UNITED STATES REPORTS

VOLUME 132

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1889

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1890

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.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.[1]

WILLIAM HENRY HARRISON MILLER, Attorney General.
ORLOW W. CHAPMAN, Solicitor General.[2]
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Justice Brewer's commission was dated December 18, 1889. The oath of office was administered to him in open court, January 6, 1890, and he immediately took his seat upon the bench. He took part in no decision reported in this volume.

[2] Mr. Jenks having resigned, Mr. Chapman was commissioned on the 29th day of May, 1889, and qualified the same day. On the 7th January, 1890, he was confirmed by the Senate and was recommissioned. He died in the city of Washington on the morning of Sunday, January 19, 1890.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

	PAGE
Akers, Hale *v.*	554
Alabama State Board of Assessment, Western Union Telegraph Company *v.*	472
Allen, Brown *v.*	27
Allen, Jackson *v.*	27
Anthony *v.* Louisville and Nashville Railroad Company	172
Aron *v.* Manhattan Railway Company	84
Avery *v.* Cleary	604
Ayers *v.* Watson	394
Bachrack *v.* Norton	337
Barlow, United States *v.*	271
Bennett, McGillin *v.*	445
Bernheim, Roemer *v.*	103
Blake, Richmond *v.*	592
Board of Levee Commissioners of the Yazoo Mississippi Delta, Yazoo and Mississippi Valley Railroad Company *v.*	190
Bolles, Smith *v.*	125
Boylan *v.* Hot Springs Railroad Company	146
Bradbury, Idaho and Oregon Land Improvement Company *v.*	509
Bradbury, Robertson *v.*	491
Bradley *v.* Claflin	379
Brown *v.* Allen	27
Brown *v.* Rank	216
Brush *v.* Condit	39
Campbell *v.* Wade	34
Carr *v.* United States	644

Table of Cases.

PAGE

Chamberlain, Continental Life Insurance Company *v.* 304
Chanute City *v.* Trader 210
Chicago and Alton Railroad Company, Missouri Pacific Railway Company *v.* 191
Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, Watson *v.* 161
Claflin, Bradley *v.* 379
Clarendon Township, Young *v.* 340
Clayton *v.* Utah Territory 632
Cleary, Avery *v.* 604
Cleary *v.* Ellis Foundry Company 612
Cleaveland *v.* Richardson 318
Cleveland *v.* King 295
Condit, Brush *v.* 31
Continental Life Insurance Company *v.* Chamberlain . 304
Corbin, First National Bank of Chicago *v.* 571
Corbin, Graves *v.* 571
Cross *v.* North Carolina 131
Cullum, Paul *v.* 539

Dahl *v.* Montana Copper Company 264
Dahl *v.* Raunheim 260
Davis, United States *v.* 334
Day *v.* Fairhaven and Westville Railway Company . 98
Dent *v.* Ferguson 50
District of Columbia, Metropolitan Railroad Company *v.* 1
Dravo *v.* Fabel 487
Dunlap *v.* Texas and Pacific Railway Company . . 662

Edelhoff, Robertson *v.* 614
Ellis Foundry Company, Cleary *v.* 612
Emken, Marchand *v.* 195
Ethell, Winters *v.* 207
Excelsior Coal Company, Oregon Improvement Company *v.* 215

Fabel, Dravo *v.* 487
Fairhaven and Westville Railway Company, Day *v.* . 98

Table of Cases.

PAGE

Ferguson, Dent *v.* 50
First National Bank of Charlotte *v.* Morgan . . . 141
First National Bank of Chicago *v.* Corbin . . . 571
Forbes Lithographic Company *v.* Worthington . . 655
Frank Brothers Company, Robertson *v.* 17
Fritts *v.* Palmer 282

Gerdan, Robertson *v.* 454
Glendenning, Robertson *v.* 158
Glenn *v.* Sumner 152
Gomila, Rio Grande Railroad Company *v.* 478
Graham, Patrick *v.* 627
Graves *v.* Corbin 571
Greene *v.* Taylor 415

Hale *v.* Akers 554
Harshman, Knox County *v.* 14
Hastings and Dakota Railroad Company *v.* Whitney . 357
Headley, Roemer *v.* 313
Hill, Scotland County *v.* 107
Hill *v.* Sumner 118
Hill *v.* Wooster 693
Hoffheimer, Klein *v.* 367
Hot Springs Railroad Company, Boylan *v.* 146
Hume *v.* United States 406
Hume, United States *v.* 406

Idaho and Oregon Land Improvement Company *v.* Bradbury 509

Jack *v.* Utah Territory 643
Jackson *v.* Allen 27
Jenkinson, Roemer *v.* 313

Keystone Manganese and Iron Company *v.* Martin . 91
King, Cleveland *v.* 295
Klein *v.* Hoffheimer 367
Knox County *v.* Harshman 14
Kupper, Roemer *v.* 313

Table of Cases.

PAGE

Louisville and Nashville Railroad Company, Anthony *v.* 172
Louisville and Nashville Railroad Company *v.* Wangelin 599

McGillin *v.* Bennett 445
Malin, Pacific Express Company *v.* 531
Manhattan Railway Company, Aron *v.* 84
Marchand *v.* Emken 195
Martin, Keystone Manganese and Iron Company *v.* . 91
Merritt, Pickhardt *v.* 252
Merritt *v.* Tiffany 167
Metropolitan Railroad Company *v.* District of Columbia 1
Miller, Pennsylvania Railroad Company *v.* 75
Miller *v.* Texas and Pacific Railway Company . . 662
Missouri Pacific Railway Company *v.* Chicago and Alton Railroad Company 191
Montana Copper Company, Dahl *v.* 264
Morgan, First National Bank of Charlotte *v.* . . . 141
Muller *v.* Norton 501

Newcombe, Vane *v.* 220
North Carolina, Cross *v.* 131
Norton, Bachrack *v.* 337
Norton, Muller *v.* 501

Oregon Improvement Company *v.* Excelsior Coal Company 215

Pacific Express Company *v.* Malin 531
Palmer, Fritts *v.* 282
Parker's Administrator, Young *v.* 267
Parks, Redfield *v.* 239
Patrick *v.* Graham 627
Paul *v.* Cullum 539
Peddie, Roemer *v.* 313
Pennie *v.* Reis 464
Pennsylvania Railroad Company *v.* Miller . . . 75
Pickhardt *v.* Merritt 252

Table of Cases.

PAGE

Rahn, Singer Manufacturing Company *v.* 518
Raimond *v.* Terrebonne Parish 192
Rank, Brown *v.* 216
Raunheim, Dahl *v.* 260
Redfield *v.* Parks 239
Reis, Pennie *v.* 464
Richardson, Cleaveland *v.* 318
Richmond *v.* Blake 592
Rio Grande Railroad Company *v.* Gomila 478
Rio Grande Railroad Company *v.* Vinet 565
Robertson *v.* Bradbury 491
Robertson *v.* Edelhoff 614
Robertson *v.* Frank Brothers Company 17
Robertson *v.* Gerdan 454
Robertson *v.* Glendenning 158
Robertson *v.* Rosenthal 460
Roemer *v.* Bernheim 103
Roemer *v.* Headley 313
Roemer *v.* Jenkinson 313
Roemer *v.* Kupper 313
Roemer *v.* Peddie 313
Rosenthal *v.* Robertson 460
Roth, Royer *v.* 201
Royer *v.* Roth 201

Schofield, United States *v.* 337
Scotland County *v.* Hill 107
Singer Manufacturing Company *v.* Rahn 518
Smith *v.* Bolles 125
Sugg *v.* Thornton 524
Sumner, Glenn *v.* 152
Sumner, Hill *v.* 118

Taylor, Greene *v.* 415
Terrebonne Parish, Raimond *v.* 192
Texas and Pacific Railway Company, Dunlap *v.* . . . 662
Texas and Pacific Railway Company, Miller *v.* . . . 662
Texas and Pacific Railway Company, Worrall *v.* . . . 662

Table of Cases.

PAGE

Thomas, Yazoo and Mississippi Valley Railroad Company *v.* 174
Thompson *v.* White Water Valley Railroad Company . 68
Thornton, Sugg *v.* 524
Tiffany, Merritt *v.* 167
Trader, Chanute City *v.* 210

United States *v.* Barlow 271
United States, Carr *v.* 644
United States *v.* Davis 334
United States *v.* Hume 406
United States, Hume *v.* 406
United States *v.* Schofield 337
Utah Territory, Clayton *v.* 632
Utah Territory, Jack *v.* 643

Vane *v.* Newcombe 220
Vinet, Rio Grande Railroad Company *v.* 565

Wade, Campbell *v.* 34
Wangelin, Louisville and Nashville Railroad Company *v.* 599
Watson, Ayers *v.* 394
Watson *v.* Cincinnati, Indianapolis, St. Louis and Chicago Railway Company 161
Western Union Telegraph Company *v.* Alabama State Board of Assessment 472
White Water Valley Railroad Company, Thompson *v.* 68
Whitney, Hastings and Dakota Railroad Company *v.* . 357
Winters *v.* Ethell 207
Wooster, Hill *v.* 693
Worrall *v.* Texas and Pacific Railway Company . 662
Worthington, Forbes Lithographic Company *v.* . . . 655

Yazoo and Mississippi Valley Railroad Company *v.* Board of Levee Commissioners of the Yazoo Mississippi Delta 190

Table of Cases.

PAGE

Yazoo and Mississippi Valley Railroad Company *v.* Thomas 174
Young *v.* Clarendon Township 340
Young *v.* Parker's Administrator 267

APPENDIX 703
Address of Chief Justice Fuller before both Houses of Congress, December 11, 1889, at the joint meeting to commemorate the inauguration of George Washington as First President of the United States 705
IN MEMORIAM, ORLOW W. CHAPMAN 735
INDEX 737

TABLE OF CASES

CITED IN OPINIONS.

	PAGE
Adams County *v.* Burlington & Missouri Railroad, 112 U. S. 123	565
Aikin *v.* Wasson, 24 N. Y. 482	236
Alaska, The, 130 U. S. 201	213
Alexander *v.* Stern, 41 Texas, 193	531
Anderson County *v.* Beal, 113 U. S. 227	626
Andrews *v.* Pond, 13 Pet. 65	117
Anthony *v.* County of Jasper, 101 U. S. 693	348, 352, 355
Armstrong *v.* Dalton, 4 Devereux, Law, 568	11
Armstrong *v.* Toler, 11 Wheat. 258	67
Aron *v.* Metropolitan Railway Co., 26 Fed. Rep. 314	88
Arthur *v.* Davies, 96 U. S. 135	661
Arthur *v.* Homer, 96 U. S. 137	160
Arthur *v.* Jacoby, 103 U. S. 667	661
Arthur *v.* Lahey, 96 U. S. 112	159
Arthur *v.* Moller, 97 U. S. 365	659
Arthur *v.* Morgan, 112 U. S. 495	626
Arthur *v.* Rheims, 96 U. S. 143	661
Arthur *v.* Zimmerman, 96 U. S. 124	623, 626
Avery *v.* Cleary, 132 U. S. 604	613, 614
Ayers *v.* Chicago, 101 U. S. 184	210, 270, 587
Badger *v.* Cusimano, 130 U. S. 39	26
Bagnell *v.* Broderick, 13 Pet. 436	245
Bailey *v.* Glover, 21 Wall. 342	609, 610, 611
Baldwin *v.* Peet, 22 Texas, 708; *S. C.* 75 Am. Dec. 806	508
Baltimore & Susquehanna Railroad *v.* Nesbit, 10 Hun, 395	83
Bank of Alexandria *v.* Dyer, 14 Pet. 141	9
Bank of Bethel *v.* Pahquioque, 14 Wall. 383	145
Bank of Louisville *v.* Young, 37 Missouri, 398	117
Barnard *v.* Gibson, 7 How. 650	93, 95
Barnes *v.* District of Columbia, 91 U. S. 540	6, 8, 303
Barney *v.* Latham, 103 U. S. 205	591
Bartle *v.* Coleman, 4 Pet. 184	66
Basey *v.* Gallagher, 20 Wall. 670	516
Baxter *v.* Wales, 12 Mass. 365	412
Bayley *v.* Taber, 5 Mass. 285; *S. C.* 4 Am. Dec. 57	353
Baylies *v.* Travellers' Insurance Co., 113 U. S. 316	515
Beatty's Administrators *v.* Burnes' Administrators, 8 Cranch, 98	13
Beebe *v.* Russell, 19 How. 283	93, 95
Beer Co. *v.* Massachusetts, 97 U. S. 25	83
Bennett *v.* McGillin, 28 Fed. Rep. 411	451
Berry *v.* Donley, 26 Texas, 737	690
Bevans *v.* United States, 13 Wall. 56	626
Bible Society *v.* Grove, 101 U. S. 610	271
Blitz *v.* Brown, 7 Wall. 693	512
Bolt *v.* Rogers, 3 Paige, 154	64, 66
Bond *v.* Dustin, 112 U. S. 604	156
Boston, Concord &c. Railroad Co. *v.* The State, 32 New Hampshire, 215	84
Bostwick *v.* Brinkerhoff, 106 U. S. 3	93, 96
Bradbury *v.* Idaho & Oregon Land Improvement Co., 10 Pacific Rep. 620	512
Bragg *v.* Fitch, 121 U. S. 478	317
Branin *v.* Connecticut & Passumpsic Railroad Co., 31 Vermont, 214	83
Breemer *v.* Burgess, 2 Wash. Ter. 290	218
Brewster *v.* Wakefield, 22 How. 118	515
Brinkerhoff *v.* Brown, 6 Johns. Ch. 139	586
Bronson *v.* Railroad Co., 2 Black, 528	93, 197
Brooks *v.* Clark, 119 U. S. 502	589
Brooks *v.* Martin, 2 Wall. 70	67

PAGE

Brown *v.* Atwell, 92 U. S. 327 565
Brown *v.* District of Columbia, 130 U. S. 87 701
Brown *v.* Hazard, 2 Wash. Ter. 464 218
Brown *v.* United States, 113 U. S. 568 366
Buck *v.* Colbath, 3 Wall. 334 481, 482
Burdette *v.* Corgan, 26 Kansas, 102 529
Burnett *v.* Sullivan, 58 Texas, 535 531
Burr *v.* Des Moines Co., 1 Wall. 99 194
Butler *v.* Manchester, Sheffield &c. Railway, 21 Q. B. D. 207 152
Calhoun County *v.* American Emigrant Co., 93 U. S. 124 354
Cambria Iron Co. *v.* Ashburn, 118 U. S. 54 271
Canal Co. *v.* Gordon, 6 Wall. 561 515
Cannon *v.* Pratt, 99 U. S. 619 515
Cardington *v.* Fredericks, 46 Ohio St. 302
Carey *v.* Barrett, 4 C. P. Div. 379 332
Carroll *v.* Green, 92 U. S. 509 13
Carroll *v.* Safford, 3 How. 441 361
Cartridge Co. *v.* Cartridge Co., 113 U. S. 624 317
Chaffe, Syndic, *v.* Scheen, 34 La. Ann. 684 391
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 84
Chateaugay Iron Co., Petitioner, 128 U. S. 544 192
Chouteau *v.* Gibson, 111 U. S. 200 565
Christ Church *v.* Philadelphia, 24 How. 300 84
Churchill *v.* Chicago & Alton Railroad, 67 Illinois, 390 151
Cincinnati *v.* Evans, 5 Ohio St. 594 11
Cincinnati *v.* First Presbyterian Church, 8 Ohio, 298; *S. C.* 32 Am. Dec. 718 11
Citizens' Bank *v.* Board of Liquidation, 98 U. S. 140 565
Claflin *v.* Lisso, 26 Fed. Rep. 420 388
Claiborne County *v.* Brooks, 111 U. S. 400 347
Coler *v.* Cleburne, 131 U. S. 162 349
Coffin *v.* Ogden, 18 Wall. 120 49
Colter *v.* Frese, 45 Indiana, 96 235
Commissioners of Douglas County *v.* Bolles, 94 U. S. 104 116
Conley *v.* Nailor, 118 U. S. 127 489
Cook *v.* Federal Life Association, 74 Iowa, 746 309
Cooper Manufacturing Co. *v.* Ferguson, 113 U. S. 727 288
Corbin *v.* Boies, 18 Fed. Rep. 3 589

PAGE

County of Callaway *v.* Foster, 93 U. S. 567 112
County of Cass *v.* Gillett, 100 U. S. 585 112
County of Henry *v.* Nicolay, 95 U. S. 619 112
County of Ralls *v.* Douglass, 105 U. S. 728 112, 113
County of Schuyler *v.* Thomas, 98 U. S. 169 112
County of Scotland *v.* Thomas, 94 U. S. 682 111
Covell *v.* Heyman, 111 U. S. 176 482
Cowell *v.* Springs Co., 100 U. S. 55 293
Cox *v.* Bray, 28 Texas, 247 684
Craighead *v.* Nilson, 18 How. 199 93, 95
Crater *v.* Binninger, 33 N. J. Law, 513; *S. C.* 97 Am. Dec. 737 130
Crawford *v.* Heysinger, 123 U. S. 589 317
Crehore *v.* Ohio & Mississippi Railroad Co., 131 U. S. 240 34, 271, 590
Crescent Brewing Co. *v.* Gottfried, 128 U. S. 158 200
Crocker *v.* Marine National Bank, 101 Mass. 200 145
Cromwell *v.* County of Sac, 96 U. S. 51 116
Cross *v.* De Valle, 1 Wall. 1 293
Cunningham *v.* Norton, 125 U. S. 77 338, 505
Cutler *v.* How, 8 Mass. 257 412
Cutler *v.* Hurlbut, 29 Wisconsin, 152 251
Cutler *v.* Johnson, 8 Mass. 266 412
Dahl *v.* Raunheim, 132 U. S. 260 265
Dainese *v.* Kendall, 119 U. S. 53 93, 96
Dambman *v.* Schulting, 75 N. Y. 55; 85 N. Y. 622 329, 330
Davies *v.* Corbin, 113 U. S. 687 213
Davis *v.* Alvord, 94 U. S. 545 514, 515
Davis *v.* Fredericks, 104 U. S. 618 514
Day *v.* Fair Haven &c. Railway, 23 Fed. Rep. 189 99
Day *v.* Fair Haven Railway Co., 132 U. S. 98 701
De Saussure *v.* Gaillard, 127 U. S. 216 565
Detroit City Railway *v.* Guthard, 114 U. S. 133 565
Dillon *v.* Barnard, 21 Wall. 430 470
District of Columbia *v.* Washington & Georgetown Railroad Co., 4 Mackey, 214 3
Double-Pointed Tack Co. *v.* Two Rivers Mf'g Co., 109 U. S. 117 206
Dravo *v.* Fabel, 25 Fed. Rep. 116 489

