month of August, 1882, was sent to relieve an engineer on the Northeastern Railroad; that he relieved him on Saturday, on which day he hauled dirt, and that on Saturday evening he went to Tallulah Falls and got his train conductor, and from there to Athens, Sunday, and started out on Monday, on the evening of which day the accident occurred; that he had never been over the road before and had no experience of it or knowledge of the track; that he had never seen or read the train rules governing the running of trains on the road; that while he had been over the road once and returned, it was impossible for him, upon so slight an experience, to remember at night just where the trestles were; and that he did not know at the time that this particular trestle was immediately in front of him. Defendant's superintendent testified that he understood that Dunlap had never been over the road but once; that he explained to him Monday morning that he had a safe conductor and a

good set of brakemen, and that he could rely upon the conductor; that he "talked with him about the train and the track, and the conductor and the equipment of the train, and about the pilot and the pilot's duty, and about the character of the conductor and the character of the run generally, and the rate of speed, which was from eighteen to twenty miles an hour — not to exceed twenty;" and that he did not know "that Mr. Dunlap ever saw our train rules or read them." There was some controversy as to the existence of the rule as stated, at the time of the accident, but there was no dispute that the train was running more than ten miles an hour.

The court instructed the jury to return a verdict for the defendant, which being done and judgment rendered thereon, the cause was brought here on writ of error.

Mr. Hoke Smith for plaintiff in error.

Mr. Pope Barrow for defendant in error.

I. No question is presented by this bill of exceptions which calls for a decision by this court. No exceptions were taken at the trial by plaintiff's attorney to any ruling of the court, or to any instructions given to the jury, or to the failure or refusal of the court to give any which were requested. There is no pretence that any such exceptions were taken or noted during the trial. *Walton* v. *United States*, 9 Wheat. 651; *Bradstreet* v. *Thomas*, 4 Pet. 102; *Phelps* v. *Mayer*, 15 How. 160; *Sheppard* v. *Wilson*, 6 How. 260, 275; *Insurance Co.* v. *Lanier*, 95 U. S. 171; *Barton* v. *Forsyth*, 20 How. 532; *French* v. *Edwards*, 13 Wall. 506.

In the case last mentioned the court instructed the jury to find for the defendant. It was contended in this court by counsel for the defendant in error that the bill of exceptions did not show that the exceptions were taken at the trial. The court examined the bill of exceptions to decide the question whether this was true and held to the contrary; that is to say, that the bill of exceptions did show that the exceptions were taken at the trial. If an instruction to find for the defendant

had been such a case as did not require counsel to except at the trial, it would undoubtedly have been disposed of by the court on that ground without an examination to ascertain whether or not exceptions were so taken. If it had been immaterial in that case whether they were so taken, the court would not have troubled itself to investigate that question.

II. On the merits the plaintiff was not entitled to recover. *Rowland* v. *Cannon*, 35 Georgia, 105; *Central Railroad* v. *Kenney*, 58 Georgia, 485; *Atlanta & West Point Railroad* v. *Webb*, 61 Georgia, 586; Code of Georgia, § 3036; *Central Railroad Co.* v. *Sears*, 61 Georgia, 279; *Zettler* v. *Atlanta*, 66 Georgia, 195; *Schofield* v. *Chicago, Milwaukee &c. Railroad Co.*, 114 U. S. 615; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478; *Chandler* v. *Von Roeder*, 24 How. 224; *Herbert* v. *Butler*, 97 U. S. 319; *Railroad Co.* v. *Jones*, 95 U. S. 439; *Pleasants* v. *Fant*, 22 Wall. 116.

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

The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. *Kane* v. *Northern Central Railway*, 128 U. S. 91; *Jones* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 128 U. S. 443.

It is urged that the exceptions were not properly saved, and therefore that they should be disregarded. There is some obscurity in the record upon this subject, but upon the whole we think that enough appears to enable us to pass upon the question presented. The bill of exceptions shows that certain instructions, numbered 1 and 2, were requested by plaintiff and refused, and certain instructions, numbered 3 and 4, objectionable or adverse to plaintiff, were given, and it is stated by the court that "the plaintiff's counsel presented his request in writing before the charge of the court began. The court instructed the jury to find for the defendant, without notice to

plaintiff's counsel that the requests would not be given, and there was no opportunity for counsel to except to the failure of the court to charge as requested until the instructions were given to the jury. The exceptions, therefore, contained in Nos. 1, 2, 3 and 4 were not taken or noted during the trial." But the bill of exceptions also states: "V. The court instructed the jury to return a verdict for the defendant. VI. The jury returned a verdict in accordance with said instructions, and judgment was thereupon entered up in behalf of defendant in pursuance of said instructions; and to said instructions, verdict and judgment, the plaintiff, by his counsel, excepted and now excepts, during the term at which said case was tried and while said term is still in session, and assigns the same as error, and prays the court to sign and certify this exception."

We understand from this language, taken together, that the general instruction of the court to find for the defendant was excepted to at the proper time; and while greater accuracy of expression should have been used, we are not inclined by too technical a construction to preclude ourselves from correcting the error we hold was committed. The judgment is

Reversed and the cause remanded, with directions to grant a new trial.

UNITED STATES *v.* HAYNES.

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

No. 273. Submitted April 24, 1889. — Decided May 13, 1889.

An action on the official bond of a collector of customs is not one of which this court has appellate jurisdiction, under § 699 of the Revised Statutes, without regard to the sum or value in dispute.

THIS was an action brought by the United States against the principal and sureties on the official bond of a collector of customs, to recover the sum of $634.60, which he had refused

to pay over, and claimed the right to retain as part of the emoluments of his office. The Circuit Court gave judgment for the defendants, and the United States sued out this writ of error, which the defendants in error moved to dismiss for want of jurisdiction.

Mr. Solicitor General for plaintiff in error.

Mr. Charles W. Ogden for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

The motion to dismiss must be granted. The amount in dispute is less than $5000; and the case does not come within any of the classes specified in § 699 of the Revised Statutes, in which this court has appellate jurisdiction without regard to the sum or value in dispute. The only subdivisions which could possibly be supposed to cover this case are the second and third.

The second subdivision relates to judgments "in any civil action brought by the United States for the enforcement of any revenue law thereof;" and, as was directly adjudged in the recent case of *United States* v. *Hill*, 123 U. S. 681, a suit upon an official bond is not an action for the enforcement of a revenue law of the United States.

The third subdivision relates to judgments "in any civil action against any officer of the revenue, for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the Treasury." This applies only to suits, whether sounding in tort or in contract, brought by individuals or corporations against officers of the revenue acting on behalf of the United States, and does not include any suit brought by the United States against one of those officers. It has regard to actions in which the interest of the United States is as defendants, not as plaintiffs.

Writ of error dismissed for want of jurisdiction.

DISTRICT OF COLUMBIA *v.* CORNELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 55. Submitted November 1, 1888. — Decided May 13, 1889.

Negotiable certificates, issued by the Board of Public Works of the District of Columbia, redeemed according to law, and cancelled by the proper officers by stamping in ink across the face words stating such cancellation, are thereby extinguished; and if a clerk, who has no duty or authority connected with their redemption or care, afterwards steals them, fraudulently effaces the marks of cancellation, and puts them in circulation, the District of Columbia is not liable to a purchaser in good faith, for value and before maturity.

THIS was an appeal from a judgment of the Court of Claims against the District of Columbia for $7750 and interest on certificates of indebtedness, commonly called sewer certificates, issued by the Board of Public Works of the District, in the following form, with coupons attached:

DISTRICT OF COLUMBIA.

No. 1380.

Washington, July 1st, 1873.

This certifies, that for work done under direction of the Board of Public Works, and chargeable to the private property adjoining and benefited thereby, there is due to the bearer Five Hundred Dollars, payable July 1st, 1876, with eight per centum interest, payable semi-annually, as per coupons attached. Issued in accordance with act of Legislative Assembly; secured by pledge to the Commissioners of the Sinking Fund of assessments made in accordance with act approved June 26, 1873, against private property benefited by improvements, and receivable in payment of such assessments.

Board of Public Works,

By James A. Magruder, Treasurer.

Countersigned:

Horace J. Frost,

For Commissioners of Sinking Fund.

Registered: Geo. E. Baker, Comptroller.

Last six months' interest payable with certificate.

Statement of the Case.

The material facts, as found by the Court of Claims, were as follows:

On July 1, 1873, such certificates to the amount of about $2,000,000 were issued by the Board of Public Works, under an act of the legislative assembly of the District of Columbia, approved June 26, 1873, and were paid out to contractors, jobbers and laborers, and soon became greatly depreciated in value, and were bought and sold by brokers and speculators.

After the creation of the board of audit by the act of Congress of June 20, 1874, c. 337, § 6, most of these certificates, including those in question, were presented to that board and redeemed as provided in that act. 18 Stat. 119.

The certificates so redeemed were cancelled by stamping across the face in ink with a ribbon stamp the words "Cancelled by the Board of Audit." They were then inclosed in jackets, tied up in bundles of fifty in numerical order, and placed on a shelf under the counter in a room in the Treasury Department, occupied by several clerks employed by the board. The fact of redemption was entered in a registry book.

After the redemption and cancellation of the certificates, and while they were in the custody of the board of audit, as above stated, they were stolen, in February or March, 1876, by one George H. Farnham, who was then a clerk in the employ of the board, and occupying a desk behind the counter under which the certificates were deposited, but whose duties were not connected with the redemption or care of the certificates.

By the use of detersive soap Farnham entirely removed from a large portion of the certificates the marks of cancellation. From other certificates, on which some ink-marks still appeared, he cut off the coupons and pasted them over the partially effaced marks. In this condition no signs or marks of cancellation or redemption were visible on the certificates, but some of them still had a soiled or stained appearance.

The stolen certificates were sold by Farnham to brokers in Washington, and by them to one Ritchie, and by him to the claimant, and all the purchasers bought them for value, in

good faith, and without notice that they had been redeemed or cancelled; and the certificates were then in the same condition, in respect of their appearance as to indicating signs or evidences of cancellation or redemption, as they were at the time they were first negotiated by Farnham, and as they are now.

The judgment of the Court of Claims in favor of the claimant was for the amount of such certificates as were shown to have been so purchased by him before their maturity. 20 C. Cl. 229.

Mr. Attorney General, *Mr. Assistant Attorney General Howard* and *Mr. W. I. Hill* for appellant.

Mr. Samuel Shellabarger and *Mr. J. M. Wilson* for appellee.

When a municipality becomes party to a negotiable instrument, by authority of law, it is bound by all the rules of commercial law applicable to such securities. *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *State Bank*, 96 U. S. 30.

Purchasers of municipal securities are entitled to the full benefit of their purchase, unaffected by the consideration of the hardship involved in requiring the municipality to repay obligations once redeemed, and also unaffected by any circumstances merely tending to excite suspicion regarding the purchased obligation. *Cromwell* v. *Sac County*, 96 U. S. 51; *Murray* v. *Lardner*, 2 Wall. 110. And when a trusted agent of the municipality has been guilty of culpable negligence or fraud, whereby an injury is done to a purchaser of its securities, the acts of negligence or fraud are in law those of the corporation. *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532; *United States* v. *State Bank*, 90 U. S. 30.