PAGE

Drennen *v.* London Assurance Co., 113 U. S. 51; 116 U. S. 461 550
Dreyfus *v.* Searle, 124 U. S. 60 200, 206
Duncan *v.* Pennsylvania Railroad Co., 94 Penn. St. 435 84
Dundee Harbour Trustees *v.* Dougall, 1 Macqueen H. L. Cas. 317 12
Earl of Chesterfield *v.* Jansen, 2 Ves. Sen. 125 411
East Tennessee Railroad *v.* Grayson, 119 U. S. 240 589, 602
Edmonson *v.* Bloomshire, 7 Wall. 306 512
Eilers *v.* Boatman, 111 U. S. 356 515
Elliott *v.* Peirsol, 1 Pet. 328 690
Ely *v.* New Mexico Railroad, 129 U. S. 291 513
Evans *v.* Erie County, 66 Penn. St. 222 12
Evans *v.* Pike, 118 U. S. 241 157
Fargo *v.* Michigan, 121 U. S. 230 473
Farmington *v.* Pillsbury, 114 U. S. 138 590
Fay *v.* Cordesman, 109 U. S. 408 166, 317
Feibelman *v.* Packard, 109 U. S. 421 338
Fellows *v.* Fellows, 4 Cowen, 682; *S. C.* 15 Am. Dec. 412 587
Ferris *v.* Higley, 20 Wall. 375 640
Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 84
Fidelity Insurance Co. *v.* Huntington, 117 U. S. 280 270, 588
Fitzgerald *v.* Turner, 43 Texas, 79 690
Fitzsimmons *v.* Chipman, 37 Mich. 139 130
Fletcher *v.* Hamlet, 116 U. S. 408 271
Foote *v.* Arthur, U. S. C. C. So. Dist. N. Y. 1880 (unreported) 459
Forbes *v.* Moffatt, 18 Ves. 384 389
Forgay *v.* Conrad, 6 How. 201 93, 97
Fortier *v.* New Orleans Bank, 112 U. S. 439 293
Fox *v.* Ohio, 5 How. 410 139
Frankford Railway *v.* The City, 58 Penn. St. 119; *S. C.* 98 Am. Dec. 242 83
Freeman *v.* Dawson, 110 U. S. 264 484
Freeman *v.* Howe, 24 How. 450 481, 482
Frisbie *v.* Whitney, 9 Wall. 187 38
Fritts *v.* Palmer, 132 U. S. 282 267
Gage *v.* Herring, 107 U. S. 640 166
Gardner *v.* Herz, 118 U. S. 180 701
Galveston Company *v.* Cowdrey, 11 Wall. 459 74
Garsed *v.* Beall, 92 U. S. 684 516

PAGE

Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174 84
Gibson *v.* Chouteau, 13 Wall. 92 246, 247
Gibson *v.* Chouteau, 39 Missouri, 536 246
Giffard *v.* Hort, 1 Sch. & Lef. 386 672
Gifford *v.* Helms, 98 U. S. 248 441, 442
Gilman *v.* City of Sheboygan, 2 Black, 510 84
Gomer *v.* Chaffee, 6 Colorado, 314 251
Goodyear Dental Vulcanite Co. *v.* Davis, 102 U. S. 222 317
Gould *v.* Oliver, 2 Man. & Gr. 208; *S. C.* 2 Scott, N. R. 241 157
Governeur *v.* Robertson, 11 Wheat. 332 293
Graham *v.* Meyer, 99 N. Y. 611 330
Grant *v.* Phœnix Insurance Co., 106 U. S. 429 93, 96
Graves *v.* Corbin, 132 U. S. 571 603
Gray *v.* Howe, 108 U. S. 12 515
Green County *v.* Conness, 109 U. S. 104 112
Greer *v.* Tweed, 13 Abb. Pr. N. S. 427 412
Gurney *v.* Atlantic & Great Western Railway, 58 N. Y. 358 237
Hale *v.* Akers, 69 California, 160 562
Hall *v.* Macneale, 107 U. S. 90 49
Hancock *v.* Holbrook, 119 U. S. 586 271
Harshman *v.* Bates County, 92 U. S. 569 347
Hartranft *v.* Langfeld, 125 U. S. 128 623, 626
Hastings & Dakota Railway Co. *v.* Whitney, 34 Minn. 538 360
Hecht *v.* Boughton, 105 U. S. 235 514, 515
Hendrick *v.* Lindsay, 93 U. S. 143 626
Hendy *v.* Miners' Iron Works, 127 U. S. 370 206, 701
Hepburn *v.* Ellzey, 2 Cranch, 445 9
Hill *v.* Moore, 62 Texas, 610 685
Hinckley *v.* Morton, 103 U. S. 764 213
Hitz *v.* Jenks, 123 U. S. 297 690
Hodges *v.* Easton, 106 U. S. 408 515
Holland *v.* Shipley, 127 U. S. 396 701
Hollister *v.* Benedict Mf'g Co., 113 U. S. 59 200
Horne *v.* Walton, 117 Illinois, 130, 141 130
Hovey *v.* McDonald, 109 U. S. 150 16
Humiston *v.* Stainthorp, 2 Wall. 106 93, 95
Hyde *v.* Stone, 20 How. 170 485
Indianapolis Railroad *v.* Horst, 93 U. S. 291 192

PAGE

Insurance Co. *v.* Mahone, 21 Wall. 152 309
Insurance Co. *v.* Wilkinson, 13 Wall. 222 309
Iron Silver Mining Co. *v.* Reynolds, 124 U. S. 374 262
Jackson *v.* Allen, 132 U. S. 27 591
James *v.* Morgan, 1 Levinz, 111 411, 412, 413
Jefferson *v.* Driver, 117 U. S. 272 270
Jenkins *v.* Loewenthal, 110 U. S. 222 565
Jennings *v.* Great Northern Railway, L. R. 1 Q. B. 7 151
Johnson *v.* Bryan, 62 Texas, 623 690
Johnson *v.* Harmon, 94 U. S. 371 516
Jones *v.* Guaranty and Indemnity Co., 101 U. S. 622 293
Jones *v.* Habersham, 107 U. S. 174 293

Kansas City &c. Railroad Co. *v.* Alderman, 47 Missouri, 349 112
Kansas Pacific Railroad *v.* Atchison Railroad, 112 U. S. 414 366
Kansas Pacific Railway *v.* Dunmeyer, 113 U. S. 629 361, 364
Kellogg & Co. *v.* Muller, 68 Texas, 182 507
Kelly *v.* Milan, 127 U. S. 139 347
Kelly *v.* Solari, 9 M. & W. 54 281, 651
Kennebunkport *v.* Smith, 22 Maine, 445 11
Keystone Manganese & Iron Co. *v.* Martin, 132 U. S. 91 210
King Bridge Co. *v.* Otoe Co., 120 U. S. 225 590
Knight *v.* McDouall, 12 Ad. & El. 438 157
Kost *v.* Bender, 25 Michigan, 515 117
Laidly *v.* Huntington, 121 U. S. 179 589
Lammers *v.* Niosen, Sup. Ct. Rep. Lawyers' Ed. Book 25, 562 490
Leggett *v.* Avery, 101 U. S. 256 317
Leland *v.* Stone, 10 Mass. 459 412
Leloup *v.* Port of Mobile, 127 U. S. 640 473, 475, 477
Leonard *v.* Ozark Land Co., 115 U. S. 465 16
Lindsey *v.* Miller's Lessee, 6 Pet. 666 244
Linnehan *v.* Rollins, 127 Mass. 123 524
Little *v.* Giles, 118 U. S. 596 589, 602
Livingston County *v.* Portsmouth Bank, 128 U. S. 102 112
Looney *v.* Adamson, 48 Texas, 619 690
Lovejoy *v.* Whipple, 18 Vermont, 379; *S. C.* 46 Am. Dec. 157 353, 355
Lukins *v.* Aird, 6 Wall. 78 68

PAGE

Lyon *v.* Robbins, 46 Illinois, 279 388
McArthur *v.* Scott, 113 U. S. 340 671
McBlair *v.* Gibbes, 17 How. 232 67
McCluny *v.* Silliman, 3 Pet. 270 13
McGarrahan *v.* Mining Co., 96 U. S. 316 349, 353
McGimpsey *v.* Ramsdale, 3 Texas, 344 376
McKinley *v.* Wheeler, 130 U. S. 630 266
McManus *v.* O'Sullivan, 91 U. S. 578 565
McMasters *v.* Mills, 30 Texas, 591 693
Mahn *v.* Harwood, 112 U. S. 354 317
Mallory *v.* Hitchcock, 29 Conn. 127 389
Mansfield &c. Railroad *v.* Swan, 111 U. S. 379 590
Marchand *v.* Emken, 26 Fed. Rep. 629; 23 Blatchford, 435 198
Marchand *v.* Emken, 132 U. S. 195 701
Marin *v.* Lalley, 17 Wall. 14 515
Marshall *v.* Hubbard, 117 U. S. 419 626
Martinton *v.* Fairbanks, 112 U. S. 670 194
Marvin *v.* McCullom, 20 Johns. 288 353
Mason *v.* Crowder, 85 Missouri, 526 251
Maxwell *v.* Griswold, 10 How. 242 21
Mayor of Baltimore *v.* Lefferman, 4 Gill, 425; *S. C.* 45 Am. Dec. 145 333
Menasha *v.* Hazard, 102 U. S. 81 112
Meyers *v.* Croft, 13 Wall. 291 293
Micas *v.* Williams, 104 U. S. 556 213
Miller *v.* Sherry, 2 Wall. 249 388
Missouri Pacific Railway *v.* Humes, 115 U. S. 512 83
Montclair *v.* Ramsdell, 107 U. S. 147 117
Moore *v.* Brown, 11 How. 414 250
Moore *v.* Illinois, 14 How. 13 139
Moores *v.* National Bank, 104 U. S. 625 157
Morgan *v.* Gay, 19 Wall. 81 515
Morisey *v.* Bunting, 1 Dev. 3 157
Mornyer *v.* Cooper, 35 Iowa, 257 117
Morris *v.* Brinler, 14 Texas, 285 682
Morton *v.* Folger, 15 California, 275 401, 405
Mosher *v.* St. Louis, Iron Mountain &c. Railway, 127 U. S. 390 151
Mott *v.* Pennsylvania Railroad Co., 30 Penn. St. 9; *S. C.* 72 Am. Dec. 664 80
Mulford *v.* Peterson, 35 N. J. Law (6 Vroom), 127 389

PAGE

Munger *v.* Lenroot, 32 Wisconsin, 541 236
Murdock *v.* City of Memphis, 20 Wall. 590 564, 565
Mutual Life Insurance Co. *v.* Baker, 94 U. S. 610 309
National Bank *v.* Matthews, 98 U. S. 621 291, 293
National Bank *v.* Whitney, 103 U. S. 99 291
Nelson *v.* Vermont & Canada Railroad Co., 26 Vermont, 717; *S. C.* 62 Am. Dec. 614 83
Neslin *v.* Wells, 104 U. S. 428 515
New Albany *v.* Burke, 11 Wall. 96 356
Newhall *v.* Sanger, 96 U. S. 761 365
New Jersey Mutual Life Insurance Co. *v.* Baker, 94 U. S. 610 309
Newman *v.* Arthur, 109 U. S. 132 257
New Orleans *v.* Construction Co., 129 U. S. 45 213
New Orleans Waterworks Co. *v.* Louisiana Sugar Refinery Co., 125 U. S. 18 565
Newton *v.* Commissioners, 100 U. S. 548 83, 84
New York Life Insurance Co. *v.* Fletcher, 117 U. S. 519 309
New York & New Haven Railroad *v.* Schuyler, 17 N. Y. 192; 34 N. Y. 30 587
Norris *v.* Jackson, 9 Wall. 125 194
North Pennsylvania Railroad *v.* Commercial Bank, 123 U. S. 727 626
Norton, *Ex parte*, 108 U. S. 237 93
Noyes *v.* Mantle, 127 U. S. 348 262
Oberteuffer *v.* Robertson, 116 U. S. 499 26
Pacific Postal Telegraph Co. *v.* O'Connor, 128 U. S. 394 537
Palmyra, The, 10 Wheat. 502 93
Parker *v.* Spencer, 61 Texas, 155 684
Parsons *v.* Robinson, 122 U. S. 112 93, 96
Pattee Plow Co. *v.* Kingman, 129 U. S. 294 701
Payne *v.* Hook, 7 Wall. 425 485
Peevy *v.* Hurt, 32 Texas, 146 684
Peninsula Iron Co. *v.* Stone, 121 U. S. 631 589
Pennington *v.* Philadelphia, Wilmington &c. Railroad, 62 Maryland, 95 151
Pennoyer *v.* Neff, 95 U. S. 714 531
Pennsylvania Railroad Co. *v.* Duncan, 111 Penn. St. 352 78
Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1 473, 475
Perkins *v.* Fourniquet, 6 How. 206 93, 94

PAGE

Petrie *v.* Pennsylvania Railroad, 13 Vroom, 449 151
Phelps *v.* Harris, 101 U. S. 370 123
Philadelphia & Reading Railroad *v.* Derby, 14 How. 468 523
Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326 473
Phillips *v.* Moore, 100 U. S. 208 293
Pickering *v.* McCullough, 104 U. S. 310 49
Pinson *v.* Kirsh, 46 Texas, 26 538
Pirie *v.* Tvedt, 115 U. S. 41 601
Planters' Bank *v.* Union Bank, 16 Wall. 483 67
Plumb *v.* Woodmansee, 34 Iowa, 116 538
Plymouth Mining Co. *v.* Amador Canal Co., 118 U. S. 264 589, 601, 602
Pomace Holder Co. *v.* Ferguson, 119 U. S. 335 206, 701
Port of Mobile *v.* Leloup, 76 Alabama, 401 475
Porter *v.* Pittsburg Steel Co., 122 U. S. 267 74, 117
Prout *v.* Roby, 15 Wall. 471 516
Providence Bank *v.* Billings, 4 Pet. 514 84
Provident Institution for Savings, *In re*, 9 Cushing, 604 83
Pulliam *v.* Christian, 6 How. 209 93, 94
Pumpelly *v.* Green Bay Co., 13 Wall. 166 83
Quinby *v.* Conlan, 104 U. S. 420 516
Rabasse *v.* Police Jury of Terrebonne Parish, 30 La. Ann. 287 195
Radich *v.* Hutchins, 95 U. S. 210 333
Railroad Co. *v.* Durant, 95 U. S. 576 67
Railroad Co. *v.* Hanning, 15 Wall. 649 523, 524
Railroad Co. *v.* Hecht, 95 U. S. 168 83
Railroad Co. *v.* Swasey, 23 Wall. 405 93, 95
Railway Co. *v.* Sayles, 97 U. S. 554 316
Randall *v.* Howard, 2 Black, 585 64
Ratterman *v.* Western Union Tel. Co., 127 U. S. 411 473, 475, 476
Rawitzky *v.* Louisville & Nashville Railroad, 40 La. Ann. 47 151
Ray *v.* Law, 3 Cranch, 179 93, 96
Rector *v.* Ashley, 6 Wall. 142 249
Regina *v.* Turner, 11 Cox Crim. Cas. 551 524
Reynolds *v.* Crawfordsville Bank, 112 U. S. 405 292
Reynolds *v.* Iron Silver Mining Co., 116 U. S. 687 262

PAGE

Riggs *v.* Johnson County, 6 Wall. 166 482
Roberts *v.* Lane, 64 Maine, 108 117
Rosenthal *v.* Walker, 111 U. S. 185 610
Rowe *v.* Heath, 23 Texas, 614 691
Royer *v.* Chicago Mf'g Co., 20 Fed. Rep. 853 206
Royer *v.* Roth, 132 U. S. 201 701
Russell *v.* Roberts, 3 E. D. Smith, 318 412
St. Charles County *v.* Powell, 22 Missouri, 525 11
St. Louis, Iron Mountain &c. Railroad *v.* Southern Express Co., 108 U. S. 24 93, 98
St. Paul Fire and Marine Insurance Co. *v.* Shaver, 76 Iowa, 282 310
Sanger *v.* Overmier, 64 Texas, 57 531
Sargent *v.* Hall Safe & Lock Co., 114 U. S. 63 173
Scheen *v.* Chaffe, 36 La. Ann. 217 390, 392
School District of Ackley *v.* Hall, 106 U. S. 428 213
Schwabacker *v.* Riddle, 84 Illinois, 517 130
Scotland County *v.* Hill, 112 U. S. 183 113
Scott *v.* United States, 12 Wall. 443 412
S. C. Tryon, The, 105 U. S. 267 213
Selden *v.* Equitable Trust Co., 94 U. S. 419 596, 597
Sewing Machine Cases, 18 Wall. 553 271
Sheboygan Co. *v.* Parker, 3 Wall. 93 347
Sheehy *v.* Hinds, 27 Minnesota, 259 251
Shepard *v.* Carrigan, 116 U. S. 593 317
Shoat *v.* Walker, 6 Kansas, 65 251
Siebold, *Ex parte*, 100 U. S. 371 139
Slaughter House Cases, 10 Wall. 273 16
Slingerland *v.* Bennett, 66 N. Y. 611 130
Sloane *v.* Anderson, 117 U. S. 275 601
Slocum *v.* Catlin, 22 Vermont, 137 389
Smelting Co. *v.* Kemp, 104 U. S. 636 261
Smith *v.* Bourbon County, 127 U. S. 105 355
Smith *v.* Clark County, 54 Missouri, 58 112
Smith *v.* Shelley, 12 Wall. 358 292
Snider *v.* Methwin, 60 Texas, 487 683
Snow *v.* Lake Shore Railway Co., 121 U. S. 617 317

PAGE

Snow *v.* United States, 18 Wall. 317 641
Solomon *v.* Arthur, 102 U. S. 208 160
Southwestern Railroad *v.* Paulk, 24 Georgia, 356 84
Spraul *v.* Louisiana, 123 U. S. 516 17
State *v.* County Court of Sullivan Co., 51 Missouri, 522 112
State *v.* Macon County Court, 41 Missouri, 453 112
State, *ex rel.* Barlow *v.* Dallas County, 72 Missouri, 329 112
State, *ex rel.* Wilson *v.* Garroutte, 67 Missouri, 445 112
Stephenson *v.* Brooklyn Crosstown Railroad Co., 114 U. S. 149 167, 701
Stevens *v.* Nichols, 130 U. S. 230 34, 271, 590
Stone *v.* Brown, 54 Texas, 330 684
Story *v.* Black, 119 U. S. 235 514
Stout *v.* Board of Commissioners, 107 Indiana, 343 235
Strickland *v.* Turner, 7 Exch. 208 282
Stringfellow *v.* Cain, 99 U. S. 610 515
Sutter *v.* Robinson, 119 U. S. 530 317
Swift Co. *v.* United States, 111 U. S. 22 21, 23
Swope *v.* Leffingwell, 105 U. S. 3 214, 292
Taylor *v.* Taintor, 16 Wall. 366 485
Taylor *v.* Ypsilanti County, 105 U. S. 60 356
Telegraph Co. *v.* Texas, 105 U. S. 460 473, 475, 476
Texas & St. Louis Railroad *v.* McCaughey, 62 Texas, 271 531
Thatcher Heating Co. *v.* Burtis, 121 U. S. 286 206
Thompson *v.* Boisselier, 114 U. S. 1 167, 701
Thornborough *v.* Whiteacre, 6 Mod. 305; *S. C. sub nom.* Thornborrow *v.* Whitacre, 2 Ld. Raym. 1164 412, 413
Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535 589, 601
Thorpe *v.* Rutland & Burlington Railroad, 27 Vermont, 140; *S. C.* 62 Am. Dec. 625 83
Townsend *v.* Crowdy, 8 C. B. N. S. 477 282
Townsend *v.* Miller, 7 La. Ann. 632 388
Traer *v.* Clews, 115 U. S. 528 610
Trustees of Kentucky Seminary *v.* Payne, 3 T. B. Monroe, 161 251
Tucker *v.* Ferguson, 22 Wall. 527 84
Turner *v.* Farmers' Loan & Trust Co., 106 U. S. 552 590

PAGE

Tutton *v.* Viti, 108 U. S. 312 169
United States *v.* Barlow, 132 U. S. 271 414, 651
United States *v.* Burlington &c. Railroad Co., 98 U. S. 334 366
United States *v.* Carey, 110 U. S. 51 538
United States *v.* Davis, 131 U. S. 36 335
United States *v.* Johnston, 124 U. S. 236 493
United States *v.* Marigold, 9 How. 560 139
United States *v.* Moore, 95 U. S. 760 366
United States *v.* Ross, 92 U. S. 281 653
United States *v.* Thompson, 98 U. S. 486 249
Utley &c. *v.* Clark-Gardner Mining Co., 4 Col. 369 290
Vannevar *v.* Bryant, 21 Wall. 41 271
Vicksburg, Shreveport & Pacific Railway Co. *v.* Dennis, 116 U. S. 665 185, 189
Wakefield *v.* Fargo, 90 N. Y. 213 236
Walbrun *v.* Babbitt, 16 Wall. 577 626
Walker *v.* Dreville, 12 Wall. 440 515
Walker *v.* Turner, 9 Wheat. 541 250
Wallace *v.* McConnell, 13 Pet. 136 485
Walston *v.* Nevin, 128 U. S. 578 213
Ward *v.* Churn, 18 Grattan, 801; *S. C.* 48 Am. Dec. 749 353
Warren *v.* Shook, 91 U. S. 704 596
Waterson *v.* Devoe, 18 Kansas, 223 251
Watson *v.* Cincinnati Railway Co., 132 U. S. 161 701
Watt *v.* Starke, 101 U. S. 247 516
Weir *v.* McGee, 25 Texas, Supplement, 20 405
Wells *v.* Supervisors, 102 U. S. 625 347

PAGE

Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530 473, 475, 476
Western Union Tel. Co. *v.* State, 55 Texas, 314 475
Western Union Tel. Co. *v.* State Board of Assessment, 80 Alabama, 273 474
Wheeler *v.* Sage, 1 Wall. 518 64
Whitaker *v.* Freeman, 1 Dev. 270 157
White *v.* Dunbar, 119 U. S. 47 317
White *v.* Latimer, 12 Texas, 61 693
Whiteside *v.* United States, 93 U. S. 247 414
Whiting *v.* Bank of the United States, 13 Pet. 6 93, 96
Whitney *v.* Cook, 99 U. S. 607 213
Wickersham *v.* Reeves, 1 Iowa, 413 389
Wilcox *v.* Jackson, 13 Pet. 498 360
Williams *v.* Nottawa, 104 U. S. 209 590
Wilson *v.* Riddle, 123 U. S. 608 516
Wilson *v.* Watts, 9 Gill, 356 64
Windham *v.* Patty, 62 Texas, 490 340
Winthrop Iron Co. *v.* Meeker, 109 U. S. 180 93, 98
Wisner *v.* Brown, 122 U. S. 214 442
Witherspoon *v.* Duncan, 4 Wall. 210 361
Wofford *v.* McKinna, 23 Texas, 36; *S. C.* 76 Am. Dec. 53 251
Wooster *v.* Hill, 22 Fed. Rep. 830 697
Yale Lock Co. *v.* Greenleaf, 117 U. S. 544 701
Yazoo & Mississippi Valley Railroad Co. *v.* Thomas, 132 U. S. 174 190
Yonley *v.* Lavender, 21 Wall. 276 484
Yosemite Valley Case, 15 Wall. 77 38
Young *v.* Parker's Administrator, 132 U. S. 267 589
Zeckendorf *v.* Johnson, 123 U. S. 617 515

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1789, Sept. 4, 1 Stat. 76, c. 20... 143
1801, Feb. 27, 2 Stat. 103, c. 15... 4
1801, March 3, 2 Stat. 115, c. 25.. 4
1802, May 3, 2 Stat. 195, c. 53.... 4
1812, July 1, 2 Stat. 771, c. 117.. 5
1820, May 15, 3 Stat. 583, c. 104, 5
1846, July 30, 9 Stat. 47.....457, 458
1848, May 17, 9 Stat. 223, c. 42.. 5
1850, Sept. 9, 9 Stat. 453, c. 51, 636, 638
1853, March 2, 10 Stat. 175, c. 90, 639
1861, Feb. 28, 12 Stat. 174, c. 59, 639
1861, March 2, 12 Stat. 190, c. 68, 160, 457, 458, 618, 619, 620, 660
1861, March 2, 12 Stat. 241, c. 86, 639
1861, Aug. 6, 12 Stat. 320, c. 62.. 5
1862, July 1, 12 Stat. 489, c. 120, 365
1862, July 14, 12 Stat. 551, c. 163, 160, 457, 458, 462, 618, 621, 623
1863, Feb. 24, 12 Stat. 665, c. 56, 639
1863, March 3, 12 Stat. 799..... 5
1863, March 3, 12 Stat. 811, c. 117, 639
1864, March 21, 13 Stat. 35..... 360
1864, May 26, 13 Stat. 88, c. 95.. 639
1864, June 3, 13 Stat. 99, c. 106, 143, 144
1864, June 30, 13 Stat. 202, c. 171, 160, 253, 619, 621, 623, 660
1864, June 30, 13 Stat. 251, c. 173, 593, 596, 597
1864, July 1, 13 Stat. 326, c. 190, 2
1864, July 2, 13 Stat. 356, c. 216.. 365
1865, March 3, 13 Stat. 472..... 597
1865, March 3, 13 Stat. 536, c. 119, 2
1866, July 4, 14 Stat. 87, c. 168, 357, 358
1866, July 13, 14 Stat. 115, c. 184, 593
1866, July 24, 14 Stat. 221...473, 477
1866, July 28, 14 Stat. 330, c. 298, 492
1867, Feb. 5, 14 Stat. 386..... 564
1867, March 2, 14 Stat. 518, c. 176, 607
1867, March 2, 14 Stat. 558, c. 196, 270

PAGE

1868, July 25, 15 Stat. 180, c. 235, 639
1870, July 14, 16 Stat. 264, c. 255, 253, 463
1871, Feb. 21, 16 Stat. 419, c. 62, 6, 7
1872, June 1, 17 Stat. 197, c. 255.. 490
1872, June 6, 17 Stat. 256, c. 315, 593
1874, April 7, 18 Stat. 27, c. 80, 218, 513, 515
1874, June 20, 18 Stat. 116, c. 337, 7
1875, Feb. 8, 18 Stat. 307, c. 36, 593, 621
1875, Feb. 18, 18 Stat. 316, c. 80, 144
1875, March 3, 18 Stat. 470, c. 137, 584, 590, 591, 601
1878, June 11, 20 Stat. 102, c. 180, 7
1882, July 12, 22 Stat. 162, c. 290, 145
1883, March 3, 22 Stat. 488, c. 121, 25, 26, 158, 160, 254, 455, 458, 463, 492, 493, 494, 495, 499, 500, 615, 616, 617, 621, 622, 624, 658, 659, 660
1885, March 3, 23 Stat. 443, c. 355, 636
1887, March 3, 24 Stat. 505.. 334, 335
1887, March 3, 24 Stat. 555..... 591
1889, Feb. 25, 25 Stat. 693..... 591

Revised Statutes.

§ 563..... 143
§ 629..... 143
§ 709..... 564
§ 711.....138, 143
§ 914.....156, 490
§ 997..... 512
§ 1007..... 17
§ 1857.....636, 637
§ 1868..... 513
§ 2031..... 336
§ 2293..... 360
§ 2308..... 365
§ 2499.....257, 258, 626
§ 2502...158, 254, 455, 458, 463, 615, 617, 624, 658, 660
§ 2503..... 254

PAGE

Rev. Stat. (*cont.*)
§ 2504.....168, 253, 455, 458, 463, 620, 623
§ 2505..... 458
§ 2906.....25, 26
§ 2907.....25, 26, 492, 494
§ 2908..... 492, 494
§ 2921..... 500
§ 2926.....497, 499
§ 2927..... 500
§ 3407.....593, 594
§ 3408.....593, 598
§ 3849..... 653
§ 3960..... 277

PAGE

Rev. Stat. (*cont.*)
§ 3961.....277, 279
§ 4057.....277, 279, 651
§ 4915..... 698
§ 5057.....440, 607, 609
§ 5136..... 290
§ 5137..... 290
§ 5197..... 142
§ 5198.....142, 144
§ 5209.....136, 137
§ 5263–5268..... 473
§ 5418.....138, 139
§ 5479..... 138

(B.) Statutes of States and Territories, and of the District of Columbia.

Alabama.
1884, Dec. 12..... 474
1885, Feb. 17..... 473

Arkansas.
Mansfield's Digest, § 4471... 250
§ 4475... 250

California.
1889, March 4..... 469

Colorado.
Gen. Stat. 1883, c. 19, § 260, 285, 287, 288, 293
§ 261.....285, 287
§ 262..... 289

District of Columbia.
Davis's Laws, D. C..... 4

Idaho.
Code of Civil Procedure (1881), c. 48..... 510
§ 138..... 513
§ 139..... 513
§ 230..... 513
§ 309..... 513
§ 353..... 513
§ 361.....515, 516
§ 389..... 515
§ 815..... 513
§ 826..... 513

Indiana.
1877, March 13.....233, 237
1879, March 8..... 234
1883, March 6.....235, 237, 238
Rev. Stat. 1881, § 5286.....233, 234, 235, 237
§ 5293..... 234
§ 5471..... 234
Elliott's Supplement, 1889, §§ 1688, 1690.....237, 238
Rev. Stat. 1873, § 647..... 235

Iowa.
1880, March 31, c. 211..... 309

Louisiana.
Code, § 3319 (3287)..... 389
§ 3347..... 390
§ 3349..... 390

Maryland.
1715, April, c. 23 (1 Kilty's Laws)..... 10
1789, incorporating Georgetown..... 4
1791, c. 45..... 13

Michigan.
1869, March 22.....346, 347, 354, 356

Mississippi.
1888, April 3..... 184

Missouri.
Rev. Stats. 1879, I. § 2723... 117
§ 2725... 117

Montana.
1879, July..... 265

New York.
1879, June 20, c. 538..... 117
II. Rev. Stats. c. 4, Tit. 3, § 1, 117

North Carolina.
Code § 93..... 156
§ 100..... 156
§ 105..... 156
§ 232..... 156
§ 1029..... 137

Ohio.
Rev. Stat. I. § 2640..... 302
§ 5144..... 302

Pennsylvania.
1846, April 13.....77, 78, 79, 82
1848, March 27..... 79
1851, April 12..... 79
1857, May 16.....78, 79, 80, 82
1 Brightly's Purdon's Dig. 728..... 490

Texas.
1841, Feb. 5.....691, 692, 693

PAGE

Texas (*cont.*)
1856, Aug. 30.....679, 681, 682
1871, April 25.....679, 680, 681, 682, 683
1879, March 24..... 338, 339, 340, 508
1883, April 7..... 339
Rev. Stat. 1879, Art. 3138, subd. 4..... 508
Art. 3225, 693
1 Sayles Civil Statutes, Rev. Stat. § 645..... 537
§ 649..... 537
§ 650..... 537
§ 1224.....525, 529
§ 1230.....525, 529, 530
§ 1346..... 525
§ 1351..... 535
§ 1352.....535, 536
§ 1354.....535, 536

PAGE

Texas (*cont.*)
§ 1355.....535, 536
§ 1357.....535, 536
Paschal's Dig. I. Art. 4210... 679
Art. 4575... 681
II. Arts. 7096–7099, 679
Utah.
1852, Jan. 20.....635, 636, 639
1878, Feb. 22.....635, 636, 639
Virginia.
1748, incorporating Alexandria..... 4
1779, concerning Alexandria. 4
Washington.
1883, Nov. 23..... 218
Code, 1881, §§ 25, 26..... 217
§ 76..... 219
§ 445..... 219
§§ 458, 459, 460, 218

(C.) Foreign Statutes.

Great Britain. 21 James I..... 10

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1889.

METROPOLITAN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 5. Argued November 22, 1888. — Decided October 21, 1889.

The District of Columbia is a municipal corporation, having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons.

The Maryland statute of limitations of 1715, which is in force in the District of Columbia, embraces municipal corporations.

The sovereign power of the District of Columbia is lodged in the government of the United States, and not in the corporation of the District.

This court expresses no opinion upon the question whether, when the right of property in highways and public places is vested in a municipality, an assertion of that right against purprestures or public nuisances is subject to the law of limitations.

An action by a municipal corporation to recover from a street railroad company the cost of maintaining pavements in a street, which the company is, by its charter, bound to maintain, is not an action upon the statute, but one in assumpsit.

ASSUMPSIT. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. Nathaniel Wilson and *Mr. Walter D. Davidge* for plaintiff in error.

Mr. Henry E. Davis and *Mr. A. G. Riddle* for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought by the District of Columbia in November, 1880, to recover from the Metropolitan Railroad Company the sum of $161,622.52. The alleged cause of action was work done and materials furnished by the plaintiff in paving certain streets and avenues in the city of Washington at various times in the years 1871, 1872, 1873, 1874, and 1875, upon and in consequence of the neglect of the defendant to do said work and furnish said materials in accordance with its duty as prescribed by its charter.

The defendant was chartered by an act of Congress dated July 1, 1864, 13 Stat. 326, c. 190, and amended March 3, 1865, 13 Stat. 536, c. 119. By these acts it was authorized to construct and operate lines or routes of double track railways in designated streets and avenues in Washington and Georgetown.

The first section of the charter contains the following proviso: "Provided, that the use and maintenance of said road shall be subject to the municipal regulations of the city of Washington within its corporate limits." Of course this provision reserves police control over the road and its operations on the part of the authorities of the city. The fourth section of the charter declares, "that the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." The fifth section declares "that nothing in this act shall prevent the government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said

company to change their said railroad so as to conform to such grade and pavement."

It is on these provisions that the claim of the city is based.

The amended declaration sets out in great detail the grading and paving which were done in various streets and avenues along and adjoining the tracks of the defendant, and which it is averred should have been done by the defendant under the provisions of its charter; but which the defendant neglected and refused to do.

The defendant filed twelve several pleas to the action, the eleventh and twelfth being pleas of the statute of limitations. Issue was taken upon all the pleas except these two, and they were demurred to. The court sustained the demurrer, and the cause was tried on the other issues, and a verdict found for the plaintiff. 4 Mackey, 214.

The case is brought here by writ of error, which brings up for consideration a bill of exceptions taken at the trial, and the ruling upon the demurrer to the pleas of the statute of limitations. It is conceded that if the court below erred in sustaining that demurrer, the judgment must be reversed. That question will, therefore, be first considered.

It is contended by the plaintiff that it (the District of Columbia) is not amenable to the statute of limitations, for three reasons: first, because of its dignity as partaking of the sovereign power of government; secondly, because it is not embraced in the terms of the statute of limitations in force in the District; and, thirdly, because if the general words of the statute are sufficiently broad to include the District, still, municipal corporations, unless specially mentioned, are not subject to the statute.

1. The first question, therefore, will be, whether the District of Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty.

In order to a better understanding of the subject under consideration, it will be proper to take a brief survey of the government of the District and the changes it has undergone since its first organization.

Opinion of the Court.

Prior to 1871, the local government of the District of Columbia, on the east side of the Potomac, had been divided between the corporations of Washington and Georgetown and the Levy Court of the county of Washington. Georgetown had been incorporated by the legislature of Maryland as early as 1789, (Davis's Laws, Dist. Col. 478,) as Alexandria had been by the legislature of Virginia, as early as 1748 and 1779 (Davis's Laws, 533, 541); and those towns or cities were clearly nothing more than ordinary municipal corporations, with the usual powers of such corporations. When the government of the United States took possession of the District in December, 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; and the laws of Virginia were continued over the former, and the laws of Maryland over the latter; and a court, called the Circuit Court of the District of Columbia, was established with general jurisdiction, civil and criminal, to hold sessions alternately in each county; but the corporate rights of the cities of Alexandria and Georgetown, and of all other corporate bodies, were expressly left unimpaired, except as related to judicial powers. See Act of Feb. 27, 1801, 2 Stat. 103, c. 15. A supplementary act, passed a few days later, gave to the Circuit Court certain administrative powers, the same as those vested in the County and Levy Courts of Virginia and Maryland respectively; and it was declared that the magistrates to be appointed should be a board of commissioners within their respective counties, and have the same powers and perform the same duties, as the Levy Courts of Maryland. These powers related to the construction and repair of roads, bridges, ferries, the care of the poor, &c. Act of March 3, 1801, 2 Stat. 115, c. 25. On May 3, 1802, an act was passed to incorporate the city of Washington. 2 Stat. 195, c. 53. It invested the mayor and common council (the latter being elected by the white male inhabitants) with all the usual powers of municipal bodies, such as the power to pass by-laws and ordinances; powers of administration, regulation and taxation; amongst others specially named, the power "to erect and

repair bridges; to keep in repair all necessary streets, avenues, drains, and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of said city." Various amendments, from time to time, were made to this charter, and additional powers were conferred. A general revision of it was made by act of Congress passed May 15, 1820. 3 Stat. 583, c. 104. A further revision was made and additional powers were given by the act of May 17, 1848, 9 Stat. 223, c. 42; but nothing to change the essential character of the corporation.

The powers of the Levy Court extended more particularly to the country, outside of the cities; but also to some matters in the cities common to the whole county. It was reorganized, and its powers and duties more specifically defined, in the acts of July 1st, 1812, 2 Stat. 771, c. 117, and of March 3d, 1863, 12 Stat. 799. By the last act, the members of the court were to be nine in number, and to be appointed by the President and Senate.

In the first year of the war, August 6th, 1861, 12 Stat. 320, c. 62, an act was passed "to create a Metropolitan Police District of the District of Columbia, and to establish a Police therefor." The police had previously been appointed and regulated by the mayor and common council of Washington; but it was now deemed important that it should be under the control of the government. The act provided for the appointment of five commissioners by the President and Senate, who, together with the mayors of Washington and Georgetown, were to form the board of police for the District; and this board was invested with extraordinary powers of surveillance and guardianship of the peace.

This general review of the form of government which prevailed in the District of Columbia and city of Washington prior to 1871 is sufficient to show that it was strictly municipal in its character; and that the government of the United States, except so far as the protection of its own public buildings and property was concerned, took no part in the local government, any more than any state government interferes with the municipal administration of its cities. The officers

of the departments, even the President himself, exercised no local authority in city affairs. It is true, in consequence of the large property interests of the United States in Washington, in the public parks and buildings, the government always made some contribution to the finances of the city; but the residue was raised by taxing the inhabitants of the city and District, just as the inhabitants of all municipal bodies are taxed.

In 1871 an important modification was made in the form of the District government; a legislature was established, with all the apparatus of a distinct government. By the act of February 21st, of that year, entitled "An Act to provide a Government for the District of Columbia," 16 Stat. 419, c. 62, it was enacted (§ 1) that all that part of the territory of the United States included within the limits of the District of Columbia be created into a government by the name of the District of Columbia, by which name it was constituted "a *body corporate for municipal purposes*," with power to make contracts, sue and be sued, and "to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States." A governor and legislature were created; also a board of public works; the latter to consist of the governor as its president, and four other persons, to be appointed by the President and Senate. To this board was given the control and repair of the streets, avenues, alleys and sewers of the city of Washington, and all other works which might be intrusted to their charge by the legislative assembly or Congress. They were empowered to disburse the moneys raised for the improvement of streets, avenues, alleys and sewers, and roads and bridges, and to assess upon adjoining property, specially benefited thereby, a reasonable proportion of the cost, not exceeding one-third. The acts of this board were held to be binding on the municipality of the District in *Barnes* v. *District of Columbia*, 91 U. S. 540. It was regarded as a mere branch of the District government, though appointed by the President and not subject to the control of the District authorities.

This constitution lasted until June 20th, 1874, when an act

was passed entitled "An act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, c. 337. By this act the government established by the act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and board of public works, except as afterwards limited by the act. By a subsequent act, approved June 11th, 1878, 20 Stat. 102, c. 180, it was enacted that the District of Columbia should "*remain and continue a municipal corporation*," as provided in § 2 of the Revised Statutes relating to said District, and the appointment of commissioners was provided for, to have and to exercise similar powers given to the commissioners appointed under the act of 1874. All rights of action and suits for and against the District were expressly preserved *in statu quo*.

Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.