Since it is true, as a matter of law, that the obligations in suit could be lawfully issued and in circulation, and in fact were lawfully issued and in circulation, then the fact that such circulation, as to the particular bonds in suit, was continued, and the bonds came into the hands of claimant as a *bona fide* purchaser, before due, by means of the fraud and wrong-doing of the agent of the District of Columbia, constitutes no

defence. *Cooke* v. *United States*, 91 U. S. 389; *California* v. *Wells, Fargo & Co.*, 15 California, 336. These decisions are based upon one of the settled and most familiar rules of the law of commercial paper that where the maker of commercial negotiable paper so deals with it as that it is stolen from his possession and put into circulation, through the act of the thief, and, before maturity, passes into the hands of a *bona fide* holder, without notice of the wrong, there the *bona fide* holder takes a complete title, and the maker of the note cannot set up the larceny as a defence. *Wheeler* v. *Guild*, 20 Pick. 545; *S. C.* 32 Am. Dec. 231; *Murray* v. *Lardner*, 2 Wall. 110; *Orleans* v. *Platt*, 99 U. S. 676; *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Collins* v. *Gilbert*, 94 U. S. 753; *Welsh* v. *Sage*, 47 N. Y. 143.

If such a criminally culpable taking up of negotiable papers, before due, shall, by this court, be held to be a withdrawal from circulation, and a destruction of the instrument, then it will be a new experience in the judicial history of commercial paper. It is a settled rule of the law merchant, which is expressed by Lord Ellenborough in *Burbridge* v. *Manners*, 3 Camp. 193, that payment of bills before due does no more extinguish them than if the note were merely "discounted." "It is the duty of bankers to make some memorandum on bills and notes which have been paid, and if they do not the holders of such securities cannot be affected by any payment made before they were due."

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

When the maker of a negotiable instrument lawfully cancels it before maturity, his liability upon it is extinguished, and cannot be revived without his consent. It is immaterial whether the cancellation is by destroying the instrument, or by writing or stamping words or lines in ink upon its face, provided the instrument, in the condition in which he puts it, unequivocally shows that it has been cancelled. *Scholey* v. *Ramsbottom*, 2 Camp. 485; *Burbridge* v. *Manners*, 3 Camp.

193; *Ingham* v. *Primrose*, 7 C. B. (N. S.) 82, 86; *Yglesias* v. *Mercantile Bank*, 3 C. P. D. 60.

In *Burbridge* v. *Manners*, Lord Ellenborough said, "It is the duty of bankers to make some memorandum on bills and notes which have been paid," clearly indicating his opinion that the making of such a memorandum upon the securities would be sufficient to protect the bankers from being afterwards held liable to any holder thereof.

The decision in *Ingham* v. *Primrose*, holding the acceptor of a bill of exchange, who had torn it in halves and thrown the pieces into the street, liable to one who afterwards took it, in good faith and for value, from one who had picked it up and pasted the pieces together, proceeded upon the ground that the tearing of the bill into two pieces, as manifest on its face, "was at least as consistent with its having been divided into two for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it." And the decision can be maintained, if at all, on that ground only. *Baxendale* v. *Bennett*, 3 Q. B. D. 525, 532.

In *Baxendale* v. *Bennett*, one who had given his blank acceptance on stamped paper to another, and authorized him to fill in his own name as drawer, and received it back from him unfilled, and put it in the unlocked drawer of his desk, from which it was afterwards stolen, and filled up, without his authority, by inserting the name of another person as drawer, was held not liable to an indorsee for value.

In *State* v. *Wells, Fargo & Co.*, 15 California, 336, cited by the claimant, treasury warrants of the State of California had been once lawfully issued, presented and paid, but never cancelled in any way before they were stolen and again put in circulation; and the suit was not upon the warrants, but was brought by the State against *bona fide* holders who had presented them a second time, and to recover back the value of bonds which the State had delivered to them in exchange for the warrants, and which they, in good faith, had since parted with.

Much reliance was placed by the claimant upon the case of *Cooke* v. *United States*, 91 U. S. 389, in which the United

States were held by a majority of this court to be liable to a *bona fide* holder of interest-bearing treasury notes, printed by the Treasury Department from genuine plates, and perfect in form, complete and ready for issue, and never issued by any authorized officer, but fraudulently or surreptitiously put in circulation. In the opinion, much stress was laid upon the considerations, that the notes were perfect and complete as soon as printed, and did not require the signature of any officer, but, as soon as they had received the impression of all the plates and dies necessary to perfect their form, were ready for circulation and use; that in this respect they did not differ from coins of the mint when fully stamped and prepared for issue; and that these notes were intended to circulate and take the place of money, to some extent, for commercial purposes; were made a legal tender for their face value, exclusive of interest, as between the government and its creditors, and passed readily from hand to hand as, or in lieu of, money. 91 U. S. 404.

We are not prepared to extend the scope of that decision, and the facts of this case, as found by the Court of Claims, are quite different.

The certificates in suit, after they had been redeemed according to law, were cancelled by the proper officers, by distinctly stamping in ink across the face words stating that fact, and in that condition were made up in bundles and put away on a shelf, whence they were afterwards stolen by a clerk, who had no duty or authority connected with their redemption or care, and who afterwards fraudulently effaced the marks of cancellation, by the use of detersive soap, and by pasting coupons over them, and then put the certificates in circulation.

The provision of the act of Congress of March 3, 1875, c. 162, § 16, by which certain officers of the District of Columbia are required to destroy by burning all redeemed certificates, is in terms and effect merely directory, and does not make the District liable on such certificates fraudulently put in circulation, after they have been otherwise unmistakably cancelled. 18 Stat. 505.

These certificates having been lawfully extinguished by

stamping across their face marks of cancellation as clear and permanent as the original signatures, the liability of the District upon them as negotiable paper could not be revived by its omission to take additional precautions against their being stolen and fraudulently restored to their original condition by such means as ingenious wickedness might devise.

Moreover, these certificates were in no sense money, or the equivalent of money. Though negotiable instruments, they belonged to a peculiar class of such instruments, being made by a municipal corporation, and having no validity unless issued for a purpose authorized by law, and as to which this court has repeatedly laid down and acted on the following rule: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose." *Mayor* v. *Ray*, 19 Wall. 468, 477; *Wall* v. *Monroe County*, 103 U. S. 74, 78; *Claiborne County* v. *Brooks*, 111 U. S. 400, 408.

Considering the nature of these certificates, the method in which they had been cancelled, and the means by which they were afterwards put in circulation, we are of opinion that there is no ground for holding the District of Columbia liable to this claimant.

Judgment reversed.

LAKE COUNTY *v.* ROLLINS.[1]

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

No. 1347. Submitted January 2, 1889. — Decided May 13, 1889.

The constitution of Colorado of 1876 provided that no county should contract any debt by loan in any form except for certain purposes therein named; that such indebtedness contracted in any one year should not exceed the rate therein named; and that "the aggregate amount of indebtedness of any county for all purposes . . . shall not at any time exceed twice the amount above herein limited," etc. *Held*, that this limitation was an absolute limitation upon the power of the county to contract any and all indebtedness, not only for the purposes named in the constitution, but for every other purpose whatever, including county warrants issued for ordinary county expenses, such as witnesses' and jurors' fees, election costs, charges for board of prisoners, county treasurer's commissions, etc.

THE case, as stated by the court, was as follows:

This action was instituted in the Circuit Court of the United States for the District of Colorado. It is a suit against the county of Lake, in that State, and is based on a large number of county warrants issued for the ordinary county expenses, such as witnesses' and jurors' fees, election costs, charges for the board of prisoners, county treasurer's commissions, etc.

The county has offered several defences; but the view we take of the case renders it unnecessary to notice any save one.

The fifth defence offered is, that of want of authority on the part of the county commissioners to issue the warrants in question or any of them. It is claimed that section six, article eleven, of the state constitution of 1876, fixes a maximum limit, beyond which no county can contract any indebtedness, and that the warrants sued on were all issued after that limit had been reached, and even exceeded; and that they are all, for that reason, void.

[1] The docket-title of this case is "*The Board of County Commissioners of the County of Lake* v. *Frank W. Rollins.*"

Statement of the Case.

The constitutional provision in question is as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of increasing such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of increasing the debt: but the bonds, if any be issued therefor, shall not run less than ten years; and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided*, That this section shall not apply to counties having a valuation of less than one million of dollars."

To this defence, the plaintiff below responded to the effect that the provision quoted was not applicable to the warrants in question; that it is properly applicable only to debts created by loan, for the purpose of erecting necessary public buildings or making or repairing public roads and bridges; and that as to debts so created by loan for the purposes designated, and as to them alone, a limitation of amount is fixed, first, as to the sum that may be incurred in any one year, and secondly, as to the aggregate sum that may be incurred by the accumulating debts of more than one year; and that these objects and restrictions exhaust the scope of the provision.

The cause was tried below on an agreed state of facts, before

the court, on the written waiver of a jury. In the agreement is found the following stipulation:

"It is further stipulated and agreed that if section six (6), of article eleven (11), of the constitution of the State of Colorado, be construed to be a limitation upon the power of defendant county to contract any and all indebtedness, including all such as that sued upon in this action, then it is admitted that the claimed indebtedness sued on herein was incurred after the limitation prescribed by said constitution had been reached and exceeded by the said defendant, the county of Lake, and in the event of such a construction by this court, or the Supreme Court of the United States, then and in that case, and for the purposes of this action, it is hereby also admitted that all the allegations of the fifth separate defence to this action of the answer of the defendant are true and correct, and the defendant entitled to judgment thereon."

The court below held, 34 Fed. Rep. 845: First, that the said section six, in all of its sentences, does not refer exclusively to debts contracted by loan, but there are two independent declarations in it, the second declaration beginning with the words "and the aggregate amount of indebtedness of any county, for all purposes, etc.;" secondly, that in determining whether the limit of county indebtedness, fixed by the second declaration, had been reached, it is immaterial how any particular portion of the indebtedness arose; but that, thirdly, when such limit had been reached, while the power of the county to incur further debt by contract was suspended, the liability for further amounts in the shape of fees and salaries, and other "compulsory obligations" imposed by the will of the legislature, remained and was enforcible. Proceeding on this idea, the Circuit Court rendered judgment in favor of the plaintiff below; whereupon the county brought the case here by writ of error.

Mr. Daniel E. Parks and *Mr. H. B. Johnson* for plaintiff in error.

Mr. Willard Teller for defendant in error.

Argument for Defendant in Error.

Section 6 of article 11 of the constitution of Colorado is a limitation, first, to debts incurred "by loan"; and, second and further, such debts by loan are limited to debts contracted for two purposes only, viz., erecting public buildings and making and repairing roads and bridges; and, third, the limitation is to debts contracted in any one year; and, fourth, to an aggregate indebtedness for any number of years.

State constitutions are not grants of power but a limitation upon pre-existing power; and to these general propositions we need cite no authority. From this it follows that all bodies recognized by the constitution as having plenary powers in any direction will be limited as to those powers only by express or implied constitutional limitations, and to authorize an *implied* limitation, the implication must be a *necessary* one. *People* v. *Rucker*, 5 Colorado, 455; *People* v. *Wright*, 6 Colorado, 92; *Alexander* v. *People*, 7 Colorado, 155.

In construing this section, courts must construe it to be a limitation of the powers of the legislature and counties, only when the limitation is expressed or implied, since both these bodies are constituent parts of the state government and are especially referred to and recognized in the constitution itself as existing before the constitution. And, since the counties are constituent parts of the state government, necessary to effectuate the political organization and administration of the state government, neither the laws of the State nor its constitution should be interpreted so as to impair, much less to deprive them of power to effectuate the ends of county being. *Hamilton County* v. *Mighels*, 7 Ohio St. 109; *Talbot County* v. *Queen Anne County*, 50 Maryland, 245; *State* v. *St. Louis*, 34 Missouri, 546; *Ray County* v. *Bentley*, 49 Missouri, 236.