In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall "remain and continue a municipal corporation," with all rights of action and suits for and against it. If it were a department of the government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities

of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle. All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. Commissioners are not unfrequently appointed by the legislature or executive of a State for the administration of municipal affairs, or some portion thereof, sometimes temporarily, sometimes permanently. It may be demanded by motives of expediency or the exigencies of the situation; by the boldness of corruption, the absence of public order and security, or the necessity of high executive ability in dealing with particular populations. Such unusual constitutions do not release the people from the duty of obedience or from taxation, or the municipal body from those liabilities to which such bodies are ordinarily subject. Protection of life and property are enjoyed, perhaps in greater degree, than they could be, in such cases, under elective magistracies; and the government of the whole people is preserved in the legislative representation of the State or general government. "Nor can it in principle," said Mr. Justice Hunt in the *Barnes* case, "be of the slightest consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality or appointed by the President or a governor. The people are the recognized source of all authority, State and municipal, and to this authority it must come at last, whether immediately or by a circuitous process." *Barnes* v. *District of Columbia*, 91 U. S. 540, 545.

One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the circuit courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power to cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the *Bank of Alexandria* v. *Dyer*, 14 Pet. 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be "beyond the seas," or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons.

2. But the Supreme Court of the District supposes that municipal corporations are not embraced in the words of the statute of limitations. Let us see whether that view can be maintained.

The statute in force in the District is that of Maryland, passed in 1715, c. 23. The act, as regards personal actions, is substantially the same as that of 21 James I. It commences with a preamble, as follows: "Forasmuch as nothing can be more essential to the peace and tranquillity of this province than the quieting the estates of the inhabitants thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencing of such actions as in the several and respective courts within this province are brought, from the time of the cause of such actions accruing." It is then enacted, "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, sur trover, or replevin, . . . all actions of account, contract, debt, book, or upon the case, . . . all actions of debt for lending, or contract without specialty, . . . shall be sued or brought by any person or persons within this province, . . . shall be commenced or sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions of account, and the said actions upon the case, upon simple contract, . . . and the said actions for debt, detinue, and replevin . . . within three years ensuing the cause of such action, and not after;——." 1 Kilty's Laws, April, 1715, c. 23. There is nothing in any part of the act to restrain the generality of this language: "all [enumerated] actions sued or brought by any person or persons within this province, . . . shall be commenced within three years." Corporations are "persons" in the law. There is no apparent reason why they should not be included in the statute. It is conceded that private corporations are included. On what ground, then, can municipal corporations be excluded? Not on the ground that they are not "persons," for that would exclude private corporations. They are, therefore, within the terms of the law.

3. Are they not also within the spirit and reason of the law?

They are certainly within the reason of the preamble. It is just as much for the public interest and tranquillity that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be. The reason stated in the preamble for the passage of the law applies to all; and, moreover, it shows that the objects of the law are beneficent ones, and, therefore, that it should be liberally construed. It cannot apply to the sovereign power, of course. No restrictive laws apply to the sovereign, unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect and laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic or state. The principle applies to all sovereigns. The reason usually assigned for this prerogative is, that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be, such is the general law — such the universal law, except where it is expressly waived. The privilege, however, is a prerogative one, and cannot be challenged by any person inferior to the sovereign, whether that person be natural or corporate.

It is scarcely necessary to discuss further the question of the applicability of the statute of limitations to a purely municipal corporation when it is embraced within the general terms of the law. It was expressly decided to be applicable in the cases of *Kennebunkport* v. *Smith*, 22 Maine, 445; *Cincinnati* v. *First Presbyterian Church*, 8 Ohio, 298; *Cincinnati* v. *Evans*, 5 Ohio St. 594; *St. Charles County* v. *Powell*, 22 Missouri, 525; *Armstrong* v. *Dalton*, 4 Devereux, (Law,) 568; and other cases cited in the notes to Wood on Limitations, § 53; and to 2 Dillon on Municipal Corporations, § 668, 3d ed. Judge Dillon, in the section last cited, accurately says: "The doctrine is well understood, that to the sovereign power the maxim, '*nullum tempus occurrit regi*,' applies, and that the United States and the several States are not, without express words, bound by statutes of limitation. Although municipal corporations are considered as public agencies, exercising, in behalf of the State, public duties, there are many cases which

hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons." In *Evans* v. *Erie County*, 66 Penn. St. 222, 228, Sharswood, J., says: "That the statute of limitations runs against a county or other municipal corporation, we think, cannot be doubted. The prerogative is that of the sovereign alone; *nullum tempus occurrit reipublicae.* Her grantees, though artificial bodies created by her, are in the same category with natural persons." See also *Dundee Harbour Trustees* v. *Dougall*, 1 Macqueen H. L. Cas. 317. But we forbear to quote further authorities on the subject. We hold the doctrine to be well settled.

What may be the rule in regard to purprestures and public nuisances, by encroachments upon the highways and other public places, it is not necessary to determine. They are generally offences against the sovereign power itself, and, as such, no length of time can protect them. Where the right of property in such places is vested in the municipality, an assertion of that right may or may not be subject to the law of limitations. We express no opinion on that point, since it may be affected by considerations which are not involved in the present case.

The court below, in its opinion on the demurrer, suggests another ground, having relation to the form of the action, on which it is supposed that the plea of the statute of limitations in this case is untenable. It is this, that the action is founded on a statute, and that the statute of limitations does not apply to actions founded on statutes or other records, or specialties, but only to such as are founded on simple contract or on tort. We think, however, that the court is in error in supposing that the present action is founded on the statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys

expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations. The case of *Carroll* v. *Green*, 92 U. S. 509, is strongly in point. That was a bill against stockholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court, that the liability of the stockholders arose from their acceptance of the charter, and their implied promise to fulfil its requirements, and that the legal remedy to enforce it was an action on the case, to which the statute of limitations would apply; and, hence, that it applied to a bill in equity founded on the same obligation. To the same effect is the case of *Beatty's Administrators* v. *Burnes's Administrators*, 8 Cranch, 98, where an action for money had and received was brought, under the Maryland act of 1791, against a party who had received from the United States payment for land situated in the District, which land was claimed by the plaintiff to belong to him. This court held that, inasmuch as the form of the action was covered by the statute of limitations of Maryland, it could be pleaded in bar, notwithstanding the action was given by the statute of 1791. So, in *McCluny* v. *Silliman*, 3 Pet. 270, 277, it was held that the statute of limitations of Ohio was pleadable to an action on the case brought against a receiver of the land office to recover damages for his refusing to enter the plaintiff's application in the books of his office for certain lands in his district. It was contended that such a case could not have been contemplated by the legislature; but the court held that the action was within the terms of the statute, and that this was sufficient. Many more cases might be cited to the same point, but it is wholly unnecessary.

The judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendant on the demurrer to the pleas of the statute of limitations; and it is so ordered.

KNOX COUNTY *v.* HARSHMAN.

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

No. 1212. Argued October 15, 1889. — Decided October 28, 1889.

An appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect.

When an injunction has been dissolved it cannot be revived except by a new exercise of judicial power.

The prosecution of an appeal cannot operate as an injunction where none has been granted.

Although a bill to impeach a judgment at law is regarded as auxiliary or dependent, and not as an original bill, the supersedure of process on the decree dismissing the bill does not operate to supersede process on the judgment at law.

GEORGE W. HARSHMAN, on the 28th day of March, 1881, recovered a judgment by default in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri against the county of Knox, in the State of Missouri, for the sum of $77,374.46 and costs, and on the 25th day of January, 1882, sued out an alternative writ of mandamus in the usual form, directed to the county court of said county and the judges thereof, for the levy of taxes to pay the same. To this writ, return was made on the 23d day of March, 1882, setting forth the reasons relied on by respondents as justifying their refusal to make the levy required. Issue was joined on this return, and upon a trial and verdict by a jury, October 11, 1883, the Circuit Court quashed the writ. Harshman brought the cause by writ of error to this court, which held the return insufficient, reversed the judgment, and directed the peremptory writ to be awarded. *Harshman* v. *Knox County*, 122 U. S. 306. The mandate went down on the 3d day of June, 1887, and a peremptory writ of mandamus was issued by the Circuit Court, commanding the county court of Knox County and the judges thereof

to levy the tax as prayed, and was duly served June 28, 1887, but nothing was done in execution thereof.

On the 11th day of July, 1887, the county of Knox filed a bill in equity in the Circuit Court against Harshman, alleging various grounds upon which complainant prayed that Harshman be enjoined from further proceeding on his writ of mandamus, or prosecuting any other writ or proceeding upon said judgment requiring the levy of a special tax to pay the same. No preliminary injunction was granted, and the cause was finally heard on bill and answer at the September term, 1888, when the bill was dismissed and a decree rendered against the county for costs. From this decree the county prayed an appeal, which was granted; an appeal bond for $500, in the usual form, was duly given and approved; and the record was thereupon filed in this court in due time. On the 10th day of April, 1889, Harshman again sued out a peremptory writ of mandamus, to which the county made substantially the same return as to the alternative writ, but setting up the proceedings in equity, and insisting that the perfecting of the appeal from the decree dismissing the bill operated as a supersedeas of the judgment recovered March 28, 1881. Thereupon Harshman moved that said return be quashed, which motion was sustained, and the return quashed accordingly, the district judge, who held the Circuit Court, delivering an opinion, in which he said: "When the bond for $500 was taken and approved the court advised counsel for respondents that it did not regard the bond for the sum of $500 as adequate to work a supersedeas, and it expressly declined to order that it should operate as such." The county then filed its motion for a rehearing of the motion to quash, and on the same day Harshman moved for an attachment against the judges of the county court for failing to obey the peremptory writ. The motion for rehearing was denied by the circuit judge, who also refused to stay the collection of the judgment.

The county, appellant in this cause, which is the appeal from the decree dismissing the bill in equity as before stated, now moves for a writ of supersedeas, requiring the Circuit

Court to quash the peremptory writ of mandamus of April 10, 1889, and restraining said court from issuing any other or further process in execution of said judgment, and commanding appellee to "cease prosecuting said peremptory writ of mandamus, and to surcease all further proceedings in execution of said judgment under the General Statutes of Missouri of 1866 until this cause shall have been heard and decided by this court."

Mr. James Carr for the motion.

Mr. J. B. Henderson, (with whom was *Mr. T. K. Skinker* on the brief,) opposing.

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

Appellant's counsel contends that the appeal taken and perfected from the decree dismissing his client's bill of complaint operated, or should be made to operate, to supersede the judgment, in collection of which the peremptory writ of mandamus was awarded. That judgment was recovered on the 28th day of March, 1881, and no proceedings in error have ever been taken, and no bond given to supersede its operation. An alternative writ of mandamus was sued out, the cause shown by the county court and its judges against granting the peremptory writ was disposed of by this court on writ of error, and the peremptory writ was directed to be issued. The county of Knox then filed its bill in equity to restrain the collection of the judgment as commanded. No preliminary injunction was granted, and upon final hearing the bill was dismissed, and a decree passed against the county for costs.

The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect. *Hovey* v. *McDonald*, 109 U. S. 150, 161; *Slaughter-House Cases*, 10 Wall. 273, 297; *Leonard* v. *Ozark Land Co.*, 115 U. S. 465, 468.

When an injunction has been dissolved, it cannot be revived

except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. *A fortiori*, the mere prosecution of an appeal cannot operate as an injunction where none has been granted.

As stated by Mr. Chief Justice Waite, in *Spraul* v. *Louisiana*, 123 U. S. 516, 518, "The supersedeas provided for in § 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs."

The supersedure of process on the decree dismissing the bill could not supersede process on the judgment at law, and this is so, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent and not as an original bill.

The record presents no ground for the interference sought, and

The motion must be overruled.

ROBERTSON *v.* FRANK BROTHERS COMPANY.

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

No. 15. Argued October 17, 1889. — Decided October 28, 1889.

The payment of money to a customs official to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

The compulsory insertion by an importer of additional charges upon the entry and invoice, which necessarily involve the payment of increased duties, makes the payment of those duties involuntary.

The general rule that the valuation of merchandise made by a customs appraiser is conclusive if no appeal be taken therefrom to merchant appraisers, is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement may be impeached.

A statute which requires the dutiable value of imported goods to be reached by adding to the market value of the goods the cost of transportation, and other defined charges, does not authorize an appraiser to reach the

amount of such cost and charges by an estimate or percentage ; and an importer who pays duties on an importation thus calculated may, in an action brought to recover such as were illegally exacted, show wherein such estimate or percentage was illegal and excessive.

This was an action to recover duties alleged to have been illegally exacted. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Henry E. Tremain for defendant in error. *Mr. Mason W. Tyler* and *Mr. W. B. Coughtry* were with him on the brief.

Mr. Justice Bradley delivered the opinion of the court.

This is an action to recover for an alleged overcharge of duties on imports. The goods imported were bananas brought from Aspinwall. The duty was ten per cent *ad valorem*. The plaintiffs offered evidence tending to show the market value of the bananas at the port of shipment, which was claimed to be only fifty cents apiece for the large bunches and twenty-five cents apiece for the small bunches. The invoices received with the cargo exhibited this as the true market value, and added certain charges for labor and consul fees. The appraisers required the plaintiffs to add fifty per cent of these amounts as transportation charges for bringing the bananas into Aspinwall, and also certain shipping charges and commissions. The plaintiffs protested against this as an unjust addition ; but whenever it was omitted, the charge was added by the appraiser and a penalty of twenty per cent of the whole duty was imposed and exacted ; and the officers declared that this would be done whenever the addition should be omitted. To avoid this penalty, and to get immediate possession of their goods, (which are of a perishable nature,) the plaintiffs made the addition required, and paid the increased duties that resulted, — but always under protest as before stated.

The form of the entries and invoices with the additions was as follows, the additions being in italics:

Entry:

"Merchandise imported by Frank Brothers Company in the steamship Alsa, whereof Seymour is master, from Aspinwall to New York, Feb. 23, 1882. Marks, F. B."

"Two bins of bananas, containing 4132 large bunches, at sixty cents," "pesos, 2479.20," "3463 small bunches at thirty cents," "1038.90 pesos."

"Charges, two hundred and thirty-nine pesos."

"*Shipping charges added as required by the appraiser to make five cents Colombian currency per bunch*, 140.38 *pesos.*"

"*Transportation charges added as required by appraiser on* 4132 *large bunches at* 25 *cents*, $1033, *and* 3463 *small bunches at* 12½ *cents*, $432.87."

Invoice:

"Invoice of merchandise shipped by the Frank Bros. Co. on board the Alsa, Sansome master, bound for New York, and consigned to Frank Bros. Co.; Colon, Feb. 11, 1882, 2 bins containing —

"4202 bunches bananas at 60	2521.20	pesos.
"3564 bunches bananas at 30	1069.20	"
"Charges for labor	239.37	"
"Consul fee	3.	"
	3832.77	"

"The Frank Bros. Company:

"4132 large bunches at 60	2479.20	"
"3463 small bunches at 30	1038.90	"
"Charges	239.37	"
"*Shipping charges added as required by the appraiser to make* 5 *cents Colombia currency per bunch*	140.38	"
	3897.85	"

"Reduced to U. S. currency	$3207.93
"*Transportation charges added as required by the appraiser on* 4132 *large bunches at* 25 *cents*	1033.
"3463 *small bunches at* 12½ *cents*	432.87
	4673.80
"Commission 2½ per cent.	116.84
	4790.64"

The appraiser's return indorsed thereon was as follows: "Value correct, with importer's additions."

It was contended by the counsel for the government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide, upon the evidence, whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done.

On this point the judge, in his charge to the jury, speaking of the entry and the additions made by the plaintiffs or their agent, said:

"He says he put them on there because he was compelled to. If that is so he ought not to be estopped from recovering, and here is a question for you on that subject, and you will decide it in this way. If those statements and figures were put on there because he thought that was the best way, on the whole; if, exercising his own judgment freely, he thought that it was the best way to get along with this to put it on there and let it go, he can't take it back, . . . he can't recover anything back. The verdict will have to be for the defendant anyway, if that is so, because it was his own act in putting it on there. The collector assessed the duty just as he made it, and he can't complain. But . . . if

he was required to do it, or given to understand by some officer in the collector's department that it would be the worse for him, seriously, if he didn't; as, for instance, if the appraiser told him if he didn't put those on there the collector's office would, that the appraiser would, and that he would be exposed to a penalty that would be assessed against him; if he was given to understand by the collector's department, or some officer of it, that if he didn't put these figures on there they should, and make it the worse for him because he didn't, and he would thereby be exposed to a penalty of a larger duty which he would have to pay for not doing it, and he was in that way, for the sake of saving himself from the penalty which they would put upon him beyond what would otherwise be chargeable, induced to put them on, then he is not bound by it. . . . If you find he did not do it freely, then you can look further, and see if there was anything put on there that ought not to be. If he was compelled to do it, it ought not to go on, and if he was, the plaintiffs are entitled to recover. And if you decide he is bound by putting that on, that will end the case; you must give a verdict for the defendant. If not, you may look and see if he was compelled to pay more than he ought; if he was compelled to pay transportation charges more than he ought to; and, if so, find a verdict for the right amount. If they were compelled to pay labor charges more than they ought to pay, find the verdict for the plaintiffs for the right amount of that. If they didn't pay any more than they ought to, transportation or labor charges, then the verdict is for the defendant."

Under this charge, of course, the jury in finding for the plaintiffs must have found that they acted under constraint, under moral duress, in making the additions for transportation and labor. We do not see how the verdict can be set aside for error in the charge on this point, unless the law be that virtual or moral duress is insufficient to prevent a payment made under its influence from being voluntary.

This point was discussed in *Maxwell* v. *Griswold*, 10 How. 242, 256, and in *Swift Co.* v. *United States*, 111 U. S. 22, 28. In *Maxwell* v. *Griswold*, an appraisement was erroneously

made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The government contended that this was voluntary. But this court said:

"This addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

"Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

"All these requisites existed here. We have already decided that the demand for such an increased appraisal was illegal. The appraisement itself as made was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

"He was unwilling to pay either the excess of duty or the penalty, and must be considered, therefore, as forced into one or the other by the collector *colore officii* through the invalid and illegal course pursued in having the appraisal made of the value of the wrong period. . . .

"The money was thus obtained by a moral duress not justified by law, and which was not submitted to by the importer except to regain possession of his property already withheld from him on grounds manifestly wrong. Indeed, it seems sufficient to sustain the action whether under the act of February 26, 1845, [Rev. Stat. § 3011,] or under principles of the common law, if the duties exacted were not legal, and were demanded and were paid under protest."

In that case, it is true, the fact that the importer was not

able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required, — as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each. In *Swift Co.* v. *United States*, 111 U. S. 22, the plaintiffs, who were manufacturers of matches, and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent on the price of such stamps, accepted for a long period their commissions in stamps, (which, of course, were worth to them only ninety cents to the dollar,) and they did this because the Treasury Department would pay in no other manner. We held that the apprehension of being stopped in their business by non-compliance with the Treasury regulation was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said: "The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand of necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or rather value parted with under such pressure, has never been regarded as a voluntary act within the mean-

ing of the maxim *volenti non fit injuria*." The cases referred to by Justice Matthews abundantly support the position taken, and need not be repeated here. In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment.

But it is contended that the act of the appraiser in making, or requiring to be made, the additional charges for transportation and labor was final and conclusive, and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable. This qualification applies to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like. What is complained of in the present case is, that the plaintiffs were required to add to the market value of the goods at the places from which they were exported transportation charges and expenses for labor which were never incurred. If that complaint is well founded, such additions cannot be maintained; for whilst the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive, they could not, whilst the law required the addition to that market value of additional charges of transportation, &c., exercise any discretion as to those charges — but were confined to the actual cost thereof when

such cost could be shown. It was "cost," not "value," which was required in that part of the estimate of *dutiable* values. The sections of the Revised Statutes which regulated this matter in 1881 and 1882, when the transactions involved in the present suit took place, were §§ 2906 and 2907, the latter of which was repealed by the act of March 3d, 1883. 22 Stat. 523.

Section 2906, which is still in force, declares that "when an *ad valorem* rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or *wholesale* price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

Section 2907 declared that, "in determining the *dutiable* value of merchandise, there shall be *added to* the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment and transhipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and a half percentum; and brokerage, export duty, and *all other actual or usual charges* for putting up, *preparing and packing* for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties, based on value, shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades

shall be graded and pay duty according to the actual value so determined."

Now, whilst under the first of these sections (2906) the estimate of the market value of the goods, made by the appraiser, is in general unimpeachable, it is plain that the items to be added to that value under § 2907 did not depend upon estimation, but upon the actual truth of the case, namely, the *cost* of transportation, shipment, &c., to the vessel in which shipment is made. This cost may be something; it may be nothing. In the present case the appraiser required fifty per cent of the market value of the goods to be added as cost of transportation. The plaintiffs disputed this item. Evidence was gone into on the subject, and the matter was left fairly to the jury. The only question for us to determine is, whether the matter was open to evidence, and could lawfully be left to the consideration of the jury; or whether the determination of the appraiser on this subject was conclusive. We think with the court below that this was a question open for examination. In *Oberteuffer* v. *Robertson*, 116 U. S. 499, we decided that since the act of 1883, repealing § 2907 of the Revised Statutes, it is not lawful for the appraiser to add to the market price of the goods the cost or value of the cartons or boxes in which they are packed, either by themselves, or as part of the market value. In the principle involved that case is similar to the present. If since the repeal of § 2907 the appraiser cannot lawfully add the cost of packing boxes to the appraised value to the goods, before such repeal he could not lawfully add more than that cost; and if he did, it was a matter for examination and correction. To the same effect is the case of *Badger* v. *Cusimano*, 130 U. S. 39, where the collector caused an appraisement to be made in which a portion of the charges for packing and transportation of the goods imported was deducted from that category and added to the invoice value of the goods themselves. We held that, in the absence of fraud on the part of the importer, this could not lawfully be done, and that such an appraisement is not lawful or conclusive.

We are satisfied, not only on the authority of these cases,

but from the reason of the thing and the proper application of the principles of the law, that the course pursued in the court below was free from error.

These are all the questions which it is deemed important to discuss, and the result is that

The judgment must be affirmed; and it is so ordered.

JACKSON v. ALLEN.

BROWN v. ALLEN.

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

Nos. 44, 45. Argued October 22, 23, 1889.— Decided October 28, 1889.

When it appears from the record in this court in a cause commenced in a state court, and removed to a Circuit Court of the United States on the ground of diverse citizenship, and proceeded in to judgment there, that the citizenship of the parties at the time of the commencement of the action, as well as at the time of filing the petition for removal, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested, the defect cannot be cured by amendment, and the judgment of the Circuit Court will be reversed at the cost of the plaintiff in error, and the cause remitted to that court with directions to remand it to the state court.

THIS action was commenced June 7, 1884, in the Civil District Court, parish of Orleans, Louisiana, by petition as follows:

"The petition of Allen, West and Bush, a commercial firm doing business in the city of New Orleans and composed of James H. Allen, Thomas H. West, and John C. Bush, respectfully shows —

"That your petitioners sold to Alfred F. Jones, to be paid for cash on delivery, and delivered to him on the 4th day of June, 1884, certain two hundred and sixty-eight (268) bales of cotton of the price and value of twelve thousand six hundred and sixty-five $\frac{25}{100}$, $12,665.25, dollars, all of which more fully ap-

pears and is set forth in the detailed account marked 'Exhibit A' and hereto annexed as part of this petition.

"That said defendant has failed and neglected to pay and now refuses to pay for said cotton, save and except the sum of eighteen hundred dollars ($1800) paid on account of and in deduction of said purchase price, leaving said purchase price now due and owing the full sum of ten thousand eight hundred and sixty-five $\frac{25}{100}$ dollars ($10,865.25).

"That your petitioners have special lien and privilege on said cotton for the payment of said purchase price thereof; that the same is now in possession of William Jackson, master of and bailee of the owners of the steamship called the 'Counsellor,' lying at the port of Orleans; that petitioners fear that pending this suit the said Alfred F. Jones and said William Jackson, master of said steamship called the 'Counsellor,' bailee of her owners, will part with, conceal, or dispose of said cotton, which is an agricultural product of the United States, and was sold as aforesaid in the city of New Orleans, or will remove the same out of the State or beyond the jurisdiction of this honorable court, and that they will thereby lose their vendors' lien and privilege thereon.

"Wherefore, the annexed bond and affidavit considered, petitioners pray that a writ of sequestration issue directed to and requiring the civil sheriff of the parish of Orleans to seize and to hold the cotton as aforesaid, in whatsoever hands or place the same may be found, subject to the further order of this honorable court; that said Alfred F. Jones and said William Jackson, master of the steamship 'Counsellor' and as bailee of her owners, be hereby cited to answer this petition, and, after due proceedings, that petitioners have judgment against said Alfred F. Jones and against the said William Jackson, master of said steamship and bailee of her owner *in solido*, in the sum of ten thousand eight hundred and sixty-five $\frac{25}{100}$ dollars, (10,865.25,) with legal interest thereon from judicial demand until paid, and for costs, with special lien and privilege upon said cotton sold and seized for the payment of said judgment. They pray for all general relief.

"Chas. S. Rice,
Of Counsel."

Statement of the Case.

On the 7th of June the writ of sequestration was ordered to issue and did issue. Thereupon, on the 11th of June, the following petition was filed in the cause:

"The petition of intervention and third opposition of Brown Bros. & Co., a commercial firm domiciled in and doing business in the city of New York and State of New York and composed of citizens of said State, *viz.*, James M. Brown, Charles D. Dickey, Howard Potter, John Crosby Brown, John Edgar Johnson, Stewart Henry Brown, Alexander H. Brown, —— Collett, —— Chalmers, respectfully shows —

"That in the above-entitled suit Allen, West & Bush, a commercial firm of this city, brought suit against A. F. Jones, also of this city, for a balance claimed to be due upon certain cotton sold and sequestered the same in the possession of one William Jackson, master and bailee of the owners of the steamship Counsellor, on which vessel said cotton, consisting of 268 bales, fully described in plaintiffs' petition, had been laden for transportation to England.

"Petitioners represent that prior to said suit and sequestration the steamship Counsellor had issued to the defendant Jones a bill of lading for the aforesaid 268 bales of cotton, on which bill of lading, negotiable by indorsement, under the law of Louisiana, the said Jones, prior to the suit herein, indorsed over and transferred to your petitioners for the purpose of pledging said cotton for the payment of a draft for 2680 pounds sterling, drawn by said Jones, to which said bill of lading was attached, and which draft your petitioners purchased upon the faith of said negotiable bill of lading; and petitioners aver that they are innocent third holders of the same for value, and, as against all persons, are to be deemed and taken to be the owners of said 268 bales of cotton and entitled to the same.

"Wherefore petitioners pray that this petition of intervention and 3rd opposition be filed; that the commercial firm of Allen, West & Bush and the individual members thereof, James H. Allen, Thomas H. West, and John C. Bush, and William Jackson, master of the S. S. Counsellor, be cited to

appear and answer this petition, and that after due proceedings there be judgment in favor of petitioners and against said defendants, recognizing petitioners as the transferees and holders of the bill of lading issued by the steamship Counsellor for said 268 bales of cotton and the lawful owners and possessors of said 268 bales of cotton, and for costs; and petitioners pray for such other and further order and relief as the nature of the case may require and the court is competent to give.

"BAYNE & DENÉGRE, *Attorneys.*"

A citation of intervention issued on the 12th day of June, and on the 26th of that month Jackson, the master of the Counsellor, appeared and made answer setting up that he was "an alien and subject of the British empire, master of the steamship Counsellor, and bailee of her owners, all of whom are aliens, subjects of said British empire."

On the same 26th of June two petitions were filed for the removal of the cause to the Circuit Court of the United States. The first, by Brown Brothers & Co., was as follows:

"To the honorable the Civil District Court in and for the parish of Orleans:

"The petition of Brown Brothers & Co., a commercial firm composed of James M. Brown, Charles D. Dickey, Howard Potter, John Crosby Brown, John Edgar Johnson, Frederick Chalmers, Mark W. Collett, Francis A. Hamilton, Alexander H. Brown, Stewart M. Brown, residing in and doing business in New York, and who are citizens of New York, as these petitioners aver, respectfully shows that the above-described suit of *Allen, West & Bush* v. *A. F. Jones et als.*, No. — of the docket of this court, is a suit of a civil nature at law now pending in the Civil District Court for the parish of Orleans, a state court of the State of Louisiana, where the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars; that —

"1st. That there is a controversy between citizens of different States.

"2nd. That there is a controversy which is wholly between

citizens of different States, which can be fully determined between them and these petitioners.

"3rd. That there is a controversy in which these petitioners, citizens of the State of New York, William Jackson, master, and owners of the steamship Counsellor, cited as bailees, concurring, and who are aliens, citizens and subjects of the Kingdom of Great Britain, on one side, and Allen, West and Bush and the members of said firm and A. F. Jones, citizens of Louisiana, on the other side, make a controversy wholly between citizens of different States, which can be fully determined as between them, and authorizes the removal.

"4th. That there is a controversy wholly between petitioners, citizens of New York, and Allen, West and Bush, citizens of Louisiana, which can be fully determined as between them.

"Petitioners file their bond and security for entering in the Circuit Court of the United States for costs, according to law, on the first day of its next session, and for paying costs.

"And petitioners pray this court to proceed no further herein, except to make the order for removal required, to accept the bond, and cause the record to be removed to said United States Circuit Court, fifth circuit, eastern district of Louisiana, and for all equitable relief.

"BAYNE & DENÉGRE,
Attorneys for Petitioners."

The second petition, by Jackson, was as follows:

"To the honorable the Civil District Court in and for the parish of Orleans:

"The petition of William Jackson, master of the steamship Counsellor, who is an alien and a citizen and subject of the Kingdom of Great Britain, bailee of the owners of said steamship Counsellor, for whom he is cited as bailee in this suit, and who are all aliens and citizens and subjects of the Kingdom of Great Britain, respectfully represents —

"That the matter and thing in dispute in above-entitled suit exceed, exclusive of costs, the sum of and value of $500; that the controversy in said suit is between citizens of a State

and foreign citizens and subjects, and that petitioner and the owners of said steamship all were at the time of the commencement of this suit and still are citizens and subjects of the Kingdom of Great Britain.

"That petitioner offers herewith a bond, with good and solvent surety, for his entering in the Circuit Court of the United States in and for the fifth circuit and eastern district of Louisiana a copy of the record of this suit and for paying all costs which may be awarded by said Circuit Court if said court should hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the fifth circuit and eastern district of Louisiana; and petitioner will ever pray.

"LEARY & KRUTTSCHNITT,
Attorneys for Petitioner."

Thereupon on the 27th of June, orders were duly made for the removal of the cause, in all its branches, to the Circuit Court of the United States. Subsequently such proceedings were had there, that after default taken against Jones, the following judgment was entered in the cause at April term, 1886:

"The parties in this cause having filed a stipulation waiving the intervention of a jury, and submitted the cause to the court upon the issues of fact as well as of law, and the court, having considered the evidence and being advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiffs. It is therefore ordered, adjudged and decreed that there be judgment in favor of the plaintiffs, the commercial firm of Allen, West & Bush, composed of James H. Allen, Thomas H. West, John C. Bush, and against the defendants, the succession of Alfred F. Jones, in the sum of ten thousand eight hundred and sixty-five $\frac{25}{100}$ dollars ($10,865.25), with legal interest thereon from the 7th day of June, 1884, until paid, with recognition of lien and privilege in favor of said plaintiffs

Counsel for Parties.

as vendors upon the two hundred and sixty-eight bales of cotton herein sequestered for the payment of the same.

"It is further ordered, adjudged, and decreed that the petition of intervention and third opposition of the commercial firm of Brown Brothers & Co., composed of James M. Brown, Charles D. Dickey, Howard Potter, John Crosby Brown, John Edgar Johnson, Stewart Henry Brown, Francis A. Hamilton, Alexander H. Brown, Mark W. Collett, and Frederick Chalmers, be to the extent of the judgment, with lien and privilege, hereinabove rendered in favor of the said plaintiffs as vendors of said cotton sequestered herein, and the same is dismissed, but that to any residue of said cotton or its proceeds, after satisfaction of the aforesaid judgment thereupon, the said intervenors and third opponents be declared to be entitled and accordingly have judgment therefor.

"It is further ordered, adjudged and decreed that said plaintiffs have judgment against the defendants, the succession of Alfred F. Jones, and William Jackson, master of the steamship Counsellor, and as bailee of the owner of said steamship, *in solido*, for all costs incurred in this suit prior to the filing of said petition of intervention and third opposition, and that all costs incurred subsequent to the filing of said petition be paid out of the cotton sequestered or its proceeds."

Thereupon a writ of error was sued out by Jackson against Allen, West & Bush and Brown Brothers & Co., and another writ of error by Brown Brothers & Co. against Allen, West & Bush. When the cause was reached on the docket in this court it was argued on the merits. The briefs on neither side treat of the question of jurisdiction on which the case turned in the opinion of the court.

Mr. Thomas L. Bayne for Brown Brothers & Co. *Mr. George Denégre* was with him on the brief.

Mr. Ernest B. Kruttschnitt and *Mr. Edgar H. Farrar*, for Jackson, submitted on their brief.

Mr. Alfred Goldthwaite and *Mr. John M. Allen* for Allen West & Bush.

Syllabus.

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

The original action and that of intervention and third opposition therein were brought in the Civil District Court for the parish of Orleans, Louisiana, and petitions filed for their removal into the Circuit Court of the United States for the Eastern District of Louisiana, upon the ground of the diverse citizenship of the parties. The cause was thereupon docketed and tried in the Circuit Court by the judge thereof, on stipulation according to the statute, and upon his findings judgment was rendered and writs of error were prosecuted to this court.

It appears from the record that the citizenship of the parties at the commencement of the actions, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested. *Stevens* v. *Nichols*, 130 U. S. 230. This being so, the defect cannot be cured by amendment. *Crehore* v. *Ohio and Mississippi Railroad Co.*, 131 U. S. 240.

We are compelled to reverse the judgment, at the costs, however, of the respective plaintiffs in error, and remit the cause to the Circuit Court, with directions to remand to the state court. Ordered accordingly.

CAMPBELL *v.* WADE.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 20. Argued October 18, 1889. — Decided October 28, 1889.

The statutes of the State of Texas of July 14, 1879, and March 11, 1881, providing for the sale of a portion of the vacant and unappropriated public lands of the State, did not operate to confer upon a person making application under them for a survey of part of said lands and paying the fees for filing and recording the same, a vested interest in such lands which could not be impaired by the subsequent withdrawal of them from sale under the provisions of the statute of January 22, 1883.

Statement of the Case.

THE case was thus stated by the court in its opinion:

This case comes from the Supreme Court of Texas, and arises upon the following facts: By an act of that State, passed on the 14th of July, 1879, the sale of a portion of its vacant and unappropriated public lands within certain counties and what was known as the Pacific Railway reservation was authorized. (Laws of 1879, Special Session, c. 52.) It provided that any person, firm or corporation desirous of purchasing any of those lands might do so by having the same surveyed by the authorized public surveyor of the county or district in which the land was situated. And it was made the duty of the surveyor, upon the application of a responsible party designating the lands desired, to make the survey within three months from its date, and within sixty days thereafter to certify to, record and map the field-notes of the survey, and file them in the General Land Office. The act provided that within sixty days after the filing of these papers in the General Land Office, it should be the right of the person, firm or corporation at whose instance the lands had been surveyed to pay into the treasury of the State the purchase-money therefor, at the rate of fifty cents per acre, and that upon presentation to the General Land Office of the receipt of the state treasurer for this money, the commissioner should issue to such person, firm or corporation a patent for the lands. And the act declared that after the survey of any of the public domain as thus authorized, it should not be lawful for any person to file or locate upon the land thus surveyed.

It was under these provisions, amended by an act passed March 11, 1881, (Laws of 1881, c. 33,) which, however, did not materially affect them in the particulars under consideration, that the petitioner below, the appellant here, who was a responsible person, sought to purchase lands situated in El Paso County of the State, to the extent of one hundred and fifteen thousand acres, in tracts of six hundred and forty acres each. For that purpose, on the 16th of December, 1882, he applied to the surveyor of the county for the lands, which were fully described, and were of the character authorized to be sold

under the acts in question within the Pacific Railway reservation. The surveyor received, filed and recorded the application. The petitioner paid the fees for such filing and recording, and demanded that the land should be surveyed for him as required by law. No such survey was, however, made by the surveyor, and on the 22d of January, 1883, before the time expired within which he was allowed to make it, the legislature of the State withdrew from sale all the public lands mentioned in the acts in question. (Laws of 1883, c. 3.) After this withdrawal, the petitioner again applied to the surveyor for a survey of the lands, and tendered him the legal fees for making the survey, but the surveyor refused to make it, on the ground that the act of July 14, 1879, authorizing the sale, and the amendatory act of March 11, 1881, had been suspended by the act passed January 22, 1883, and consequently that he had no authority to make the survey. The petitioner thereupon presented to the District Court of the county of El Paso a petition for a mandamus to compel the surveyor or his successor in office to make the survey and return the field-notes of it to the General Land Office of Texas. The surveyor appeared in the suit, and filed both an answer and a demurrer to the petition, a procedure permitted, as we understand, under the laws of that State. The demurrer was on the ground that the petition disclosed no cause of action. The answer was a general denial of the allegations of the petition. Upon the trial which followed, the court sitting without the intervention of a jury, judgment was given in favor of the defendant. An appeal being taken, the case was heard by the Commissioners of Appeals. Upon their report the judgment was affirmed by the Supreme Court. To review that judgment the case is brought here on writ of error.

When the petition was filed in the District Court of the State, and its judgment rendered, Ward B. Marchand was the surveyor of El Paso County. Pending the appeal from the judgment he died, and his successor in office, Samuel H. Wade, was, by consent of parties, substituted in his place as defendant.

Opinion of the Court.

Mr. John B. Rector for plaintiff in error.

No appearance for defendant in error.

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

It was contended in the state courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the act, it was only after the return and filing in the General Land Office of the surveyor's certificate, map and field-notes of the survey, that the applicant acquired the right to purchase the land by paying the purchase-money within sixty days thereafter. But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State. Clearly, there was no such right in advance of the survey. The State was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the State to sell the lands.

The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preëmption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific

amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preëmption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Frisbie* v. *Whitney*, 9 Wall. 187, where this doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case*, 15 Wall. 77, 87, where the court said that until all the preliminary steps prescribed by law for the acquisition of the property were complied with, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price. "Until such payment and entry," the court said, "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."

In the present case, before the act withdrawing the lands from sale, which was equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the State. No contract rights of the petitioner were therefore violated by its legislation.

The law in this respect is very clearly stated in the opinion of the Commissioners of Appeals of Texas, adopted by the Supreme Court of that State.

Judgment affirmed.

BRUSH *v.* CONDIT.

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

No. 9. Argued October 15, 16, 1889. — Decided November 4, 1889.

Claims 1, 3, 5 and 6 of reissued letters patent No. 8718, granted May 20, 1879, to Charles F. Brush for "improvements in electric lamps," the original patent, No. 203,411 having been granted to said Brush May 7, 1878, are invalid by reason of their prior existence as perfected inventions in a lamp made in June, 1876, by one Hayes.