It is a settled rule of construction, that in construing such a section, we must presume that no superfluous words were used, and that meaning must be given to every word used; and if possible it must be so construed as to make every word significant of something, so as, if possible, to make every word operative; and, above all, as the section is one of many in one instrument it must be so construed as to be consistent with the objects of the whole instrument and to secure effectiveness to

all parts of it. *United States* v. *Bassett*, 2 Story, 389; *Derr* v. *Dubois*, 16 N. Y. 285; *People* v. *Osborne*, 7 Colorado, 605; *Opinion of Judges*, 22 Pick. 571; *Commonwealth* v. *McCaughy*, 9 Gray, 297. And since the various counties of the State are recognized by the constitution itself as having plenary powers in some directions, such powers can be limited only by express, or implied constitutional restrictions, and to authorize an implied limitation the implication must be a necessary one. *People* v. *Rucker*, 5 Colorado, 455; *People* v. *Wright*, 6 Colorado, 92; *Alexander* v. *People*, 7 Colorado, 155.

Proceeding then to construe, we say: (1) The first three lines are plainly declaratory of the scope and intent of the section, viz., to restrain the contracting of debts by loan, and to restrain that class of debts to the purpose of building roads and bridges and the repair thereof; (2) to limit the amount that could be contracted in any one year; (3) to limit the amount of the aggregate of such debts in any number of years; (4) to provide for a contingency by allowing the people by vote to exceed the first limits named; (5) the words "by loan in any form" are used in the same article in the same way to restrict incurment of debt by loan; (1) sections 3 and 4 as to the State; (2) section 7 as to school districts; (3) section 8 as to towns and cities. These sections, being *in pari materia* with section 6, must all be considered in construing it. It is clear that the restriction in section 3 is confined to debts for four purposes.

But if we interpolate the word "such" before the word "indebtedness," in the tenth line, and after the words "aggregate amount," we shall have precisely the same limitations in the same words as in section 3, and we shall leave unlimited those debts, the incurment of which are had without a loan, but which are essential to county government and county life, and the interpolation of the word is warranted by the rule.

The construction of a statute should always be such as, if possible, not to lead to injustice or absurd consequences, and infringe as little as possible on the existing rights of individuals. Or, as the rule was expressed by this court in *United States* v. *Kirby*, 7 Wall. 486: "All laws should receive a sensi-

ble construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always be presumed that the legislature included exceptions to its language which would *avoid results of this character.*" *United States* v. *Fisher*, 2 Cranch, 358; *Chinese Merchant Case*, 13 Fed. Rep. 605; *Southern Pacific Railroad* v. *Orton*, 32 Fed. Rep. 457, 477; *Springfield* v. *Edwards*, 84 Illinois, 626.

The construction of this statute contended for by the plaintiff in error leads to many and manifest absurdities, making municipal government impracticable.

The convention, in adopting the language and opinions of this section, were acting, to some extent at least, as other States that have already adopted similar provisions. Prior to 1876 seven States had adopted a similar provision in their constitutions, to wit: Iowa in 1846, Oregon in 1857, Illinois in 1870, Pennsylvania in 1873, West Virginia in 1872, Wisconsin in 1874, Missouri in 1875. The language, in all these States, is plain and more imperative than that of Colorado. Yet in Missouri, the only State in which the question has been raised, it has been held that necessary county expenses are not included in the limitations.

Since then, counties, county officers and the powers of county officers are especially recognized in the constitution, and the salaries and fees are by it to be fixed by legislative enactment, and since by the schedule of the constitution, all laws relating to these officers and persons were left in force, it follows that as to all powers formed *before* the constitution the same was possessed afterwards, except by limitation, and that limitation, like limitation on legislative powers, must be strictly construed. *Southern Pacific Railroad* v. *Orton*, 32 Fed. Rep. 451, and cases cited.

A state constitution, establishing the fundamental law of the State, must be in harmony with itself. If two constructions of any part of it be possible, that construction must be adopted which will not only best harmonize with other sections, but give compensation when compensation is due, and make effective every agency provided in it to make the state gov-

ernment effective. Since the organization of administrative power of counties is recognized, and is necessary to state government, neither any part of the constitution or the statutes should be construed so as to render them less suitable to effectuate their ends. Neither the machinery of elections, the collection of the taxes, or the prosecution of criminals, can be carried on except through the county officers. Hence, not only must the counties be preserved, but provision made for payment of county officers. *People* v. *Wright*, 6 Colorado, 92; *People* v. *Draper*, 15 N. Y. 532; *People* v. *Fancher*, 50 N. Y. 291.

In *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, this court held that where the law attaches a fixed compensation to a public office, a person filling the office is entitled to the compensation, as by an implied contract which could not be impaired by legislation. So in the case at bar, the power to fix compensation having been expressly conferred on the legislature, and it having been fixed by it in accordance with the constitutional power thus given, the compensation can by no known rules of construction be taken away from such office, since the law and the constitution in all parts must stand together if possible, and the construction is clearly possible, and, as we have seen, imperatively required to effectuate the end of both the constitution and the laws, and county government. And such has been the holdings of the Supreme Court of California in the case of *Welsh* v. *Strothe*, 16 Pac. Rep. 22, where the court held that the salaries of county officers fixed by statute were not included within the terms of a law which provided that the county authorities could not contract for or pay, in any one month, any demand against the treasury exceeding one twelfth that allowed by law to be expended for the fiscal year. So, too, in *Smith* v. *Town of Dedham*, 144 Mass. 177, it was held that a statute which provided that "cities and towns may, by ordinary vote, incur debts for temporary loan in anticipation of the taxes," etc., and by another section provided that "*other debts* than those mentioned in the preceding section shall be incurred only by a vote of two thirds of the voters present and voting at a town

meeting," could not be held to include *all* debts, and could not be held to inhibit contraction of debts necessary and convenient to the exercise of the corporate powers of such towns.

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

We are unable to assent either to the conclusions of the court below, or to the positions of defendant in error. The language of the sixth section seems to be neither complicated nor doubtful; and we think it plain that what is meant is exactly what is said; no more and no less. It deals with the subject of county debts; and to begin with, assumes a unit of measurement which is one and one half dollars in the thousand of assessed values; that is, one and one half mills on the dollar. This is about equal to the average amount of taxes levied for county purposes per annum under normal conditions. The provision then proceeds as follows:

First. It provides that no county shall borrow money in any way;

Secondly. Exception is then made in favor of the erection of necessary public buildings, and the making or repairing of public roads and bridges; and,

Thirdly. The loans allowed by the foregoing exception to be taken in any one year are limited to the amount of one and one half mills on assessed values in one class of counties, and three mills in another class.

Here the matter of indebtedness by loan is completed; and the section passes to a broader subject. Manifestly, the purpose of the collocation of the two passages in one section is not that by a wrested reading the latter may yet further limit and complicate the power of borrowing; but that the meaning of the latter passage may be more sharply and clearly defined and emphasized by an antithesis. It is an example not of inadvertence, but of good rhetoric, as if special attention had been by discussion and care given to the wording of the section.

The next provisions are:

Fourthly. That the aggregate debt of any county for all purposes (exclusive of debts contracted before the adoption of the constitution) shall not at any time exceed the sum of three mills (or six, as the class might be) on assessed values; unless the taxpayers vote in favor of such excess, at some general election; and

Fifthly. That even when an election has been held, the aggregate debt so contracted shall not exceed, at any one time, the sum of six mills (or twelve, as the case might be) on the assessed values.

We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell* v. *People*, 7 N. Y. 9, 97; *Hills* v. *Chicago*, 60 Illinois, 86; *Denn* v. *Reid*, 10 Pet. 524; *Leonard* v. *Wiseman*, 31 Maryland, 201, 204; *People* v. *Potter*, 47 N. Y. 375; Cooley, Const. Lim. 57; Story on Const. § 400; *Beardstown* v. *Virginia*, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or lim-

ited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Doggett* v. *Florida Railroad*, 99 U. S. 72.

There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.

Such considerations give weight to that line of remark of which *The People* v. *Purdy*, 2 Hill, 31, 36, affords an example. There, Bronson, J., commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: "In this way . . . the constitution is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter, and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we lose sight of the instrument itself and roam at large in the boundless fields of speculation."

Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation.

Defendant in error insists that the interpretation contended for by the county leads to certain absurd consequences, viz., that it is senseless to limit the power of a county to incur

debt generally, since its exercise of such a power may, by sudden exigencies, become imperatively necessary to the discharge of its functions; that it would be to require the county to provide in advance, by taxation or otherwise, for the payment of expenses, which, from their nature, can only be guessed at; that it would be to enable any county in two years, by a vote and a loan, to exhaust the whole possible indebtedness in the way of buildings, roads and bridges, leaving no margin for other necessities; that it would be to destroy the county governments, since the county officials and others will not work for nothing, and the margin of possible debt is, in nearly all the counties, already reached; and that it would be to avoid nearly all the tax payments heretofore made in warrants. All of these objections could well be answered from the facts as disclosed by the bill of exceptions; but it is not necessary.

We cannot say, as a matter of law, that it was absurd for the framers of the constitution for this new State to plan for the establishment of its financial system on a basis that should closely approximate the basis of cash. It was a scheme favored by some of the ablest of the earlier American statesmen. Nor can the fact disclosed in the bill of exceptions, that, after the adoption of the state constitution the county officials, and many of the people, designedly or undesignedly, disregarded the constitutional rule, render the plan absurd. If it was a mistaken scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the courts.

In *Wisconsin Central Railroad* v. *Taylor*, 52 Wisconsin, 37, 58, the court says: "We have been urged with great ability to give the section such construction as to forever prevent unjust discrimination by the legislature; and grave consequences have been assumed as the result of a different construction. On the other hand, we have been urged with equal ability that such a decision would unseat many titles, stop revenue, necessitate an immediate revision of the laws of taxation, and possibly the calling of a constitutional convention. The answer to all this is obvious. It is no part of the duty of the court to make or unmake, but simply to construe this provision of the

constitution. All questions of policy; all questions of restriction and unjust discrimination; all questions of flexibility and adjustability to meet the varied wants and necessities of the people — must be regarded as having been fully considered and conclusively determined by the adoption of the constitution. The oath of all is to support it as it is, and not as it might have been. To do so may, in some cases, lead to individual hardships; but to do otherwise would be most portentous with evil." In *Law* v. *People*, 87 Illinois, 385, 395, the court said: "But should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon the rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperilled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted."

In the light of these principles, expressed in the authorities quoted and in many others, we must decline to read the expression in section six, "and the aggregate amount of indebtedness of any county, for *all* purposes," etc., as if it were written "and the aggregate amount of *such* indebtedness," etc. This the defendant in error concedes to be necessary to his case. We see no admissible reason for the

introduction of this restrictive word "such," except to alter radically the plain meaning of the sentence.

Neither can we assent to the position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated "compulsory obligations." The compulsion was imposed by the legislature of the State, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question. There is no necessary inability to give both of the provisions their exact and literal fulfilment.

In short, we conclude that article six aforesaid is "a limitation upon the power of the county to contract any and all indebtedness, including all such as that sued upon in this action;" and therefore, under the stipulation already set forth, the county is entitled to judgment.

Wherefore the judgment of the court below is reversed, and the case is remanded to that court, with a direction to enter judgment for the defendant.