Although claims 5 and 6 speak of an "annular clamp," and the apparatus of Hayes had a rectangular clamp, the latter embodied the principle of the invention, carried out by equivalent means, the improvement, if any, in the use of the circular clamp over the rectangular clamp being only a question of degree in the use of substantially the same means.

IN EQUITY for the infringement of letters patent. Decree dismissing the bill, from which the plaintiffs appealed. The case is stated in the opinion.

Mr. W. H. Kenyon for appellants. *Mr. W. C. Witter* was with him on the brief.

Mr. Edmund Wetmore for appellees. *Mr. S. A. Duncan* was with him on the brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the plaintiffs, Charles F. Brush and The Brush Electric Company, in a suit in equity brought by them in the Circuit Court of the United States for the Southern District of New York, against C. Harrison Condit, Joseph Hanson and Abraham Van Winkle, from a decree dismissing with costs their bill of complaint, so far as it relates to reissued letters patent No. 8718, granted May 20, 1879, to Charles F. Brush, one of the plaintiffs, for "improvements in electric lamps," on an application for a reissue filed April 14, 1879, the original letters patent, No. 203,411, having been granted

to said Brush May 7, 1878, on an application filed September 28, 1877.

The rights of the plaintiffs were finally rested upon an alleged infringement of claims 1, 3, 5 and 6 of the reissue. Another patent was sued on in the case, but at the final hearing the bill in regard to it was dismissed with costs, on motion of the plaintiffs. The opinion of the Circuit Court, held by Judge Shipman, on the merits, as to reissue No. 8718, is reported in 22 Blatchford, 246.

The specification of the reissue states the general nature of the invention in these words: "My invention relates to electric light mechanism, and it consists in the following specified device, or its equivalent, whereby the carbon sticks usually employed are automatically adjusted and kept in such position and relation to each other that a continuous and effective light shall be had without the necessity of any manual interference." In this automatic arrangement, the electric arc is established, and then, as the electrodes are consumed, the arc is regulated by causing the strength of the current and the length of the arc mutually to control each other. There is no clock-work or other extraneous power, but the action of the electric current alone effects the necessary movements. The electrodes tend to move towards each other at all times, and this tendency is opposed by the electro-magnetic action, which tends to separate them. These opposing forces are designed to be in equilibrium when the electrodes are at such a distance from each other as will produce the maximum development of light with a given electric current. It was to an electric arc lamp of this character that the invention of Brush was to be applied. The construction of his arrangement, as described in the specification of the reissue, is as follows: A helix of insulated wire, such helix being in the form of a tube or hollow cylinder, rests upon an insulated plate upheld by a metallic post or standard. Within the cavity of the helix are contained an iron core and a rod which passes longitudinally and loosely through and within the core. This rod holds a carbon. The core is also made to move very freely within the cavity of the helix, and is partially supported by means of springs which push upward

against ears attached to the core. A ring of metal just below the core surrounds the carbon-holder, and rests upon a floor or support. One edge of the ring is over a lifting tongue, which is attached to the core, while the opposite edge is a short distance below the crown of an adjustable set screw. The design is that one point of the ring may be lifted in such way as to clamp the carbon-holder, while a limit is placed to the upward movement of the core. The poles of the battery being so attached that the circuit of an electric current is completed, the core, by the force of the axial magnetism, is drawn up within the cavity of the helix, and by means of the lifting tongue one edge of the ring is lifted until, by its angular impingement against the rod or carbon-holder, it clamps such rod, and also lifts it up to a distance limited by an adjustable stop. While the ring preserves this angular relation with and impingement against the rod, the rod will be firmly retained and prevented from moving through the ring. The adjustable stop is fixed so that it shall arrest the lifting of the rod when the two carbons are sufficiently separated from each other. While the electric current is not passing, the rod can slide readily through the loose ring and the core; and in this condition gravity will cause the upper carbon to rest upon the lower carbon, thus bringing the various parts of the device into the position of a closed circuit. If then a current of electricity is passed through the apparatus, it will instantly operate to lift the rod, and thus separate the two carbons and produce the electric light. As the carbons burn away, thus increasing the length of the voltaic arc, the electric current diminishes in strength, owing to the increased resistance. This weakens the magnetism of the helix, and accordingly the core, rod and upper carbon move downward by the force of gravity until the consequent shortening of the voltaic arc increases the strength of the current and stops such downward movement. After a time, however, the ring will reach its floor or support, and its downward movement will be arrested. Any further downward movement of the core, however slight, will at once release the rod, allowing it to slide through the ring until arrested by the upward movement of the core, due to the

increased magnetism. In continued operation, the normal position of the ring is in contact with its lower support, the office of the core being to regulate the sliding of the rod through it. If, however, the rod accidentally slides too far, it will instantly and automatically be raised again as at first, and the carbon points thus be continued in proper relation to each other.

Claims 1, 3, 5 and 6 of the reissue, on which alone recovery is sought, read as follows, there being eight claims in all in the reissue as granted:

"1. In an electric lamp, the combination, with the carbon-holder and core, of a clamp surrounding the carbon-holder, said clamp being independent of the core, but adapted to be raised by a lifter secured thereto, substantially as set forth."

"3. In an electric lamp, the combination of the core or armature C, the clamp D, and adjustable stop D′, or their equivalents, whereby the points of the carbons are separated from each other when an electrical current is established — prevented from separating so as to break the current — and gradually fed together as the carbons are consumed, substantially as described."

"5. In an electric lamp, the combination, with a carbon-holder, of an annular clamp surrounding the carbon-holder, said clamp adapted to be moved, and thereby to separate the carbon points by electrical or magnetic action, substantially as herein set forth.

"6. In an electric lamp, an annular clamp adapted to grasp and move a carbon-holder, substantially as shown."

What is called in these claims "the clamp D" is the ring of metal which surrounds the rod or carbon-holder.

The specification of the reissue, as granted, contained the following paragraph: "I do not limit myself narrowly to the ring D, as other devices may be employed which would accomplish the same result. Any device may be used which, while a current of electricity is not passing through the helix A, will permit the rod B to move freely up and down, but which, when a current of electricity is passing through the helix, will, by the raising of the core C, operate both to clamp

and to raise the rod B, and thereby separate the carbon points F F′, and retain them in proper relation to each other."

On the 14th of October, 1881, the plantiffs filed in the Patent Office a disclaimer, in which they stated that the patentee had claimed more than that of which he was the first inventor or discoverer, by or in consequence of the use in the specification of the language contained in the paragraph last above quoted; and that there were material and substantial parts of the thing patented, also embraced within the terms of the above quoted paragraph, which were truly and justly the invention of Brush. The paper went on to enter a disclaimer to that part of the subject matter of the specification and of claims 1, 2, 3, 5 and 6 of the reissue, which, being embraced within the general language of the above quoted paragraph, included as within the invention of Brush "clamping devices substantially different in construction and mode of operation from the clamp D."

On the 6th of April, 1883, the plaintiffs filed in the Patent Office a disclaimer of so much or such part of the invention described in the reissue, and coming within the general language of the third claim, as might cover or include as elements thereof "the core or armature C" and "the clamp D" excepting when the core or armature raises the clamp by a lifter secured to such core or armature, substantially as described in the patent. The same paper disclaimed the specific combinations forming the subject matter of claims 2, 7 and 8.

Judge Shipman held that the first claim describes a clamp independent of, that is, not fixed to, the core, but adapted to be raised by a lifter secured to the core, and does not mean that the clamp is independent of, and not in any way dependent for its motion upon, the core, but is adapted to be raised by a lifter secured to itself. He further held, that the first claim does not include the adjustable stop of the third claim, but includes only the combination of the clamp and core and rod, with the described elements which are necessary to cause an angular impingement upon the rod and an intermittent downward feeding of the rod. He also held that the clamp of the sixth claim is not any annular clamp adapted to grasp and

move a carbon-holder, but means to describe in general terms the clamp of the first claim, which raises, clamps and feeds downwardly the rod, preserving a practically uniform length of arc by the described means, or an annular clamp surrounding the carbon-holder independently of the core, but adapted to be raised by a lifter secured to the core and some suitable agency to allow the clamp to be tripped; and that the fifth claim includes the clamp of the first and sixth claims, the carbon-holder, the motor, and the tripping device.

Judge Shipman examined the question of the novelty of claims 1, 3, 5 and 6, and arrived at the conclusion that they were invalid by reason of their prior existence as perfected inventions, in a lamp made in June, 1876, by one Hayes, at Ansonia, Connecticut. On this subject he says in his opinion:

"The clamp, in combination with the other necessary elements, which was made by Charles H. Hayes of Ansonia, Connecticut, and was a part of a lamp which he constructed about the end of June, 1876, as an improvement upon the White lamp, is the combination of the first and third claims of the Brush patent. The carbon rod was square or rectangular, and, therefore, was surrounded by a rectangular clamp which was independent of the core. It is not denied that this clamp is the equivalent of an annular clamp. It was raised by a lifter secured to the core and was tripped by coming in contact with a floor, while the ascent of the rod was checked by the contact of the clamp with an adjustable stop.

"The plaintiffs' answer to the anticipatory character of this clamp is that it was an abandoned experiment and never was a perfected invention. The facts in regard to its character and position as an invention are as follows: Mr. Hayes was, in 1876, and has been continuously since, in the employ of Wallace & Sons, who are large manufacturers of brass goods in Ansonia. In 1876 this firm was trying to find a successful electric lamp to manufacture. Mr. White furnished them with his device, which they sent, as a part of their exhibit, to the Centennial Exhibition at Philadelphia. Mr. Hayes testifies as follows; 'Experiments with the White lamp showed its defects so strongly or plainly that I designed this' (the

Hayes) 'lamp to overcome those defects. I made rough drawings in the middle or latter part of May, 1876; commenced building the lamp at once, and finished it about the end of June following; tested it, tried it, and made some minor alterations, and run it from time to time, when a lamp was needed, until the 16th of September following.' At this time he was in Philadelphia, and a fellow-employé by the name of King, thinking that he could improve upon the clutch and make the feeding of the carbons answer more promptly to the changes of the current or make the feeding less 'jerky,' obtained permission from Wallace & Sons, who owned the clamp, to make an alteration. The 'King clutch,' constructed upon a different principle from that of the Hayes or the Brush clamp, was put into the lamp, which has remained in use in the mill, and, since the end of 1876, has been 'used in the electrical room for testing machines, carbons, &c., and has been used for that purpose more or less ever since.' But one Hayes lamp was made until a duplicate specimen was made for use in this case. The Hayes clamp, it will be observed, was used in the lamp only until September 16th. Prior to that date the use of the lamp with the original clamp is thus described by Mr. Hayes upon cross-examination: 'It' (the lamp) 'was moved about and burned in different places — in the mill and outside — and it was also burned in our other shop occasionally.' This shop was known as the skirt shop, the third floor of which was used for electrical work. The mill and skirt shop were ordinarily lighted by gas. 'Question. On what occasions did you use the lamp out-of-doors? Ans. The lamp was used out-of-doors on several occasions; when gangs of men required light unloading freight from railway cars; digging for some work connected with the water power. I am unable to specify positively any particular date, but have a general recollection of being frequently called upon to make a light for some such purposes. Question. Did you use it sometimes to test dynamos with in June–September, 1876? Ans. I think not during that time. Question. What other use did you put it to during those months except the occasions out-of-doors which you have

mentioned? Ans. It was used about the mill, more particularly around the muffles, on occasions when it was necessary to work during the evening.' The use was a public one in the presence of the employés of the factory. The Hayes clamp has been preserved and was an exhibit in the case. Wallace & Sons thereafter, after much experimenting, went, to a limited extent, into the manufacture of what were known in the case as 'plate lamps,' or lamps having two carbon plates instead of rods, but did not continue the business long. They say that the discontinuance was due to the fact that they did not have a satisfactory generator. The Hayes clamp was used upon the plate lamps, but, as has been said, was used upon but one carbon pencil electric lamp.

"The plaintiffs vigorously insist that the Hayes clamp was not a completed and successful invention, but that its use was merely tentative and experimental, and was permanently abandoned because the device did not promise to be successful.

"Two facts are manifest: 1st, that the Hayes clamp was the clamp of the Brush patent: and, 2d, that it became, after September 16th, a disused piece of mechanism in connection with carbon points. The question then is — Was it a perfected and publicly known invention, the use of which was abandoned prior to the date of the Brush invention, or was its use merely experimental, which ended in an abandoned experiment on September 16th?

"The plaintiffs, in support of their view, say that Wallace & Sons were searching for a successful lamp, and were exhibitors of an electric lamp at the Centennial Exhibition; that inventors were in their employ, who were encouraged to make experiments and trials in the hope that something good might be produced, and, under this stimulus, one Hayes lamp was made; that improvements in the location of the spring were made; that it gave a 'jerky' light, and, when the inventor was away another clamp was put on, by the permission of the owners, to remedy this irregular feeding; that afterwards no other lamp was ever constructed, and the Hayes clutch was left among other 'odds and ends;' and that the indifference with which it was received, its confessed faults, the attempted

improvements and its disuse, show that the Hayes clamp never was anything more than an attempt to invent something which proved to be a failure.

"The question of fact, in this part of the case, must turn upon the character of the use of the lamp prior to September 16th, because it is established that the Hayes clamp and the Brush clamp, in its patented features, were substantially alike, and that the point in which they differ, viz., the length of the arms, is not a part of the principle of the device. Was the lamp with this clutch used merely to gratify curiosity, or for purposes of experiment, to see whether the feeding device was successful, or whether anything more was to be done to perfect it; or was it put to use in the ordinary business of the mill, as a thing which was completed, and was for use, and was neither upon trial nor for show?

"Hayes made the lamp for Wallace & Sons as an improvement upon the White lamp, and apparently turned it over to them to be used when they chose. An alteration was subsequently made in the location of the spring. The lamp was used at different times, in the work of the mill, at night, indoors, and out-of-doors. Its use at these times does not seem to have been for the purpose of testing the machine, or of calling attention to its qualities, or of gratifying curiosity, but it was used to furnish light to the workmen at their work. I have queried whether this use was not that of a thing which might be of help in an emergency, and which was thought to be better than nothing, though not of much advantage; but it was, apparently, used to accomplish the ordinary purposes of an electric light in a mill, to enable the workmen to see at night, although it was not uniformly used, because the mill was lighted by gas.

"But the plaintiffs press the question — Why, then, was the further use of the Hayes clamp and lamp discontinued? This question is significant, because the abandonment of a thing which is greatly wanted is, ordinarily, a very suggestive circumstance to show that it was defective, and that, before the invention could be completed, something was to be done which never was done.

"I think that Wallace & Sons did not push the electric lamp business because they had no generator, and I also think that the Hayes lamp, either with or without the Hayes clutch, did not impress them favorably, for they contented themselves with making only one specimen, whereas they made six White lamps, and, after much experimenting, and after the invention of the Hayes lamp, they made fifty or sixty plate lamps. For some reason they did not manufacture the Hayes lamp, but turned away to the plate lamps. But the facts that the anticipatory device was the device of the patent, and did do practical work, and was put to ordinary use, and that it does not appear that the Hayes clamp was the cause of the neglect with which Wallace & Sons treated the Hayes lamp, seem to me to outweigh the doubts which arise from the shortness of its existence and its permanent disappearance from a carbon pencil lamp.

"The case is that of the public, well-known, practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric arc lighting, of the exact invention which was subsequently made by the patentee; and, although only one clamp and one lamp were ever made, which were used together two and one-half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject. With a strong disinclination to permit the remains of old experiments to destroy the pecuniary value of a patent for a useful and successful invention, and remembering that the defendants must assume a weighty burden of proof, I am of the opinion that the patentee's invention has been clearly proved to have been anticipated by that of Hayes. *Coffin* v. *Ogden*, 18 Wall. 120; *Reed* v. *Cutter*, 1 Story, 590; *Pickering* v. *McCullough*, 104 U. S. 310; Curtis on Patents, §§ 89–92.

"The bill, so far as it relates to the clamp patent, is dismissed."

We have examined carefully the evidence in this case, relied upon by the plaintiffs to show that the clamp arrangement of

Hayes was not a perfected invention, but was merely an abandoned experiment, and we have arrived at the conclusion that Judge Shipman's views on the subject are correct. They are well and accurately expressed, and we could not add to their force by a prolonged discussion of what is purely a question of fact.

The cases of *Coffin* v. *Ogden* and *Pickering* v. *McCullough*, cited by Judge Shipman, are enforced by the case of *Hall* v. *Macneale*, 107 U. S. 90, 97. This latter case meets, also, the objection made by the appellants that the mechanism of the Hayes clutch was concealed from view, and the further objection that it would not operate as perfectly as that of the Brush invention. In *Hall* v. *Macneale*, speaking of the anticipating safes, this court said: "The invention was complete in those safes. It was capable of producing the results sought to be accomplished, although not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view, after the safes were completed, and it required a destruction of the safes to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them."

It is contended by the appellants that, notwithstanding the prior existence of the Hayes apparatus as a perfected invention, claims 5 and 6 of the reissue are sustainable because each of them is limited to an "annular clamp." It is urged that the clamp of the patent is a ring which surrounds a cylindrical rod, and that the rod in the Hayes apparatus was square or rectangular, and was surrounded by a rectangular clamp. But it is quite apparent that claims 5 and 6 of the reissue would, if the patent were valid, be infringed by the manufacture and use of the patented apparatus with a rectangular carbon rod surrounded by a rectangular clamp. Such an apparatus might be inferior in perfection and utility to the cylindrical rod with the ring clamp; but it would still embody the principle of the

invention, carried out by equivalent means. The improvement, if any, in the use of the circular clamp over the rectangular clamp was only a question of degree, in the use of substantially the same means.

We are of opinion that the decree of the Circuit Court must be affirmed; and it is so ordered.

DENT *v.* FERGUSON.

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

No. 32. Argued April 23, 24, 1889. — Decided October 28, 1889.

The petition of a bankrupt in bankruptcy, in which he states under oath that he owns no real estate and holds no interest in real property, is evidence of the execution and validity of a prior deed of his real estate in a suit in which he contests such execution and validity.

The proof in this case fails to show imbecility, dotage or loss of mental capacity on the part of the appellee at the time when the contract in dispute was made.

An executed agreement by one party to cause the debts of the other to be cancelled by his creditors, valid in its inception, is not invalidated as to the debtor by reason of the settlements being effected for a small percentage, or even by the employment of improper means to effect them.

A conveyance by a debtor, deeply indebted, and in anticipation of decrees and judgments which, added to existing incumbrances, will amount to the value of the property conveyed, will lead a court of equity to presume that the instrument was executed in fraud of the creditors.

If a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for many years acquiesces and concurs in devices, collusive suits and impositions upon the court in furtherance of that purpose, without taking any step to annul such conveyance or stop such proceedings, a court of equity will not aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished.

The maxim "*in pari delicto, potior est conditio defendentis*" is decisive of this case.

This was a suit in equity originally brought in the Chancery Court of Shelby County, Tennessee, on the 10th of December,

Statement of the Case.

1881, by the appellees, heirs-at-law of Alexander M. Ferguson, deceased, against the appellants, heirs-at-law and legal representatives of Henry G. Dent, deceased. Upon application of the complainants, the case was removed into the United States Circuit Court for the Western District of Tennessee on the ground of the diverse citizenship of the parties.

The object of the original and the two amended and supplemental bills was to recover from the defendants a large amount of real property alleged to have belonged to A. M. Ferguson, deceased, and to have been fraudulently obtained from him by Henry G. Dent, deceased; and also to have set aside and annulled the agreement, deeds and judicial proceedings by which such fraudulent acquisition was effected.