LAKE COUNTY *v.* GRAHAM.[1]

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

No. 1265. Submitted January 2, 1889. — Decided May 13, 1889.

Lake County v. *Rollins*, *ante* 662, affirmed and applied to the bonds in controversy in this action.

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[1] The docket title of this case is *The Board of County Commissioners of the County of Lake* v. *Graham*.

Opinion of the Court.

When the constitution of a State imposes upon the municipal corporations within it a limitation of their power to incur debts, it is not within the power of the legislature of the State to dispense with that limitation, either directly or indirectly.

The constitution of Colorado imposed a limit upon the power of municipal corporations to contract debts. The legislature authorized county commissioners (a vote of the tax-payers first being had) to issue bonds of the county, not to exceed the amount of the floating debt, that amount to be ascertained by the commissioners, no reference being made in the statute to the constitutional limitation. The commissioners of Lake County settled the amount of the floating debt of the county at $500,000, which was in excess of the constitutional limitation, and issued bonds to that amount, in which reference was made to the statute, and in which it was "certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." *Held*, that the county was not estopped to deny that the bond was issued in violation of the provisions of the Constitution.

THE case is stated in the opinion.

Mr. Daniel E. Parks and *Mr. H. B. Johnson* for plaintiff in error.

Mr. Robert E. Foot and *Mr. Willard Teller* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This action was instituted in the Circuit Court of the United States for the District of Colorado.

It is a suit against the county of Lake, in that State, and is based on one hundred and ninety-eight coupons, aggregating the sum of $7280, and being for interest on certain bonds issued by the county on the 2d of January, 1882.

The case was tried in the court below on an agreed statement of facts, which is in the bill of exceptions. From that agreement it appears that the bonds, from which the coupons sued on were detached, were executed in exchange for divers warrants of the county, to the amount of five hundred thousand dollars; that they were executed in compliance with an act of the General Assembly of Colorado, entitled "An act to enable the several counties of the State to fund their floating

indebtedness;" that the indebtedness of the county on the 6th day of September, 1881, the day the first notice was published under the act, as evidenced by county warrants, was $500,000, and the assessed valuation of the property of said county on said day was $16,423,403, afterwards rebated, in 1882, to $5,017,000, in accordance with a decision of the Supreme Court; and that such was the indebtedness and valuation on the day the bonds and coupons were issued.

There is also in the record an agreement between the parties that if section six of article eleven of the constitution of the State of Colorado be construed to be a limitation upon the power of the defendant county to contract any and all indebtedness, including all such as that sued upon in this action, then it is admitted that the claimed indebtedness sued on herein was incurred after the limitation prescribed by said constitution had been reached and exceeded by the said defendant, the county of Lake, and in the event of such a construction by the Circuit Court, or the Supreme Court of the United States, then and in that case, and for the purposes of the action, it is also admitted that the defendant is entitled to judgment thereon, unless the defendant is estopped from making such defence by the recitals contained on the face of the bonds and coupons sued on in this action.

In the case of *Commissioners of Lake County* v. *Rollins*, *ante*, 662, we have set forth said section six, and have decided that it does impose "a limitation upon the power of the defendant county to contract any and all indebtedness." That decision disposes of the first condition in the agreement recited above. It only remains to decide whether the county is estopped from making such defence by the recitals contained on the face of such bonds and coupons. The bonds and coupons are as follows:

"No. ———. $———.

"United States of America, County of Lake, State of Colorado.

Funding bond. Series ———.

"The county of Lake, in the State of Colorado, acknowledges itself indebted, and promises to pay to ——— ———,

or bearer, ———— dollars, lawful money of the United States, for value received, redeemable at the pleasure of the said county, after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of the said county, in the city of Leadville, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, with interest thereon at the rate of eight per cent per annum, payable semi-annually, on the first day of January and the first day of July in each year, at the office of the county treasurer aforesaid, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

"This bond is one of 710 funding bonds each of like date, comprised in three series, designated 'A,' 'B,' and 'C,' respectively, series 'A' consisting of 450 bonds for the sum of one thousand dollars each, numbered from 1 to 450, both numbers inclusive; series 'B' consisting of 60 bonds for the sum of five hundred dollars each, numbered from 451 to 510, both numbers inclusive; and series 'C' consisting of 200 bonds for the sum of one hundred dollars each, numbered from 511 to 710, both numbers inclusive; the whole amounting to five hundred thousand dollars, which the board of county commissioners of said Lake County have issued under and by virtue of and in full compliance with an act of the general assembly of the State of Colorado entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond. It is further certified that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of said county of Lake, voting on the question at a general election duly held in said county on the 8th day of November, A.D. 1881.

"The faith and credit of the county of Lake are hereby pledged for the punctual payment of the principal and interest of this bond.

"In testimony whereof the board of county commissioners of the said county of Lake has caused this bond to be signed by its chairman, countersigned by the county treasurer, and attested by the county clerk, under the seal of the county, this second day of January, A.D. 1882.

"Attest: ——— ———,

"[County seal.] *County Clerk.*

——— ———,

"*Chairman Board of County Commissioners.*"

Section one of the act under which the bonds were issued is as follows:

"SEC. 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars upon the petition of fifty of the electors of said counties (county) who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish for the period of thirty days, in a newspaper within said county, a notice requesting the holders of the warrants of such county to submit, in writing, to the board of county commissioners, within thirty days from the date of the first publication of such notice, a statement of the amount of the warrants of such county which they will exchange, at par and accrued interest, for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners, at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county, who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county, who shall have paid taxes on property assessed to them in said county in the preceding year, the question whether the board of county commissioners shall issue bonds of such county, under the provisions of this act, in exchange, at par, for the warrants of such county, issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a

special election, which they are hereby empowered to call for that purpose, at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid at such election. The county treasurer of such county shall make out and cause to be delivered to the judges of election, in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness unless his name shall appear upon such list, or unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants, issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county in exchange therefor at par. No bonds shall be issued of less denomination than one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent per annum. The interest to be paid semi-annually, at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county, after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in ex-

cess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond."

Nothing is better settled than this rule—that the purchaser of bonds, such as these, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to the protection of such recitals of facts as the bonds may contain.

In this case the constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals one million of dollars, there is a maximum limit, beyond which those counties can incur no further indebtedness under any possible conditions, provided, that in calculating that limit, debts contracted before the adoption of the constitution are not to be counted. The statute, on the other hand, charges the purchaser with knowledge of the fact that the county commissioners were to issue bonds, at par, in exchange for such warrants of the county as were themselves issued prior to the date of the first publication of the notice provided for; that the only limitation on the issue of bonds in the statute was, that the bonds should not exceed in amount the sum of the county indebtedness on the day of notice aforesaid; that while the commissioners were empowered to determine the amount of such indebtedness, yet the statute does not refer that board, for the elements of its computation to the constitution or to the standards prescribed by the constitution, but leaves it open to them, without departing from any direction of the statute, to adopt solely the basis of the county warrants. The recitals of the bonds were merely to the effect that the issue was "under, and by virtue of, and in full compliance with," the statute; "that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond;" and that the issuing was "authorized by a vote of a majority of the duly qualified electors," etc.; no express reference being made

to the constitution, nor any statement made that the constitutional requirements had been observed.

There is, therefore, no estoppel as to the constitutional question, because there is no recital in regard to it. *Carroll County* v. *Smith*, 111 U. S. 556. It is true, it might be said, that inasmuch as the bonds recite that all the requirements of the statute had been fully complied with by the proper officers, and inasmuch as one of those requirements was that the officers should determine the amount of the county debt, the inference is fair and reasonable that the statute meant only that they should count what was a just and actual debt, not claims that were void, and therefore no debt; and that the recital made was in effect a statement that the whole matter had been examined by the board, and that they had issued bonds for only such warrants as were found to be issued in conformity to the law, the whole law — fundamental as well as statute. Waiving the question as to whether such a conclusion, persuasive as it might be in other aspects of a cause, is not too remote and indirect for the basis of an estoppel, the avowed object of which is to exclude from consideration the truth, still how could the case be any better for the defendant in error? Had the bond expressly stated that the board canvassed the debt, and found the same to be binding and valid under the law and the constitution, and that the same was $500,000, the recital would not be an estoppel. It must be remembered that these bonds show on their face an issue of $500,000. In the case of *Dixon County* v. *Field*, 111 U. S. 83, 92, this court said :

"Recurring, then, to a consideration of the recitals in the bonds, we assume, for the purposes of this argument, that they are in legal effect equivalent to a representation, or warranty, or certificate on the part of the county officers, that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law ; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when,

judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself."

Now, while it is true that the bonds show on their face an issue of $500,000, yet it is also true that neither the constitution nor the statute nor the bond shows the amount of the valuation of the county; and it therefore might be said that, for this reason, and notwithstanding the purchaser's knowledge of the limit, and his knowledge that $500,000 of debt was incurred, yet he might not have known that the limit had been exceeded, being ignorant of the other term in the calculation, that of the amount of the assessed values, and that the recital of conformity, misleading him, would operate as an estoppel.

This question is settled in the case of *Dixon County* v. *Field*, *supra*. The court there say, p. 93:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."

"The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally ac-

cessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

To the suggestion that the purchaser was not chargeable with knowledge of the fact that the maximum of 12 mills on the dollar had been exceeded — for the $500,000 of debt ascertained to be due on the day of notice, and for which bonds were issued, might have been partly or wholly created before the constitution was adopted, and therefore be excluded from the rule by the very terms of the constitution itself — there are two decisive answers. First, the bill of exceptions shows that the debt was not so created either in whole or in part. Second, the defendant in error is not entitled to an estoppel even if such an inference might have been drawn from the recital of conformity. The cases just cited show that the records are the only source of information.

The question here is distinguishable from that in the cases relied on by counsel for defendant in error. In this case the standard of validity is created by the constitution. In that standard two factors are to be considered; one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being

exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.

In the case of *Sherman County* v. *Simons*, 109 U. S. 735, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was, that the legislature, being the source of exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a *bona fide* purchaser. So also in *Oregon* v. *Jennings*, 119 U. S. 74, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people.

For these reasons, and under the stipulation above recited,

The judgment of the court below is reversed, and the case is remanded to that court, with a direction to enter judgment for the defendant.

JONES *v.* VAN DOREN.

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

No. 202. Argued March 14, 1889. — Decided May 13, 1889.

A bill in equity by a widow to obtain her right of dower, alleging that she conveyed it to one of the defendants upon an express trust for her, and he conveyed to the other defendants with notice of the trust, may be allowed to be amended by alleging that she was induced to make her conveyance by his fraudulent misrepresentations as to the nature of the instrument.

Upon a bill in equity by a widow against one who has obtained from her by fraud a conveyance of her right of dower, and another who, with notice of the fraud, has taken a mortgage from him, and has foreclosed the mortgage by sale of all the land, part to the mortgagee and part to a purchaser in good faith, and praying for an account, a redemption of the mortgage and a reconveyance of the land still held by the mortgagee,

Statement of the Case.

and for general relief, dower may be decreed, and damages if necessary to give full indemnity.

In a suit in equity to obtain a right of dower from persons who have taken conveyances thereof by, or with notice of, fraud upon the plaintiff, the statute of limitations begins to run only from her discovery of the fraud.

THIS was a bill of equity, filed May 18, 1883, by Sarah M. Jones, a citizen of Pennsylvania, against Matilda A. Van Doren, a citizen of Indiana, and Samuel J. Jones and Samuel J. Glover, citizens of Illinois.

The original bill alleged that Robert H. Jones died intestate in April, 1863, leaving the plaintiff, his widow, and the defendant Jones, his son and only heir at law, and seized in fee of one fourth undivided part of certain land described, in Minnesota; that the plaintiff became entitled to a dower interest therein, which by the laws of Minnesota was a life estate in one third part, and the son became vested with the title in fee, subject to her dower interest; that she, being informed that the estate was involved in litigation, and having little or no knowledge of business, and at his request, for no consideration, and merely for the purpose of facilitating the conduct of the litigation, made a quitclaim deed of her interest to him; and that he accepted the deed upon the express understanding and agreement to receive it for that purpose only.

The bill further set forth, as the result of the litigation, that certain described parcels of the land were set off to him in severalty; and alleged that he, conspiring and confederating with the defendant Matilda A. Van Doren (who was fully advised of all the facts above alleged) to defraud the plaintiff of her dower estate, made a mortgage by a conveyance in trust to the defendant Glover, on July 25, 1871, of all the land so set off, including the plaintiff's interest therein, to secure a sum of $10,000 lent to him by Mrs. Van Doren; that, as part of the conspiracy, a suit for foreclosure was begun in the name of Glover on August 26, 1876, and a decree obtained therein, under which all the land was sold, and (except a small portion purchased by one Galusha) bought by Mrs. Van Doren for the sum of $8745.14, and a final decree, vesting title in the pur-

chasers, was entered on May 22, 1880; that the plaintiff was ignorant of the mortgage and of the foreclosure suit until long after the final decree therein; that on December 16, 1876, in order to protect her dower right, she paid $1808.48 in discharge of taxes on the land, of which payment the defendants availed themselves; and that Mrs. Van Doren, in 1881, sold a portion of the land to one Marshall, a *bona fide* purchaser, for the sum of $10,000, which she received and applied to her own use, and still held the rest of the land.

The plaintiff further alleged that before filing her bill she demanded an account of Mrs. Van Doren, and offered to pay her all moneys paid or expended by her on or about the land, with interest, in redemption of the mortgage, and demanded a reconveyance, but she refused; and that the plaintiff was ready and willing to pay to her all sums of money, and to do all other acts, that might be adjudged by the court necessary to redeem the land from the mortgage and foreclosure.

The bill prayed for an account; and that the plaintiff, on paying to Mrs. Van Doren such sums as the court might direct to enable her to redeem the mortgage, should be adjudged to be entitled to redemption, and Mrs. Van Doren might be ordered to reconvey the land still held by her; and for such other or different relief as the nature of the case might require and as might be agreeable to equity.

A demurrer to that bill was sustained and the bill dismissed, on the ground that, the plaintiff having conveyed her interest by a deed absolute on its face, the statute of frauds would not permit her to set up an oral trust, and, as no fraud, accident or mistake in making that deed was alleged, no trust arose by implication of law. 18 Fed. Rep. 619.

The bill was then amended by substituting, for the allegations concerning the plaintiff's conveyance to the defendant Jones, allegations that he, with intent to defraud her, prepared an instrument which he represented to be a power of attorney to enable him to act for the plaintiff in regard to certain anticipated litigation and other business, and thereby induced her to sign it; that the instrument was in fact, as he knew, a quitclaim deed of all her right of dower; that she did

not read the instrument, or know its true character or effect, but relied on his representations, and, had she read it, was then so ignorant of business that she would not have understood its legal purport; and that she always, until within six months before the filing of this bill, believed that the instrument was a mere power of attorney.

The defendant Van Doren demurred to the amended bill; and afterwards moved to have it stricken from the files, for the reason that it stated a new and different cause of action, the original bill being based upon an express trust, and the amended bill upon a resulting trust arising by implication of law. The court overruled the motion; but sustained the demurrer, on the ground that the plaintiff was not entitled to the specific relief prayed for, as shown by its opinion sent up with the record and printed in the margin.[1] A final decree was

[1] NELSON, J. The demurrer is sustained, for the reasons:

1st. If the allegations of the bill of complaint are true, the right of the complainant to bring her action to recover dower exists, unless the statute of limitations of the State of Minnesota has barred such recovery. Of course, if she has lost all right of action by laches, the bill must fail, for the relief claimed is based upon an interest in the property as doweress.

2d. If not barred by the statute of her action to recover dower, the fraud alleged, which creates an impediment to a recovery at law, can be removed by a suit in equity and her dower obtained. Equity furnishes the most adequate and complete remedy, and dower is highly favored in that forum.

3d. The complainant is not entitled by the fraud alleged, if true, to anything more than dower; she is not entitled to the whole property. If, by a fraud perpetrated upon her, which the defendants were cognizant of and participated in, as alleged, she has been prevented from asserting her right to dower by a suit at law, she is not thereby deprived of all remedy to recover it. The relief prayed for in this bill as amended does not necessarily follow from the facts alleged therein and admitted by the demurrer. The demurrer goes to the relief prayed; and, not being entitled to the relief, the bill must fail.

In the original bill, the relief claimed was based upon the admitted allegation that the quitclaim deed was voluntarily given, and accompanying it was a parol trust for the benefit of the grantor, known to the defendants at the time the property was mortgaged. This bill was held bad on demurrer, for the reason that such a trust as alleged could not be created and recognized, it being in violation of the laws governing uses and trusts, which were specially defined by the statutes of Minnesota. The amendments have changed the features of the bill, and it is doubtful whether they are proper; but I have overruled a motion to strike them from the files, and decided the demurrer upon the bill as amended. *Demurrer sustained.*

entered dismissing the bill, and the plaintiff appealed to this court.

Mr. Charles E. Flandrau and *Mr. Jeremiah Leaming* for appellant.

Mr. J. M. Gilman (with whom was *Mr. C. K. Davis* on the brief) for appellees.

I. The amended bill should be stricken from the files for the reason that the same is not in form, substance or effect an amendment to the original bill, but a new and different cause of action. A party cannot, under the privilege of amending, introduce matter which would constitute a new bill. *Snead* v. *McCoull*, 12 How. 407; *Shields* v. *Barrow*, 17 How. 130; *Pratt* v. *Bacon*, 10 Pick. 123; *Platt* v. *Squire*, 5 Cush. 551; *Verplanck* v. *Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Crabb* v. *Thomas*, 25 Alabama, 212; *Carey* v. *Smith*, 11 Georgia, 539; *Goodyear* v. *Brown*, 3 Blatchford, 266.

II. The amended bill makes no case entitling the complainant to any relief. The only interest she claims in the property is that of dower, and by virtue of that interest she seeks to redeem the mortgage upon the theory that it is necessary to do so in order to secure her dower interest. The mortgage and foreclosure proceedings were regular, legal and valid so far as respects the interest of Samuel J. Jones in the property, and cannot be disturbed by the plaintiff. If she has a dower interest in the property, she can proceed and recover it irrespectively of the mortgage or foreclosure. The interest of her husband, Robert H. Jones, was a legal, not merely an equitable interest, and she was not a party to the mortgage; and in such cases a widow need not redeem a mortgage in order to recover her dower interest, and will not be allowed to do so. *Messiter* v. *Wright*, 16 Pick. 151; *Davis* v. *Wetherell*, 13 Allen, 60; *S. C.* 90 Am. Dec. 177; *Whitcomb* v. *Sutherland*, 18 Illinois, 578; *Opdyke* v. *Bartles*, 11 N. J. Eq. (3 Stockton) 133. Where the mortgage is not binding and operative upon the widow, because she was not a party to it, or because it was

obtained by fraud, or for any other reason, she can have her dower regardless of the mortgage, and therefore will not be allowed to redeem it. And when a husband makes a deed to defraud his creditors, and without consideration, and his wife joins in the deed, she may still have dower in the premises as against the grantee and all persons claiming under him with notice. *Woodworth* v. *Paige*, 5 Ohio St. 70.

Upon the facts stated in the amended bill, the plaintiff could have proceeded and recovered her dower before the mortgage was given, notwithstanding her deed to her son; and Mrs. Van Doren stands in no better position, as she took the mortgage, according to the allegations of the bill, with full notice that Samuel J. Jones obtained the deed, from his mother by fraud, and without consideration. In other words, the dower right is anterior and superior to the mortgage and to all rights acquired under the same. The complainant, therefore, would not have been a proper party in the suit to foreclose the mortgage, and had she been made a party, the decree would not have barred or in any way affected her right of dower. *Lewis* v. *Smith*, 9 N. Y. 502; *S. C.* 61 Am. Dec. 706; *Bank* v. *Thomson*, 55 N. Y. 7.

Where land of a bankrupt is sold by order of court which declares that all liens and incumbrances shall be discharged by the sale, the dower right of the wife is not thereby cut off. *Porter* v. *Lazear*, 109 U. S. 84. If the mortgage or the foreclosure proceedings did in any way prejudice her dower rights, she could, in a proper suit, have the cloud or difficulty removed. *Burns* v. *Lynde*, 6 Allen, 305. But no such action is necessary. If she has a right of dower in the premises she seeks now to redeem from the mortgage, neither the mortgage nor the foreclosure proceedings cut off, or stand in the way of, or prejudice her right to a direct proceeding for the recovery of her dower.

III. The plaintiff is barred of her dower right by § 4, of c. 66, General Statutes of Minnesota of 1878, being the twenty year limitation clause against the recovery of real estate. *Seymour* v. *Carli*, 31 Minnesota, 81. As she bases her right to maintain the action upon her alleged right to dower in the premises, of course if she is barred of her right

to recover dower she cannot maintain this action. She alleges that her husband died in April, 1863. Her right to dower, and right to recover it, then and thereupon immediately accrued and became barred in twenty years. *Durham* v. *Angier*, 20 Maine, 242; *Jones* v. *Powell*, 6 Johns. Ch. 194; *Allen* v. *Allen*, 2 Penn. 310; *Conover* v. *Wright*, 2 Halst. Ch. (6 N. J. Eq.) 613; *S. C.* 47 Am. Dec. 213; *Tuttle* v. *Willson*, 10 Ohio, 24; *Kinsolving* v. *Pierce*, 18 B. Mon. 782; *Caston* v. *Caston*, 2 Rich. Eq. 1.

The bill alleges that plaintiff never resided in Minnesota, therefore she could never have been "seized or possessed" of the land, as required by the statute. It is also held that where the right of dower is not embraced in the statute of limitations, a court of equity will, by analogy to the statute, refuse relief where a party has slept upon her dower rights for twenty years without claiming it. *Ralls* v. *Hedges*, 1 Dana (Ky.) 407; 2 Scribner on Dower, 532.

IV. If the plaintiff ever had a right to redeem the land from the mortgage, she was barred of that right before the commencement of this action. Section 11 of the same chapter provides that, "Every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues," and it has repeatedly been held by our Supreme Court that the right to redeem and the right to foreclose a mortgage are reciprocal and commensurable, and that the right to redeem is therefore barred in ten years. *King* v. *Meighen*, 20 Minnesota, 264; *Parsons* v. *Noggle*, 23 Minnesota, 328.

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

The only difference between the original and amended bills is that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon an express trust for her, whereas the second alleges that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in

her favor. The other facts alleged in the two bills are substantially identical. Each bill proceeds upon the ground that the defendant Jones was a trustee for the plaintiff, and that the defendant Van Doren, taking the land from him with notice of all the facts, was affected by the trust; and the object of both bills is the same, to obtain the right of dower of which the plaintiff has been deprived by the acts of the defendants, and to which she was entitled under the laws of Minnesota in force at the time of her husband's death. Pub. Stat. 1849–1858, c. 36, §1.