The instrument which the complainants most especially sought to have delivered up and cancelled purported to be an absolute agreement and conveyance of a large amount of real property situated in Memphis, Tennessee, executed by Ferguson to Dent, and was as follows:

"This agreement, made this 14th day of May, 1869, by and between A. M. Ferguson, of the first part, and H. G. Dent, of the second part, all of the city of Memphis and State of Tennessee, witnesseth, that the said Ferguson, for the purposes and considerations hereinafter set forth, has this day bargained and sold to the said Dent all his right, title and interest of, in and to certain lots or parcels of land situated, lying and being in the city of Memphis and State of Tennessee, as per schedule thereof hereto annexed, and for identification signed by the parties hereto.

"That for said considerations he binds himself to make conveyance by quit-claim to said Dent, or to whomsoever he may direct, of said several pieces of property on demand, excepting, however, one piece of property contained in the schedule hereto annexed, situated on the southeast corner of Beale and Hernando streets, to which he agrees to make a warranty deed to James E. Dillard, to whom said Dent has bargained the same for $8000 subject to certain judgment liens which will be expressed on the face of said deed when it shall be executed. The

consideration of this agreement is that the property hereby agreed to be conveyed is much encumbered by judgments, decrees and deeds of trust, taxes and assessments for grading and paving to nearly, if not quite, its full value, as also shown in said schedule, and the only interest remaining to said Ferguson in the same is his equity of redemption. For this equity he is willing to take the sum of $10,000, and allow the purchaser to make the best use he can of the property in paying off said encumbrances and making what he can out of the surplus. The further consideration of this agreement is, therefore, that the said H. G. Dent will pay the said A. M. Ferguson the sum of $4000 in cash in hand and by the conveyance to be made to James E. Dillard, will secure the payment of the further sum of $6000 to said Ferguson, making an aggregate of $10,000 as agreed upon, and will dispose of the balance of said property to the best advantage, to discharge the liens thereon, or otherwise discharge the same, and will have no recourse on said Ferguson in law or equity for any encumbrance or defect of title whatsoever on any of said pieces or parcels of land, but take the same at his own risk; and inasmuch as the terms, conditions and considerations of this agreement cannot be properly expressed in the several conveyances desired and contemplated by the parties, this instrument and the schedule hereto annexed are made for a more thorough and complete explanation and exposition of the same.

"In testimony whereof the said A. M. Ferguson and H. G. Dent have hereunto set their hands the day and date first above written.

"Attest: W. L. Van Dyke. A. M. Ferguson. [Seal.]
C. W. Frazer. H. G. Dent. [Seal.]"

The complainants averred in their bills that this instrument was drawn up and signed only as a plan proposed, but never adopted, was never understood by the parties to it to be of any force as between themselves, and was never in fact delivered to Dent, but was retained by Ferguson as his private property and placed with his other papers in the possession

and custody of his attorney, one W. L. Van Dyke, where it remained until the death of the latter, when Dent, by fraudulent representations to a woman in charge of Van Dyke's room and effects, succeeded in abstracting it from the papers of Ferguson; and that Dent then, after Ferguson died, set up a claim to the ownership of the property under said pretended contract. They further averred that, even if said instrument was really delivered, it was void because of the fraudulent means and undue influence by which Dent imposed upon Ferguson to make a conveyance of his property at a grossly inadequate price, which was never paid. It was further alleged that Dent was, at the date of said agreement, and had been for many years prior thereto, the agent of Ferguson in the management of his property, and had so gained his confidence and had acquired such an ascendancy over Ferguson's mind and will, especially during the latter part of his life, when he was in his dotage and incapacitated to attend to his interests, that all his financial transactions were subject to Dent's supervision and direction; that among these transactions was an indorsement by Ferguson on the 12th of April, 1867, of four notes of Dent of $12,500 each, aggregating in amount $50,000, which he (Dent) gave in part payment of a purchase by him of a stock of goods from Lockwood & Co. in Memphis; that this sale by Lockwood & Co. to Dent was soon afterwards attacked by the creditors of the former as fraudulent, and four successive attachments were sued out and levied upon the stock of goods; and that four replevin bonds were given by Dent and signed by Ferguson, one as surety and the other three as a principal, he having purchased from Dent one-half interest in the stock.

It was alleged that the amount of the judgment rendered on these bonds against Dent and Ferguson was about $65,000; and that of the Lockwood notes for $50,000, one was claimed to have been paid off and taken up by Dent, the other three having been compromised by Dent and Ferguson giving their notes for $18,000, secured by a deed of trust upon a large part of the Ferguson property in dispute and one lot belonging to Dent, executed to one Carmack, trustee for certain

creditors into whose hands the notes had fallen. It was further alleged that Ferguson, harassed by this sudden and largely increased indebtedness, (already great,) desired and proposed to make an assignment for the benefit of his creditors, but was overruled in this purpose by the controlling influence of Dent, who, by imposition and fraud, prevailed upon him to sign the pretended contract of May 14, 1869, which the said Dent got up to serve his purpose of fraudulently possessing himself of Ferguson's estate.

The bill further set forth with great minuteness of detail the various subterfuges and contrivances to which, it was alleged, Dent resorted to cover up and conceal from the creditors the ownership of the property, and the trust deeds and judicial proceedings by which the baffled creditors were inveigled into compromises at enormous sacrifices; and that various persons, mostly Dent's attorneys and relations, or persons having an understanding with him, purchased all of the property under these trust deeds and at said judicial sales, (with money furnished by Dent, which he raised from the rents and profits of Ferguson's estate,) and held their titles in trust for said Dent.

It was then alleged that all the liabilities of Ferguson had been settled, and all the encumbrances upon his property removed, for the most part, out of the rents and profits of said property.

The prayer of the bill was that the contract of May 14, 1869, be declared void; and that the defendants be declared trustees of the property for the complainants, and required to turn it over to their possession, and account for its rents and profits.

The answer, after a general denial of all the allegations of the bill, especially denied those relating to the undue influence charged to have been exercised by Dent over Ferguson, those relating to Dent's agency, and those relating to Ferguson's dotage, weakness of mind and incapacity for business. It admitted that Dent's heirs had in their possession a deed or contract properly executed, attested and delivered, dated May 14, 1869, but unregistered, under which they claimed title to the property referred to in the bill, and averred the fairness and justice of the contract, its delivery to Dent by Ferguson, and

Citations for Appellants.

also the delivery into his actual possession of all the property conveyed by it. It also set forth the hopeless condition of Ferguson's affairs; that Dent had extinguished the debts and removed from the property all the encumbrances and paid the $10,000, or its equivalent, which was the consideration mentioned in the deed; and that $10,000 and the discharge of the debts, quite as great in amount as that of the value of the property conveyed, constituted a full and sufficient price therefor. It set up as a defence the acquiescence of Ferguson, as long as he lived, (a period of eleven years,) in the contract, and in Dent's acts under it, and also the fact that Ferguson had filed his petition in bankruptcy, stating under oath that he did not own any real estate, which proceeding it relied on as an estoppel and as proof of an outstanding title.

The defendants Frazer, Trezevant and the De Soto Building and Loan Association each filed a separate answer, in which they each stated that the titles held by them respectively to the property with which the bill had connected their names were held by them as trustees for Dent, or as a security for fees, advances and loans to him. Dillard, in his deposition, answered, alleging that the titles held by him to any of the property claimed by complainants were held for the benefit of Dent. Hooper and wife answered, denying the averments of the bill that Susan R. Hooper purchased the Selby claim which she was prosecuting against the estate of Ferguson, as the agent of Dent, but averring that such purchase by her was *bona fide* and for her own use and benefit, and that said claim was then her own property.

The answers of the other defendants averred that before the filing of the bill they had parted with whatever right or title they ever had to any of the property in controversy.

Proofs were taken and a hearing was had before the circuit justice, the district judge sitting with him, and a decree was rendered in accordance with the prayer of the bill. 24 Fed. Rep. 412.

Mr. D. H. Poston and *Mr. T. B. Turley*, for appellants, cited: *Battle* v. *Street*, 85 Tennessee, 282; *Taylor* v. *Harwell*,

5 Humphreys, 331; *Searcy* v. *Carter*, 4 Sneed, 271; *Magniac* v. *Thompson*, 7 Pet. 348; *Walker* v. *McConnico*, 10 Yerger, 228; *Jenkins* v. *Pye*, 12 Pet. 241; *Heyward* v. *Elliot Nat'l Bank*, 96 U. S. 611, 617, 619; *Graham* v. *Boston, Hartford &c. Railroad*, 118 U. S. 161; *New Albany* v. *Burke*, 11 Wall. 96; *Preston* v. *Preston*, 95 U. S. 200; *Bolton* v. *Dickens*, 4 Lea, 569; *Burke* v. *Smith*, 16 Wall. 390, 401; *Snell* v. *Atlantic Ins. Co.*, 98 U. S. 85; *Grymes* v. *Sanders*, 93 U. S. 55; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806; *Brown* v. *Buena Vista County*, 95 U. S. 157; *Hamilton* v. *Zimmerman*, 5 Sneed, 39, 48; *Cooley* v. *Steele*, 2 Head, 605; *Stephenson* v. *Walker*, 8 Baxter, 289; *Bank* v. *Sherman*, 101 U. S. 403; *Conner* v. *Long*, 104 U. S. 228; *Glenny* v. *Langdon*, 98 U. S. 20; *Redmand* v. *Gould*, 7 Blackford, 361; *Griswold* v. *McMillan*, 11 Illinois, 590; *Berry* v. *Gillis*, 17 New Hampshire, 9; *S. C.* 43 Am. Dec. 584; *Lea* v. *Talfer*, 1 Car. & P. 147; *Mims* v. *Swartz*, 37 Texas, 13; *Swepson* v. *Rouse*, 65 N. C. 34; *Crayton* v. *Hamilton*, 37 Texas, 269; *Fay* v. *Reager*, 2 Sneed, 203; *Killibrew* v. *Murphy*, 3 Heisk. 546; *Johnson* v. *Geisriter*, 26 Arkansas, 44; *Barron* v. *Newberry*, 1 Bissell, 149; *Perley* v. *Dole*, 38 Maine, 558; *Oakey* v. *Corry*, 10 La. Ann. 502.

Mr. T. B. Edgington, for appellee, cited: *Jackson* v. *Leek*, 12 Wend. 105; *Fay* v. *Richardson*, 7 Pick. 91; *Hampton* v. *Rouse*, 22 Wall. 263; *Sutherland* v. *Davis*, 42 Indiana, 26; *Hamilton* v. *Zimmerman*, 5 Sneed, 39; *Helm* v. *Wright*, 2 Humphreys, 72, and Cooper's notes; *Decherd* v. *Blanton*, 3 Sneed, 373; *Smith* v. *Fowler*, 12 Lea, 163, 174; *Lincoln* v. *Purcell*, 2 Head, 143, 145; *S. C.* 73 Am. Dec. 196; *Faucher* v. *DeMontegre*, 1 Head, 40, 41; *Hurd* v. *French*, 2 Tenn. Ch. 355; *Meriwether* v. *Vaulx*, 5 Sneed, 300; *Kirk* v. *Smith*, 9 Wheat. 241, 256; *DeArusmont* v. *DeLagerty*, 9 Lea, 199; *Armstrong* v. *Campbell*, 3 Yerg. 201; *S. C.* 24 Am. Dec. 556; *Bovey* v. *Smith*, 1 Vern. 60; *Johnson* v. *Waters*, 111 U. S. 640; *United States* v. *Throckmorton*, 98 U. S. 61, 65, 66; *Brooks* v. *Cauhgran*, 3 Head, 464; *Williamson* v. *Godwyn*, 9 Grattan, 503; *Pettus* v. *Smith*, 4 Rich. S. C. Eq. 197; *Wiley* v. *Knight*, 7 Alabama, 336.

Opinion of the Court.

Mr. Justice Lamar, after stating the facts in the foregoing language, delivered the opinion of the court.

The main grounds of the bill are :

(1) That the agreement or conveyance of May 14, 1869, was never delivered, but was only a paper in contemplation to be executed, and that the execution and delivery of it were finally abandoned; and

(2) That said contract was procured by fraud on the part of Dent to enable him to possess himself of the estate of Ferguson without paying him a valuable consideration therefor; and that Ferguson was of weak mind, in his dotage, and easily imposed upon by Dent, between whom and himself the relation of principal and agent existed.

We concur fully in the position assumed by both the circuit justice and the district judge, that the execution and delivery of the agreement and conveyance of May 14, 1869, by Ferguson to Dent were sufficiently proven. A careful examination of the evidence, especially that introduced in behalf of complainants, leaves no doubt on this point. The paper was frequently recognized and acted upon by Ferguson. He received part, at least, of the money to be paid under it and frequently called for more, complaining of Dent that he had not fully paid the amount agreed to in the contract. He received the two Dillard notes for $3000 each, as provided for in it, in part payment, and also accepted Dillard's deed of trust on the property conveyed to him, as securities therefor. He solemnly reaffirmed it over his own signature and seal on the 23d of August, 1869, in a deed introduced in evidence by complainants, in which deed the recital is as follows : "Whereas on the 14th of May, 1869, H. G. Dent and A. M. Ferguson entered into an agreement of purchase and sale, by which said Dent purchased the equity of said Ferguson in all his real estate in Shelby County for the sum of $10,000, $4000 of which was to be paid in cash, and $6000 in notes," etc. He again recognized and carried out his part of it, when, on the 25th of May, 1869, he made a deed to Dillard in pursuance of its terms. His petition in bankruptcy, filed on April 29, 1878, in which he stated on oath

that he did not own any real estate, nor hold any interest in any real property, except a leasehold that would expire in less than a month, though not a technical estoppel as a defence in this suit, is at least evidence of the execution and validity of the instrument in question. In view of these facts, which appear from the proofs and pleadings of the complainants, we do not deem it necessary to review the mass of testimony offered by the complainants to sustain their charge that Dent purloined the writing from Ferguson's papers.

As to the second point we cannot assent to the conclusions of the court below. The evidence, we think, fails to show any imbecility, dotage or loss of mental capacity on the part of Ferguson in 1869, when the contract was made. About fifteen witnesses produced by the complainants were questioned as to the character and condition of his mind, three, and perhaps four, of whom, speak of him as being weak, ignorant and childish; but the general tenor of the testimony of the others, who had any opinions to express, was directly the reverse. The combined effect of this testimony, taken as a whole, putting out of view the evidence on behalf of the defendants, leaves on the mind a decided impression that Ferguson, though to a certain extent illiterate, was a man of good, sound sense, of large experience in business and capable of transacting his own affairs. Outside of the nature of the transaction itself, and the relation of principal and agent between him and Dent, which will be presently considered, there is very little, if any, testimony that he was ignorant of his rights or of the value of his property, or in the slightest degree incompetent to comprehend the terms of the contract in question, or to understand the obligations of an oath. Nor does a single witness testify that Dent ever falsely represented to Ferguson the amount of his indebtedness, ever under-estimated to him the value of his property, or ever exaggerated to him the danger from creditors. Even as to who suggested the contract of May 14, 1869, the testimony, slight as it is, is conflicting and uncertain.

It is, however, insisted that the price agreed to on the face of the instrument itself was so grossly inadequate as to create the presumption of fraud and undue influence, aside from, and

independent of, any proof other than the single fact that the parties thereto bore the relation to each other of principal and agent. Assuming for the present, and for present purposes only, that the agreement was *bona fide* as respects third persons, creditors of Ferguson and Dent, and considering it with exclusive reference to the reciprocal rights of the two parties to it, we do not think the evidence is such as to raise the presumption of fraud and therefore to call for or justify the interposition of a court of equity for the cancellation of the contract. The fairness of the transaction, on this point, should be determined by the condition of things at the time the contract was made and executed, and not by what occurred afterwards, except so far as subsequent developments may reflect light upon it.

What were the circumstances under which this instrument was executed? A. M. Ferguson was then possessed of a large estate in Memphis, consisting of valuable city lots with improvements, all estimated by competent witnesses to be worth $100,000, more or less. At that time he was indebted to various persons in sums which, we believe, it is admitted amounted to as much as the value of his property. Many of these debts, perhaps the majority in amount, originated as joint promissor with, or as indorser or surety for, Henry G. Dent, who had been his agent for the renting of his property and intimate friend for many years, and who was himself wholly insolvent. But whatever the origin of his debts, they had become, as between Ferguson and his creditors, legal and binding upon him; nor did the fact that they were the liabilities of an indorser lighten the burden of them, or lessen the peril of impending insolvency, or abate the eagerness of pursuing creditors. These creditors had been for some time active and pressing for payment, and his real estate was heavily encumbered with judgments, decrees, deeds of trust, sheriff's deeds, taxes and assessments for public improvements. Several other suits, aggregating nearly $50,000, were proceeding to judgment. Some idea of his embarrassed condition may be found from the fact that on the 29th of March, 1869, a bill had been filed to reach his equitable rights and interest in the

property, the subject of this controversy, in which the complainant alleged on oath that an execution issued on a judgment at law obtained by him against Ferguson had been duly returned "no property found whereon to levy;" and that after diligent search and inquiry he could not find any property in Memphis to which Ferguson had an unencumbered legal title subject to an execution at law.

Such was the condition of Ferguson's affairs when he made the agreement of May 14, 1869. The consideration of this agreement was that Ferguson should receive $4000 in cash and $6000 in notes, and that Dent should "*discharge the liens*," not that he should *pay them in full*. This discharge Dent fully procured. Ferguson was fully discharged, and all claims against him were legally cancelled, not only those then existing, but also those that were impending and which afterwards matured. This fact is thus stated in the words of complainants' bill: "The liabilities of the said A. M. Ferguson by judgments, trust deeds, mortgages and mortgages in the form of warranty deeds, have all been settled and paid off except as hereinafter stated, and the said complainants, as heirs at law of the said A. M. Ferguson, are entitled to have the said real property handed over to them free and discharged of all liens."

If the promise to cancel the debts was a fair and valid transaction when it was made, it did not become less so because subsequent occurrences enabled Dent to effect a settlement with the creditors upon the payment of a small percentage of their respective claims; and if the means he employed to effect such compromises were not proper, it might give the overreached creditors cause of complaint, but certainly not Ferguson. Had Dent been able to persuade the creditors to give a release of their claims without any consideration whatever, that could not retroact and make inadequate what was an adequate consideration when the contract was made. When it was made no one knew that the debts could be compromised for much less than their face value as was done by Dent; for as the district judge truly remarks: "The astounding fact in this record is that the creditors did not appropriate

all this property to their debts." And yet it is an undeniable fact that Dent did avert such an appropriation; and that Ferguson was fully discharged, and the claims were legally cancelled by methods not fully developed, but assented to and facilitated by Ferguson. For instance, a judgment for over $22,000 in favor of H. B. Claflin & Co. of New York, was settled for $1000; a claim in favor of Louis Selby for $12,622.11 for $1325; and an assessment for $6998 for the Nicholson pavement, stated in said agreement of May 14, 1869, to be a lien on the property conveyed, was entirely defeated on legal grounds.

The consideration as to the extinguishment of the debts was fully performed. The $6000 of notes were received by Ferguson and afterwards indorsed to his relatives. As to how much of the remaining $4000 coming to him under the agreement was paid to him in cash, there is much conflict of testimony, which, owing to the lapse of time and the death of both parties to the contract, cannot be reconciled. Apparently $1400 was paid soon after; for the instrument dated August 23, 1869, which the complainants introduced and rely on, states that the payment of that sum was made on that day. C. L. Morrison, a witness for complainants, whose testimony their counsel declares, in his brief, to be more important than that of any and all the other witnesses for complainants, testifies that from 1871 to 1876 he paid to Ferguson from $80 to $90 a month out of the rents collected by him from a portion of the property; and that he saw Dent pay him during that period out of his own pocket about $300 a year. These sums aggregate a larger amount than $4000.