The amendment was therefore one which the court in the exercise of its discretion might properly allow, and the motion to strike the amended bill from the files was rightly denied. *Hardin* v. *Boyd*, 113 U. S. 756.

But we are of opinion that the court erred in sustaining the demurrer to the amended bill.

One who by fraudulent misrepresentations obtains a conveyance from the owner of any interest in property, real or personal, is in equity a trustee *ex maleficio* for the person defrauded; and any one taking the property from such trustee with notice of the fraud and of the consequent trust is affected by the trust. *Tyler* v. *Black*, 13 How. 230; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Moore* v. *Crawford*, 130 U. S. 122. When a trustee, dealing with the trust property together with property of his own, as one mass, conveys part of the whole to a purchaser who takes it for value, in good faith, without notice of the fraud or of the trust, and who therefore acquires a good title, the question how far the rest of the property shall be charged with the trust, so as fully to indemnify the person defrauded, can only be determined in a court of equity.

In the present case, upon the facts alleged in the amended bill, and admitted by the demurrer, the defendant Jones obtained a conveyance of the plaintiff's dower interest by fraud, and held that interest in trust for her. The defendant Van Doren, taking the property with full notice, was equally affected by the fraud and bound by the trust. Parts of the property, having been conveyed to *bona fide* purchasers, were

beyond the reach of the plaintiff. Full, adequate and complete relief, either by awarding to the plaintiff her dower in the whole out of the part not so conveyed, or by awarding her dower in that part only, with damages for having been fraudulently deprived of her interest in the rest, could not be had in an action at law. The case made in the bill, therefore, by reason of the fraud, the trust, and the peculiar relief which the conduct of the defendants has made necessary to be given in order fully to indemnify the plaintiff, is clearly within the jurisdiction of a court of equity. *Herbert* v. *Wren*, 7 Cranch, 370.

The learned judge of the Circuit Court, in his opinion sustaining the demurrer to the amended bill, recognized that "the fraud alleged, which creates an impediment to a recovery at law, can be removed by a suit in equity and her dower obtained," and that "equity furnishes the most adequate and complete remedy, and dower is highly favored in that forum." The ground on which he declined to support the amended bill was that the plaintiff was not entitled to the specific relief prayed for.

It is true that the prayer of the bill, being apparently drawn upon the supposition that the plaintiff might be held bound by the mortgage, is chiefly directed towards securing a right to redeem. In that aspect of the case, she properly offered to redeem the whole property, by paying off the whole mortgage, because she could not, unless at the election of the mortgagee, redeem by paying less. *Collins* v. *Riggs*, 14 Wall. 491; *McCabe* v. *Bellows*, 7 Gray, 148. But the general object of the bill is to secure to the plaintiff the dower interest of which she has been defrauded, and the bill contains a prayer for general relief. This is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify. *English* v. *Foxall*, 2 Pet. 595; *Tayloe* v. *Merchants' Ins. Co.*, 9 How. 390; *Texas* v. *Hardenberg*, 10 Wall. 68.

What has been said furnishes an answer also to the argument that the plaintiff's right, if any, is barred by the statute of limitations. The plaintiff is not suing for her dower as such, the right to which accrued in 1863, but for property

of which she has been defrauded, and in such a case the statute of limitations begins to run only from the discovery of the fraud. *Moore* v. *Greene*, 19 How. 69; *Meader* v. *Norton*, 11 Wall. 442; *Cock* v. *Van Etten*, 12 Minnesota, 522; Minnesota Gen. Stat. 1878, c. 66, § 6, cl. 6.

Decree reversed, and case remanded, with directions to overrule the demurrer to the amended bill, and to take such further proceedings as may be consistent with this opinion.

MICHIGAN INSURANCE BANK *v.* ELDRED.

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

No. 239. Argued April 5, 8, 1889. — Decided May 13, 1889.

Even before the act of June 1, 1872, c. 255, a provision, in a state statute of limitations of personal actions, that a service of the summons, or its delivery to an officer with intent that it should be served, should be deemed a commencement of the action or equivalent thereto, was applicable, like the rest of the statute, to an action in the Circuit Court of the United States.

A provision in a statute of limitations, that a delivery of the summons to an officer, with the intent that it shall be actually served, shall be deemed equivalent to the commencement of the action, is satisfied if the summons made out by the clerk, pursuant to the attorney's direction, is placed by the clerk in a box in his office, designated by the officer, with the clerk's assent, as a place where processes to be served by him may be deposited and from which he usually takes them daily.

This was an action by a Michigan corporation against a citizen of Wisconsin upon a judgment recovered by the plaintiff against the defendant on May 13, 1862, in the Circuit Court for the county of Wayne and State of Michigan, for the sum of $4211.56, which the plaintiff now sued for, with interest. The defendant answered that the cause of action did not accrue within ten years.

At the trial, the plaintiff offered in evidence the *præcipe*, dated May 11, 1872, signed by its attorney, and directing the

clerk to issue a summons in this case, returnable according to law; and the summons issued by the clerk, bearing the same date, and returnable on the first Monday (which was the third day) of June, 1872; with the return of the marshal thereon, stating that he had served it on June 3, 1872.

The plaintiff's attorney testified that he prepared the *præcipe* on the day it bore date, and, when he had filled it up, filed it with the clerk, and then went immediately to the marshal's office, which was one story above the clerk's office in the same building, and told the marshal that there was in the clerk's office a summons in this case for service.

The clerk, who had been in office for more than five years before that day, being called as a witness, and asked as to the practice or habit of the marshal in respect to calling at the clerk's office for process, and as to the usual practice in the clerk's office as to making out and delivering a summons, testified as follows: "The marshal usually stopped at our office, on his way up and down stairs, and got such writs as were waiting for him. We had a box in which we usually placed them, so that he could stop in, open the door, and get them and take them up. The box stood on a bookcase near the door. That had been the custom for years; ever since I had been in the office." "Sometimes attorneys would wait until the process was issued, and take it and deliver it to the marshal; sometimes we would put it in his box, and the marshal would get it there." "I presume the summons must have been made out by me on May 11, 1872; I know of nothing to the contrary. The mark of filing on the *præcipe* for a summons is in my handwriting; it was filed May 11, 1872. I have no special recollection about that particular summons." "Our practice was to put writs in that box for the marshal. It was our practice to put them there the day when the writ was issued."

On cross-examination, he testified that he sometimes delivered processes to the attorney in the case to take to the marshal, and sometimes, if the marshal did not come down immediately, would take them up to him.

On reëxamination, he testified that the custom was to issue

the summons on the same day the *præcipe* was filed, and that he had no recollection of ever having neglected to do so.

The plaintiff requested the court to instruct the jury that "the delivery of the process to the marshal for serving may be inferred from the practice and course of business as to delivery of the summons by the clerk, or the practice of the marshal to receive the same in the office of the clerk."

The court declined to give this instruction, and directed a verdict for the defendant, which was returned. The plaintiff duly tendered a bill of exceptions and sued out this writ of error.

Mr. George P. Miller for plaintiff in error.

Mr. Alfred L. Cary (with whom was *Mr. F. C. Winkler* on the brief) for defendant in error.

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

The cause of action accrued May 13, 1862, when the judgment sued on was recovered; and the case turns upon the question whether the action was commenced within ten years afterwards.

As the facts relied on by the plaintiff to prevent the bar of the statute of limitations occurred in May, 1872, the question is not affected by the act of Congress of June 1, 1872, c. 255, § 5, requiring the practice, pleadings, and forms and modes of proceeding, in actions at law in the Circuit and District Courts of the United States, to conform, as near as may be, to those of the courts of record of the State. 17 Stat. 197; Rev. Stat. § 914.

Before the act of 1872, the form of mesne process and the forms and modes of proceeding in actions at law in the courts of the United States in Wisconsin were such as were used in the highest court of original jurisdiction of the State at the time of its admission into the Union in 1848. Acts of May 19, 1828, c. 68, 4 Stat. 278; August 6, 1846, c. 89, § 4, and

May 29, 1848, c. 50, 9 Stat. 57, 233; *United States* v. *Keokuk Council*, 6 Wall. 514.

But it had been settled by a series of decisions of this court that statutes of limitations, even in personal actions, including actions on judgments, were "laws of the several States" which, except where the constitution, treaties or statutes of the United States otherwise required or provided, must, under the Judiciary Act of September 24, 1789, c. 20, § 34, "be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92; Rev. Stat. § 721; *Beatty* v. *Burnes*, 8 Cranch, 98; *McCluny* v. *Silliman*, 3 Pet. 270; *Alabama Bank* v. *Dalton*, 9 How. 522; *Bacon* v. *Howard*, 20 How. 22; *Amy* v. *Dubuque*, 98 U. S. 470. Statutes of limitation of personal actions are laws affecting remedies only, and not rights, as is clearly shown by the decisions that the only statutes of limitations applicable to such an action are the statutes of the State where the action is brought, and not those of the State where the cause of action arose. *McElmoyle* v. *Cohen*, 13 Pet. 312; *Townsend* v. *Jemison*, 9 How. 407; *Walsh* v. *Mayer*, 111 U. S. 31. It was thus established that statutes of limitations of the State governed personal actions in the courts of the United States. Otherwise, in the absence of Congressional legislation, there would be no limitation of the time of bringing any personal action in a court of the United States.

The statute of Wisconsin upon this subject, in force in May, 1872, was chapter 138 of the Revised Statutes of 1858, entitled "Of the Limitation of Actions," the material provisions of which are as follows:

"Sec. 1. Civil actions can only be commenced within the periods prescribed in this chapter, except when in special cases a different limitation is prescribed by statute."

"Sec. 14. The periods prescribed in section one of this chapter for the commencement of actions, other than for the recovery of real property, shall be as follows:"

"Sec. 16. Within ten years: 1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States."

"SEC. 27. An action shall be deemed commenced as to each defendant, when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, where the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which the defendants, or one of them, usually or last resided." "But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days."

The first sentence of the last section, declaring that the service of the summons shall be deemed the commencement of the action, is embodied in the statute of limitations, and is as clearly a part of it as the second sentence of the section, declaring that an attempt to commence an action by delivery of the summons to an officer with intent that it shall be actually served shall be deemed equivalent to a commencement thereof. The words "within the meaning of this chapter" were fitly inserted in the second sentence, in order to make clear the intent of the legislature that this sentence laid down a rule applicable only to the limitation of actions; and were naturally omitted in the first sentence, because the rule therein laid down accorded with similar provisions in a previous chapter, entitled "Of the Manner of Commencing Civil Actions," c. 124, §§ 1, 11.

The legal construction and effect of § 27 of c. 138, taken in connection with the preceding sections of the same chapter, is that the service of the summons, or its delivery to an officer with intent that it shall be served, is the act by which the period of limitation must be computed; and the definition of that act is an integral part of the statute of limitations, and as such applicable, as the rest of the statute undoubtedly is, to actions in the courts of the United States.

But in order to come within the second sentence of that section, requiring the summons to be "delivered, with the intent that it shall be actually served, to the sheriff or other proper officer," it does not appear to us to be necessary that

there should be a manual delivery of the summons to the officer in person. It would be sufficient, for instance, if the attorney left it on the marshal's desk or other place in the marshal's office, so that the marshal would understand that it was left with him for service. It would be equally sufficient if the attorney, or the clerk acting by his direction, placed the summons in a box in the clerk's office, designated by the marshal, with the clerk's assent, as a place where processes to be served by him should be deposited, and from which he usually took them daily.

The defendant much relies on an opinion of the Supreme Court of Wisconsin, in which it was said that "the fact that the summons was not placed in the hands of an officer of the county in which the action was intended to be commenced would be fatal to the claim that there was an attempt to commence the action within the meaning of § 4240" of the Revised Statutes of 1878, corresponding to § 27 of c. 138 of the Revised Statutes of 1858. *Sherry* v. *Gilmore*, 58 Wisconsin, 324, 334. But in that case there was no service, or attempt to serve, except through the mail; and the court had not before it the question whether depositing a process in a place provided and designated by the officer was equivalent to putting it in his own hands.

In the case at bar, the testimony introduced by the plaintiff tended to show that the attorney filled out the *præcipe* to the clerk to issue the summons and filed the *præcipe* with the clerk on May 11, 1872, and immediately went to the marshal's office, one story above, in the same building, and told him there was in the clerk's office a summons in this case for service. The summons issued by the clerk bore date of the same day. The clerk testified that he presumed that the summons must have been made out on the day of its date, and knew nothing to the contrary; that his custom was to issue the summons on the same day the *præcipe* was filed, and he had no recollection of ever having neglected to do so; but had no personal recollection about this particular summons. He also testified that there was a box on a bookcase near the door in his office, where he usually placed such writs as were

waiting for the marshal, so that he could stop in, open the door, and get them and take them up, and he usually stopped on his way up and down stairs and got such writs; and that the practice of the clerk's office was to put writs in that box for the marshal on the day on which they were issued, but the clerk sometimes delivered processes to the attorney to take to the marshal, and sometimes, if the marshal did not come down immediately, took them up to him.

Upon this testimony, the questions, whether the box in the clerk's office had been duly designated by the marshal as a place where processes to be served by him should be deposited, and whether the summons in this case was either deposited by the clerk in that box, or delivered by him to the marshal, within ten years after May 13, 1862, when the cause of action accrued, were not questions of law for the court, but questions of fact, which should have been submitted to the jury. The court therefore erred in not giving the instruction requested, and in directing the jury to return a verdict for the defendant.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

HILL *v.* HARDING.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 253. Submitted April 16, 1889. — Decided May 13, 1889.

If an attachment of property in an action in a state court is dissolved by the defendant's entering into a recognizance, with sureties, to pay, within ninety days after any final judgment against him, the amount of that judgment; and the defendant, after verdict against him, obtains his discharge in bankruptcy upon proceedings commenced more than four months after the attachment; the Bankrupt Act does not prevent the state court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties.

Statement of the Case.

THIS was an action of assumpsit, commenced by Harding and others against Hill in an inferior court of the State of Illinois, in accordance with the statutes of the State, by attachment of the defendant's real estate. The attachment was dissolved, in accordance with those statutes, by the defendant giving bond, or, more strictly speaking, entering into a recognizance, with sureties, conditioned to pay to the plaintiffs "the amount of the judgment and costs which may be rendered against him in this suit on a final trial hereof, within ninety days after such judgment shall be rendered." After verdict for the plaintiffs, and before judgment thereon, and on proceedings in bankruptcy commenced more than four months after the attachment, the defendant was adjudged a bankrupt under the Bankrupt Act of the United States, and applied to the state court, under § 5106 of the Revised Statutes, for a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. The application was denied, and judgment rendered against the defendant on the verdict, and upon a bill of exceptions, stating these facts, that judgment was affirmed by the Supreme Court of the State. 93 Illinois, 77. Upon a former writ of error, this court reversed the judgment of that court, and remanded the case to it for further proceedings, upon the ground that the defendant was entitled to the stay applied for, without considering the question whether the court in which the suit was pending might, after the defendant had obtained his discharge in bankruptcy, render a special judgment in favor of the plaintiffs for the purpose of charging the sureties on the recognizance given to dissolve the attachment. 107 U. S. 631, 635.

The case was then remanded by the Supreme Court of Illinois to the inferior court with a direction that, upon its satisfactorily appearing that the defendant since the verdict had obtained his discharge in bankruptcy, a judgment should be entered for the plaintiff and against the defendant upon the verdict, with a perpetual stay of execution. The inferior court thereupon denied a motion of the defendant for leave to file a formal plea setting up his discharge in bankruptcy; admitted in evidence a copy of that discharge, offered by the plaintiff

Argument for Plaintiff in Error.

and objected to by the defendant as not duly verified; refused the defendant's request for a trial by jury on the question of his discharge in bankruptcy; denied a motion to enter a judgment in his favor, releasing him from all liability subsequent to the commencement of the proceedings in bankruptcy, on account of all causes of action involved in this suit; and ordered judgment on the verdict, pursuant to the mandate of the Supreme Court of the State, with a perpetual stay of execution. Upon a bill of exceptions the judgment and order were affirmed by the Supreme Court of Illinois. 116 Illinois, 92. The defendant sued out this writ of error.

Mr. George W. Brandt for plaintiff in error.

I. The courts of Illinois proceeded in hostility to the decision of the Supreme Court of the United States in this case, and erred in refusing plaintiff in error leave to file a plea of his discharge in bankruptcy, and in entering a judgment against him for the purpose of depriving him of the benefit of his discharge as a bankrupt. *Page* v. *Bussell*, 2 M. & S. 551; *Taylor* v. *Mills*, Cowp. 525; *Paul* v. *Jones*, 1 T. R. 599; *Welsh* v. *Welsh*, 4 M. & S. 333; *Buel* v. *Gordon*, 6 Johns. 126; *Woodard* v. *Herbert*, 24 Maine, 358; *Ellis* v. *Ham*, 28 Maine, 385; *Hankin* v. *Bennett*, 8 Exch. 107; *Hinton* v. *Acraman*, 2 C. B. 367; *Eastman* v. *Hibbard*, 54 N. H. 504; *McMullen* v. *Bank of Penn. Township*, 2 Penn. St. 343; *Cake* v. *Lewis*, 8 Penn. St. 493; *Wells* v. *Mace*, 17 Vermont, 503; *Comfort* v. *Eisenbeis*, 11 Penn. St. 13; *Haddens* v. *Chambers*, 2 Dall. 236; *Page* v. *Cole*, 123 Mass. 93; *Carpenter* v. *Turrell*, 100 Mass. 450; *Hamilton* v. *Bryant*, 114 Mass. 543; *Barnstable Savings Bank* v. *Higgins*, 124 Mass. 115; *Denny* v. *Merrifield*, 128 Mass. 228; *Lincoln* v. *Leshure*, 132 Mass. 40; *McKay* v. *Funk*, 37 Iowa, 661; *Bratton* v. *Anderson*, 5 South Carolina, 504; *Bank of Clinton* v. *Taylor*, 120 Mass. 124; *Payne* v. *Able*, 7 Bush, 344; *Martin* v. *Kilbourn*, 12 Heiskell, 331; *Odell* v. *Wootten*, 38 Georgia, 224; *Wolf* v. *Stix*, 99 U. S. 1; *Empire Fire Ins. Co.* v. *Real Estate Trust Co.*, 1 Bradwell, 391; *Drake* v. *Drake*, 83 Illinois, 526.

II. Sureties are favorites in law, and no intendments will be made against them. *Law* v. *East India Co.*, 4 Ves. 824; *Lang* v. *Pike*, 27 Ohio St. 498; *Kingsbury* v. *Westfall*, 61 N. Y. 356; *Stull* v. *Hana*, 62 Illinois, 52; *People* v. *Tompkins*, 74 Illinois, 482; *Pickersgill* v. *Lahens*, 15 Wall. 140; *Risley* v. *Brown*, 67 N. Y. 160; *Weaver* v. *Shyrock*, 6 S. & R. 262; *Kennedy* v. *Carpenter*, 2 Wharton, 344, 362; *Towne* v. *Ammidown*, 20 Pick. 535; *Wood* v. *Fisk*, 63 N. Y. 245.

III. A surety is under no moral obligation to pay the debt of his principal. *Winston* v. *Fenwick*, 4 Stew. & Porter (Ala.) 269; *Harrison* v. *Field*, 2 Wash. (Va.) 136; *Van Derveer* v. *Wright*, 6 Barb. 547.

IV. The Circuit Court erred in admitting in evidence the alleged certificate of Hill's discharge in bankruptcy. *Baldwin* v. *Hale*, 17 Johns. 272; *Griswold* v. *Sedgwick*, 1 Wend. 126; *Brackett* v. *The People*, 64 Illinois, 170.

V. There was no verdict on which a judgment could be entered. *Boynton* v. *Ball*, 105 Illinois, 627.

Mr. John M. Glover and *Mr. William H. Barnum* for defendants in error.

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

The question presented by this writ of error is quite distinct from that which arose when the case was before this court at a former term, as reported in 107 U. S. 631. The only point then decided was that the defendant, on his application made after verdict and before judgment, was entitled to a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. The question not then passed upon, and now presented, is whether, since he has obtained his discharge in bankruptcy, there is anything in the provisions of the Bankrupt Act to prevent the state court from rendering judgment on the verdict against him, with a perpetual stay of execution, so as to prevent the plaintiffs from enforcing the judgment against him, and leave them at liberty to proceed against the sureties in the bond or recognizance

given to dissolve an attachment made more than four months before the commencement of the proceedings in bankruptcy.

Such attachments being recognized as valid by the Bankrupt Act (Rev. Stat. § 5044) a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt, to be levied only upon the property attached. *Peck* v. *Jenness*, 7 How. 612, 623; *Doe* v. *Childress*, 21 Wall. 642. When the attachment has been dissolved, in accordance with the statutes of the State, by the defendant's entering into a bond or recognizance, with sureties, conditioned to pay to the plaintiffs, within a certain number of days after any judgment rendered against him on a final trial, the amount of that judgment, the question whether the state court is powerless to render even a formal judgment against him for the single purpose of charging such sureties, or, in the phrase of Chief Justice Waite in *Wolf* v. *Stix*, 99 U. S. 1, 9, whether "the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed," depends not upon any provision of the Bankrupt Act, but upon the extent of the authority of the state court under the local law. Whether that authority is exercised under the settled practice of the court, as in Illinois, or only by virtue of an express statute, as in Massachusetts, there is nothing in the Bankrupt Act to prevent the rendering of such a judgment. The bond or recognizance takes the place of the attachment as a security for the debt of the attaching creditors; they cannot dispute the election, given to the debtor by statute, of substituting the new security for the old one; and the giving of the bond or recognizance, by dissolving the attachment, increases the estate to be distributed in bankruptcy. The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of that provision of the Bankrupt Act which declares that "no discharge shall

release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise." Rev. Stat. § 5118; *In re Albrecht*, 17 Bankr. Reg. 287; *Hill* v. *Harding*, 116 Illinois, 92; *Barnstable Savings Bank* v. *Higgins*, 124 Mass. 115.

If the bond was executed before the commencement of proceedings in bankruptcy, the discharge of the bankrupt protects him from liability to the obligees, so that, in an action on the bond against him and his sureties, any judgment recovered by the plaintiffs must be accompanied with a perpetual stay of execution against him; but his discharge does not prevent that judgment from being rendered generally against them. *Wolf* v. *Stix*, above cited. If the sureties should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal the amount so paid (which is a point not now in issue), it would be because his liability to them upon such a claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy nor barred by the discharge, and consequently would not be affected by any provision of the Bankrupt Act.

The courts of Illinois, in the judgment rendered in this case, having assumed the validity of the defendant's discharge in bankruptcy, he has not been prejudiced by the rulings denying leave to file after verdict a formal plea of the discharge in bankruptcy, and admitting in evidence an unverified copy of the discharge, and refusing his request for a trial by jury upon that issue.

Judgment affirmed.

APPENDIX.

I.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

ORDER.

It is now here ordered by the court that Rule 57 of the Rules of Practice in Admiralty be, and the same is hereby, amended so as to read as follows:

57.

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libelled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libelled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

Promulgated April 22, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

ORDER.

It is now here ordered by the court that Section 2 of Rule 26 of the rules of this court be, and the same is hereby, amended so as to read as follows:

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

May 13, 1889.

II.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

ORDER.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court, among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, JOSEPH P. BRADLEY, Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, JOHN M. HARLAN, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, SAMUEL F. MILLER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

May 13, 1889.

INDEX.

CONTRIBUTORY NEGLIGENCE.

CORPORATION.

COUNTY COURT.

COURT AND JURY.

See CONSTITUTIONAL LAW, 1;
CONTRIBUTORY NEGLIGENCE;
CRIMINAL LAW.

COVENANT.

A purchaser of land, taking a conveyance from the vendor, with a covenant for peaceable possession, cannot maintain an action for its rental value from the date of conveyance until placed in actual possession, in consequence of being kept out by a trespasser: since he might have required the delivery of such possession to accompany the conveyance and the payment of the purchase money. *Andrus* v. *St. Louis Smelting Co.*, 643.

CRIMINAL LAW.

A statute of Utah provided that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; *Held*, (1) That the authority given to substitute imprisonment at hard labor in the penitentiary for life for the punishment by death, when the accused is found guilty of murder in the first degree, depends upon a previous recommendation to that effect by the jury; (2) that when a person is on trial charged with the commission of murder in the first degree, it is the duty of the court to inform the jury of their right, under the statute, to recommend imprisonment for life at hard labor in the place of the punishment of death; and that failure to do so is error. *Calton* v. *Utah*, 83.

See JURISDICTION, A, 8.

CUSTOMS DUTIES.

1. When there is a general finding in favor of the plaintiff on the issues of fact raised by the pleadings in an action for the recovery of duties illegally exacted, the facts must be taken to be as alleged by him in the pleadings. *Badger* v. *Cusimano*, 39.
2. Since the enactment of § 7 of the act of March 3, 1883, c. 121, 22 Stat. 488, 523, the value of an importation of goods is to be ascertained for the purpose of customs duties by their actual market value, without reference to the "charges" specified in §§ 2907, 2908, Rev. Stat.; and it appearing in this case that under an appraisement of imported oranges, the invoiced value of such "charges" was reduced, and the amount of such reduction added to the invoiced value of the fruit, although such invoice value represented its true market value; *Held*, that such addition to the true invoice value was illegal, and that the power of the collector to make it was apart from any question of fraud in the appraisement, and could be raised in an action at law when the importer had taken such steps as entitled him to bring suit for the recovery of the duties so illegally exacted. *Ib.*

DAMAGES.

See LOCAL LAW, 13, 14, 15.

DISTRICT OF COLUMBIA.

EQUITY OF REDEMPTION.

See MORTGAGE, 1, 2, 3.

EQUITY PLEADING.

See LOCAL LAW, 11.

ESTOPPEL.

The constitution of Colorado imposed a limit upon the power of municipal corporations to contract debts. The legislature authorized county commissioners (a vote of the tax-payers first being had) to issue bonds of the county, not to exceed the amount of the floating debt, that amount to be ascertained by the commissioners, no reference being made in the statute to the constitutional limitation. The commissioners of Lake County settled the amount of the floating debt of the county at $500,000, which was in excess of the constitutional limitation, and issued bonds to that amount, in which reference was made to the statute, and in which it was "certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." *Held*, that the county was not estopped to deny that the bond was issued in violation of the provisions of the constitution. *Lake County* v. *Graham*, 674.

EVIDENCE.

1. In the absence of a provision of statute in Montana respecting the manner of authenticating a copy of the certificate of incorporation of a corporation of a State, filed in the records of a county of Montana, the certificate of the original custodian in the State of origin, under his seal of office, is a sufficient authentication. *Hammer* v. *Garfield Mining and Milling Co.*, 291.
2. In an action to recover for goods sold and delivered, a copy of an itemized account of them may be handed to a witness to refresh his memory in regard to the matters contained in it. *New York and Colorado Mining Syndicate* v. *Fraser*, 611.
3. Evidence that a witness is familiar enough with gold mills to know what they can perform and what they can earn, but that he has only seen one silver mill, being the one in controversy, lays no foundation for his testimony as to the fair rental value of that silver mill. *Ib.*
4. In the absence of other and better evidence, the rental value of a silver mill may be shown by proof of the amount of ore delivered and milled. *Ib.*
5. The declarations of the defendant's agent as to matters within the scope of his authority were properly admitted in evidence. *Ib.*

See DAMAGES, 3;

MINERAL LAND, 4.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

C. JURISDICTION OF TERRITORIAL COURTS.

D. JURISDICTION OF THE COURT OF CLAIMS.

LONGEVITY PAY.

The time of the service of a cadet in the Military Academy at West Point is to be regarded as a part of the time he served in the army within the meaning of the act of July 5, 1838, 5 Stat. 256, and should be counted in computing his longevity pay; and in an action to recover that pay he is entitled to judgment for so much of the amount thereon thus computed as is not barred by the statute of limitations. *United States* v. *Watson*, 80.

MARITIME LAW.

See ADMIRALTY.

MASTER AND SERVANT.

See CONTRIBUTORY NEGLIGENCE.

MECHANICS' LIEN.

A statute of Texas, passed in 1879, gave a lien for wages to mechanics and laborers, on a railroad, prior to all other liens, and authorized its enforcement, in a suit, by a judgment for the sale of the railroad, and provided that it should not be necessary to make other lien-holders defendants, but that they might intervene and become parties. It did not provide for any notice by publication. In 1882, a railroad in Texas was mortgaged to secure bonds. In 1884, a creditor of the railroad company holding such labor claims, in a suit against it alone, in a court of the State, obtained a judgment for his claim and lien, and for the sale of the railroad. In a suit afterwards brought by a bondholder, in the Circuit Court of the United States, to have the rights of the creditors of the company ascertained, and a receiver appointed, it was referred to a master to report on the priority of claims. The creditor by judgment presented his claim; it was objected to by the bondholder as fraudulent and embracing amounts not covered by the statutory lien. The master reported that the claim included amounts which were not a lien, as well as amounts which were, but did not separate them; that the claim was a valid one against the company, but that it was not a lien entitled to priority. The court, on exceptions, awarded priority of lien to the claim, for the full amount of the judgment; *Held*, (1) The bondholders were not bound by the judgment rendered in a suit to which they were not made parties; (2) as the claims of the creditor originated after the mortgage was made, he was bound to prove affirmatively, before the master, the existence and priority of his lien; (3) the evidence before the master did not sustain the lien for the whole amount; (4) the proceeding in the state court could not be sustained as one *in rem*, because the adverse claimants did not have even constructive notice of it; (5) the claim was founded wholly on the statute of Texas; (6) it was proper that the claim should be reëxamined before a master. *Hassall* v. *Wilcox*, 493.

MINERAL LAND.

See PUBLIC LAND, 5, 6.

MORTGAGE.

See LOCAL LAW, 3.

PILOT.

See ADMIRALTY, 7.

PLEDGE.

See BANKER'S LIEN.

PRACTICE.

1. Between the time when the Process Act of May 8, 1792, 1 Stat. 275, went into effect, and the passage of the act of June 1, 1872, 17 Stat. 196, (Rev. Stat. § 914,) it was always in the power of the Federal courts, by general rules, to adapt their practice to the exigencies and conditions of the times; but since the passage of the latter act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject, and prescribed a rule. *Amy* v. *Watertown*, (No. 1,) 301.
2. When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations. *Ib.*
3. Unless the fact upon which a reversal of a judgment is claimed appears in the record sufficiently to be passed upon, the judgment will not be reversed. *N. Y. and Colorado Mining Syndicate* v. *Fraser*, 611.
4. Where the certificate to the transcript of a record, on a writ of error, did not comply with subdivision 1 of Rule 8, and the record was not complete, not containing the pleadings, so that, under subdivision 3 of Rule 8, this court could not hear the case, it was not dismissed, because it had been submitted on both sides, on the merits, and the defendant in error had not moved to dismiss it for non-compliance with the rules, although more than three years had elapsed since the filing of the transcript, but leave was given to the plaintiff in error to sue out a writ of *certiorari*, to bring up the omitted papers. *Redfield* v. *Parks*, 623.

See APPEAL, 1, 8; EQUITY, 3; CUSTOMS DUTIES, 1; JURISDICTION, A, 10, 11, 13.

PUBLIC LAND.

1. No portion of the public domain, unless it be in special cases, not affecting the general rule, is open to sale until it has been surveyed, and an approved plat of the township embracing the land has been returned to the local land office. *Buxton* v. *Traver*, 232.
2. A settler upon public land, in advance of the public surveys, acquires no estate in the land which he can devise by will, or which, in case of his death intestate, will pass to his heirs at law, until, within the specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys

RAILROAD.

RECEIVER'S CERTIFICATES.

It is immaterial whether the receiver's certificates, which are in controversy in this suit were properly issued to the appellee, for the reason that: (1) it is apparent that the order of the state court under which they were issued was the result of an agreement between the parties to this suit; and (2) if they should be held to be invalid the appellee could not be restored to the rights under the decree of the state court which he surrendered for them. *Central Trust Co.* v. *Seasongood*, 482.

REMOVAL OF CAUSES.

A petition for removal which alleges the diverse citizenship of the parties in the present tense is defective, and if it does not appear in the record that such diversity also existed at the commencement of the action, the cause will be remanded to the Circuit Court with directions to send it back to the state court, with costs against the party at whose instance the removal was made. *Stevens* v. *Nichols*, 230.

SALARY.

Under §§ 823 and 839 of the Revised Statutes, the clerk of a District Court in the Territory of Utah is not entitled, for his personal compensation,

B. STATUTES OF THE UNITED STATES.

C. STATUTES OF STATES AND TERRITORIES.

STEAMBOAT INSPECTION.

TAX AND TAXATION.

1. The legislature of New Jersey, by a statute, enacted that a "poor farm," belonging to the city of New Brunswick, and situated in the township of North Brunswick, should be at all times thereafter liable and subject to taxation by that township so long as it should be embraced within its limits. Subsequently, it was enacted by a statute, that the property of the cities of the State, and all land used exclusively for charitable purposes should be exempt from taxation, and that all inconsistent acts were repealed. The "poor farm" was used exclusively for charitable purposes; *Held*, (1) The provision of the first statute was repealed; (2) the legislature could constitutionally repeal the power of taxation given by the first statute; (3) the first statute did not create a contract between the State and the township, the obligation of which could not be constitutionally impaired by its repeal. *Williamson* v. *New Jersey*, 189.
2. The power of taxation on the part of a municipal corporation is not private property, or a vested right of property in its hands; but the conferring of such power is an exercise by the legislature of a public and governmental power which cannot be imparted in perpetuity, and is always subject to revocation, modification and control, and is not the subject of contract. *Ib.*
3. Legislative immunity from taxation is a personal privilege, not transferable, and not to be extended beyond the immediate grantee, unless otherwise so declared in express terms. *Picard* v. *East Tennessee, Virginia and Georgia Railroad*, 637.
4. Immunity from taxation does not pass to the purchaser at a sale of "the property and franchises of a railroad corporation" to enforce a