Our conclusion, therefore, is that the contract, considered apart from its bearing on other creditors, does not in the absence of other proof lack the essential qualities of adequacy and fairness as between the parties thereto themselves. If this be so, the point as to principal and agent, upon which so much stress has been laid, is of minor importance. The doctrine as to this fiduciary relation, applied to its full extent, is simply a rule of evidence which, under some circumstances, imposes upon an agent the burden of proving the fairness and justice

of the transaction with his principal within the scope of his agency. If the contract was valid as to the creditors of Ferguson, the consideration therein expressed was sufficient to satisfy this burden.

The evidence shows that for many years Dent was an agent of Ferguson for the renting of his property, with more intimate relations than with his other patrons. But the record does not show that he was ever employed to buy or sell real estate for Ferguson. On the contrary, there is positive testimony that his (Ferguson's) traffic in that business was carried on by himself alone.

We have considered this case, so far, upon the assumption of the circuit justice, that the agreement was executed and delivered by Ferguson to Dent in good faith as to Ferguson's creditors. We do not concur in this assumption. If the voluminous record before us discloses a single fact tending to sustain that assumption, except a general expression of opinion by some of the witnesses that he was an honest man, it has escaped our search. The instrument itself was executed under circumstances which would lead a court to presume fraud upon creditors. It was a conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing encumbrances, amounted to the value of his property. We, therefore, agree with the district judge on this point, that the real contract was one between Ferguson and Dent to defraud the creditors out of the property conveyed, and to so conceal and cloud the title that they could be circumvented, hindered and delayed, and coerced into settlements and compromises. We think the evidence shows beyond doubt that Ferguson willingly participated for ten years in carrying out this plot. Both parties knew that $10,000 could not be saved for Ferguson, or any residuum out of the property for Dent, unless creditors could be wrought upon by some means to accept less than their claims. Neither party to such a contract could have been deceived or imposed upon about that result. Both knew the record fact, that the encumbrances perfected, and the encumbrances rapidly perfecting, exceeded in amount the value of the property.

Opinion of the Court.

That Ferguson had that fraudulent design when he signed his name to the instrument and turned over the property to Dent, as its owner, was directly sworn to by witnesses introduced by the complainants and examined by them — of course for a very different purpose. Mrs. A. G. Morrison, a witness produced to show that Dent had fraudulently abstracted certain papers from Ferguson deemed by him to be important and valuable, deposes as follows in reply to the question "What was it Mr. Ferguson told you about the sale of the property?" [referring to the sale now under consideration]: "He told me he went on Mr. Dent's bond, as near as I can remember. Mr. Dent went into business and broke, and the property was covered up some way in Mr. Dent's name to keep it from being sold. I couldn't tell you how long Mr. Ferguson told me, but I am positive he told me it was covered up in Dent's name, and he says: 'There is wherein Dent has robbed me; he would not give me those papers back.'" In reply to another question, which the witness said did not repeat her previous answer accurately, she replied: "He didn't say it in those words. . . . He says he turned the property over to Dent, put it in his name," etc. Again, "He said something about a receiver being appointed, and he says: 'I turned the property over to Dent to keep it from being sold; I don't want it sold, because the rent of my property will pay the debt,'" etc. Another witness for the complainants, Robert McWilliams, testifies as follows concerning a conversation had with Ferguson in 1878: "If I remember correctly, he said that he had made over his property to Dent, with the tacit understanding that he should have sufficient to live on until his discharge in bankruptcy, and then Dent would return or turn over the property to him again." In reply to the question "What, if anything, do you know concerning the arrangement of A. M. Ferguson and Henry G. Dent concerning the Ferguson property on Beale, Hernando and De Soto streets and elsewhere?" he said: "I know of nothing except that Ferguson told me that he had conveyed this property to Dent with the tacit understanding that he (Ferguson) should have enough out of the rents of the property

to live on until he had got through bankruptcy, when the property should be returned to him again."

The question arises — if a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for eleven years acquiesces and concurs in the devices, collusive suits and impositions upon the court in furtherance of this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings, will a court of equity aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished? This court has answered that question in the negative in *Randall* v. *Howard*, 2 Black, 585. In that case the complainants and defendant had made an agreement to defeat the claims of third persons to certain lands which the complainants had mortgaged to the defendant to secure a debt, so as to cloak the ownership by means of a foreclosure sale at which the defendant should purchase and hold the nominal title. After obtaining the title, he fraudulently dispossessed the complainants and asserted the right of ownership in himself. The prayer of the bill was to restrain the defendant from disposing of the land, and to restore it, or so much of it as remained after paying the debt, to complainants. The court, Mr. Justice Davis delivering the opinion, held that the agreement was a fraudulent one, to defeat a claim set up by other parties for a portion of the mortgaged lands by the covering up, through the aid of the court, the real ownership of the property, and said (p. 588): "A fraudulent agreement was entered into to defeat, as is charged, 'a fraud attempted against the complainants.' . . . A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, *in pari delicto potior est conditio defendentis*, must prevail. It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another;" citing 1 *Story's Equity*, § 298; *Bolt* v. *Rogers*, 3 Paige, 154, 156; and *Wilson* v. *Watts*, 9 Gill, 356.

The same principle was applied in *Wheeler* v. *Sage*, 1 Wall.

518. In that case an agreement was entered into between complainants and defendant to secure the title to valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, which the defendant violated, and, in conjunction with another person, secured an interest in the property to himself. The bill prayed that he be declared a trustee for the complainants, and required to convey to them that portion of the land to which, under the agreement, they were entitled. The court, Mr. Justice Davis delivering the opinion, said (p. 529): "Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But, if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him." And then, after a review of the evidence in that case, the opinion concluded in these words: "A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, '*in pari delicto*,' etc., must prevail" (p. 530).

We cannot assent to the opinion of the district judge that this maxim has no application to the case at bar. In the views prepared by him at the request of Mr. Justice Matthews, and which were adopted by the latter, he says, in speaking of the contract of May 14, 1869, that it is only "in *form* a contract for the sale of property;" and proceeds: "The real contract was one to defraud the creditors of Ferguson and Dent out of this property, and it was calculated that this could be done on a basis of $10,000 to Ferguson, to be realized out of the property itself, and all the balance to Dent, whatever that might be. But this was an unequal, unconscionable, and unfair division, particularly in view of actual results, in the accomplishment of which Dent has risked nothing but his time and labor. Ferguson has agreed to give too much for Dent's services in that behalf. . . .

One of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud, and the maxim, *in pari delicto potior est conditio defendentis*, . . . has no application whatever to a case like this."

From this view we dissent. We find no authority for the idea that it is the province of a court of equity to make a fraudulent debtor the special object of its favor because he has not received a large enough consideration for his "confessed fraud." That court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud. Mr. Justice Baldwin, delivering the opinion of the court, in *Bartle* v. *Coleman*, 4 Pet. 184, 189, uses the following language: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." Or, as Chancellor Walworth states it: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." *Bolt* v. *Rogers*, 3 Paige, 154, 157.

The cases relied upon by the court below to sustain its position do not shake the authorities we have cited to show that courts of equity refuse to annul and also to enforce contracts in fraud of the rights of others, when called to act as between the parties. For there is a distinct class of decisions affecting subsequent and collateral contracts not partaking of the fraud which infects the main transaction.

The principles established by those decisions in diversified forms, according to the varying cases, is that a new contract, founded on a new and independent consideration, although in

relation to property respecting which there had been unlawful or fraudulent transactions between the parties will be dealt with by the courts on its own merits. If the new contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition or undue influence, it will be rescinded and justice done to the parties. *Armstrong* v. *Toler*, 11 Wheat. 258; *McBlair* v. *Gibbes*, 17 How. 232; *Brooks* v. *Martin*, 2 Wall. 70; *Planter's Bank* v. *Union Bank*, 16 Wall. 483; *Railroad Co.* v. *Durant*, 95 U. S. 576.

But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts invalid in consequence of their illegality from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here. The present case does not involve any question of a subsequent and distinct contract, but seeks relief directly from the original fraud, to which the person under whom complainants claim was a contracting party fully sharing in the fraudulent intent.

We do not think that complainants' counsel gives an explanation of the testimony of McWilliams which strengthens their claim to relief. That claim, stated in his own language, is: "That Ferguson placed his property in Dent's hands, to be used in liquidating his debts, and, when this was done, the property, or so much of it as had not been consumed in the payment of debts, was to be restored to Ferguson, and that in the meantime Ferguson was to have enough of the rents to live on."

Such an arrangement, so entirely inconsistent with the absolute conveyance of the property as executed between the parties, has all the features of a fraud upon creditors. It reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors have a right of immediate appropriation to their debts, and involves a secret trust for the return to himself of property of which such cred-

itors have the immediate right of sale. The law does not countenance any such transaction, but leaves both parties in the position where they have placed themselves. *Lukins* v. *Aird*, 6 Wall. 78.

The district judge is mistaken when he says that "one of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud." The object of the suit, as clearly and explicitly stated in the bill, is to secure to the complainants the entire benefit of the confessed fraud by having all the property, with all the intermediate rents and profits added, free from all liens and liabilities, returned to them. The real complaint is that Dent, the fraudulent vendee, refused to perform his part of the fraudulent understanding with Ferguson, the fraudulent vendor; and the avowed purpose of the suit is to compel the defendants to perform it. The prayer cannot be granted without overturning established principles of equity.

The decree of the Circuit Court should, therefore, be

Reversed, and the case remanded to that court, with a direction to dismiss the bill with costs; so ordered.

THOMPSON *v.* WHITE WATER VALLEY RAILROAD COMPANY.

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

No. 26. Argued October 21, 1889. — Decided November 4, 1889.

A mortgage by a railroad company, which covers its entire property and also all property appertaining to its road which it might afterwards acquire, is valid as to such after-acquired property; and the bonds issued under it are a prior encumbrance on a part of the chartered line constructed, after the funds realized from the mortgage bonds had been exhausted, out of moneys subsequently furnished by parties who took from the company a special lien upon the rents and profits of the section so constructed with their money.

Statement of the Case.

The doctrine that a vendor not taking security for the price of real estate sold by him holds in equity a lien upon the property for such price has no application to this case.

THIS suit was brought by holders of obligations of the Indiana, Cincinnati and Lafayette Railroad Company, and on behalf of other holders similarly situated, to enforce an alleged lien claimed by them upon earnings of a section of the road of the White Water Valley Railroad Company, against the claim to priority of bondholders secured by an earlier mortgage. The White Water Valley Railroad Company was organized as a corporation in 1865, under the laws of Indiana, with authority to locate, construct and operate a line of railway from Hagerstown, in Wayne County of that State, to the town of Harrison, Dearborn County, on the boundary line between Indiana and Ohio. To raise the necessary means to construct the railway, the company issued its coupon bonds to the amount of one million of dollars, in sums of one thousand dollars each. They were dated August 1, 1865, and were to mature the 1st of August, 1890, and draw interest at the rate of eight per cent per annum, payable semi-annually. To secure the payment of the principal and interest of these bonds, the company executed to trustees by way of mortgage, a deed bearing date on that day, of its railroad and all the right of way and land occupied thereby, with the superstructure and all property, materials, rights and privileges, then or thereafter appertaining to the road, and the benefit of all contracts with other railroad companies, then existing or thereafter to be made, and all property, rights and interests under the same. The deed contained the usual covenants to execute suitable conveyances for the further assurance of property subsequently acquired and intended to be included in the instrument. The company soon afterwards commenced the construction of the road, and by the 4th of November, 1867, completed that part of it which lies between the towns of Harrison and Cambridge City, leaving the distance from the latter place to Hagerstown —between seven and eight miles — unconstructed. It was then without the requisite means to equip the part of the road completed, or to undertake the construction of the remaining

portion of the road. In this condition it entered into a contract of perpetual lease with the Indianapolis, Cincinnati and Lafayette Railroad Company, a corporation then in existence, in consideration of which the latter company agreed to furnish all the necessary equipments, material and laborers to operate the line of the road then completed, and to construct and put in good and safe running order for the accommodation of the public that part of the line then uncompleted, that is, the section between Cambridge City and Hagerstown, and to pay to the lessor annually the sum of one hundred and forty thousand dollars in four quarterly payments of thirty-five thousand dollars each. The contract referred to the mortgage of one million of dollars before mentioned, and provided for the payment of the interest thereon out of the rents received, and for the resumption of possession by the lessor if the lessee failed to keep its covenants.

The Cincinnati, Indianapolis and Lafayette Company went into the possession of the property thus leased, and proceeded to have the remaining portion of the line of the road between Cambridge City and Hagerstown constructed. For that purpose the lessee, on the 7th of December, 1867, entered into a contract with Benjamin E. Smith and Henry C. Lord, by which these gentlemen agreed to construct the remaining portion of the line, and the lessee agreed, in consideration of such construction, to issue to them, or to such parties as they might name, obligations of the company to the amount of two hundred and five thousand dollars, divided into shares of one hundred dollars each, which obligations were to be transferable on the books of the company like shares of stock, and the principal thereof was to be irredeemable, but to bear interest at the rate of eight per cent per annum, payable semi-annually. The contract with these parties recited the right of the lessee company to the perpetual use and possession of the railroad from Harrison to Hagerstown, and the right to construct the uncompleted portion of the road, and have the benefit of all donations made for that purpose, and provided that in payment for the construction of the uncompleted portion the lessee was to issue its obligations to the amount of two hundred

and five thousand dollars, as before mentioned. Under this contract the line of railway between Cambridge City and Hagerstown was completed, and the lessee company remained in its possession from July, 1868, to May 1, 1871, receiving the income thereof, and gave its certificates for the obligations mentioned to Lord and Smith to the amount of two hundred and five thousand dollars. Whilst the work upon this section of the road was in progress it was agreed between the contractors and the lessee company that the holders of the certificates for the obligations should have a perpetual lien upon all the earnings of the line constructed by them, to secure the payment of the semi-annual interest, as stipulated, and on the 23d of April, 1868, such lien was given by resolution of the board of directors of the lessee company. On the 10th of July, 1869, the lessor company and the lessee company united in executing and delivering a mortgage to Smith and Lord upon the section of railroad built by them, in trust to secure the holders of the certificates mentioned. On the 12th of July, 1869, the board of directors of the White Water Valley Railroad Company, by a resolution entered on its records, ratified the contract of lease, and directed its president to execute, or join in the execution of, any writing necessary or proper to give effect to the agreement for the lien on the earnings mentioned. On the first of May, 1871, the two corporations, the lessor and the lessee companies, agreed that the original contract of lease should be cancelled, and that the road of the White Water Valley Railroad Company should be returned to it. In pursuance of such agreement the lease was cancelled, and thereafter the White Water Valley Railroad Company operated the property, receiving its revenue and earnings, amounting, as charged in the bill, to the sum of one hundred thousand dollars. It was agreed between these two companies that in part consideration for the surrender of the road from Hagerstown to Cambridge City the White Water Valley Railroad Company should recognize the priority of the lien of all the holders of the certificates, and should either pay or discharge the interest thereon continuously thereafter, or make other satisfactory arrangements with such holders; or, failing

therein, should surrender to the lessee company the possession of the railroad between those places and cease to operate the same or to receive its earnings.

The bill charged that the White Water Valley Railroad Company had taken and maintained possession of the section of the railroad mentioned since the first day of May, 1871, up to the commencement of the suit, and been in the receipt of all its earnings, and had disregarded its obligations to the holders of the certificates. The bill therefore prayed that an account be taken of the income and earnings of the said branch, and that out of the same the amount due the complainants on their certificates be directed to be paid, and that in default of payment the lien be foreclosed and the property sold.

Answers were filed to this bill and replications to them, and proofs were taken.

Pending the progress of the case the White Water Railroad Company, a corporation under the laws of Indiana — a different corporation from the White Water *Valley* Railroad Company — was permitted to intervene in the case. It seems that after the commencement of this suit the trustees in the mortgage of August 1st, 1865, brought suit for the foreclosure of the mortgage executed to them and obtained a decree for the sale of the entire road mortgaged, which included the whole of the road from Harrison, in Dearborn County, to Hagerstown, in the county of Wayne, embracing that portion extending between Cambridge City and the town of Hagerstown, and under such decree said property was sold and the White Water Railroad Company became its purchaser. In its answer to the bill of complaint, that company set up the proceedings had in the foreclosure suit, the decree for the sale of the property mortgaged, and its purchase of the same. The court below decreed in its favor, holding that the whole of that railroad, including the portion lying and extending between Cambridge City and Hagerstown, was thus acquired and owned by the White Water Railroad Company, and that the only equitable relief to which the complainants were entitled was a possible right to redeem from said mortgage, and gave

to the complainants thirty days in which to commence proceedings for such redemption, and ordered that in default of such proceedings the bill should be dismissed. The complainants declined to take any proceedings for that purpose and the bill was accordingly dismissed; and they appealed to this court.

Mr. C. B. Matthews for appellants. *Mr. D. Thew Wright* was with him on the brief.

Mr. Attorney General for the White Water Valley Railroad Company, appellee.

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

From the above brief statement of the case, it is clear that the decree of the court below must be affirmed. The claims of the complainants, whatever validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of the White Water Valley Railroad Company, executed for their benefit to trustees on the 1st of August, 1865. That mortgage was made before the claims of the complainants had any existence. It covered the entire property of the company then owned by it, including its line of railway from Hagerstown, in Wayne County, to Harrison, in Dearborn County, and all property appertaining to the road which it might afterwards acquire. The validity of mortgages of that character by railroad companies upon property which may be subsequently acquired is not an open question now. It has been affirmed by adjudications of the highest courts of the States as well as by this court. Indeed, in a majority of cases, mortgages by such companies upon their roads and appurtenances have been executed for the purpose of raising the necessary means to construct the roads; and sometimes, indeed, when the lines of such roads

had only been surveyed. In *Galveston Company* v. *Cowdrey*, 11 Wall. 459, 481, there were several deeds of trust which in terms covered after-acquired property, each of which was similar in its character to the one in this case, and the court held that they estopped the company and all persons claiming under them, and in privity with them, from asserting that they did not cover all the property and rights which they professed to cover. Said the court: "Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases." See also *Porter* v. *Pittsburg Steel Co.*, 122 U. S. 267, 283, and cases there cited.

The decision in the case of *Galveston Company* v. *Cowdrey* also covers the only plausible position of the complainants, that they have a lien upon the earnings of the section, because with their moneys the road over it was constructed. But the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line. With those contractors the bondholders, secured by the mortgage of August 1, 1865, had no relations, and incurred no obligation to them. In the case cited it was contended that priority should be given to the last creditor for aiding to conserve the road. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stand on a particular reason; that by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails, but those perma-

nent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed.

The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price is not controverted, but it has no application to the present case. The only right which the complainants possessed was that which was recognized by the decree, a right to redeem the property from the sale under the mortgage, a right which they were allowed to exercise within a specific period; but, they declining to do so, the bill was properly dismissed.

Decree affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* MILLER.

ERROR TO THE COURT OF COMMON PLEAS, NO. 2, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

No. 36. Argued October 24, 25, 1889. — Decided November 11, 1889.

Neither the charter of the Pennsylvania Railroad Company, contained in an act of the legislature of Pennsylvania, passed April 13, 1846, (Laws of 1846, No. 262, p. 312,) nor the acts supplementary thereto, nor the act of that legislature, passed May 16, 1857, (Laws of 1857, No. 579, p. 519,) constituted such a contract between the State and the company as exempted the latter from the operation of § 8 of Article XVI of the constitution of Pennsylvania of 1873, requiring that corporations invested with the privilege of taking private property for public use should make compensation for property injured or destroyed by the construction or enlargement of their works, highways or improvements; nor did such constitutional provision, as applied to the company, in respect to cases afterwards arising, impair the obligation of any contract between it and the State.

The company took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions and future general legislation, since there was no prior contract with it exempting it from liability to such future general legislation, in respect of the subject matter involved.

Exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words.

THE case is stated in the opinion of the court.

Mr. Wayne Mc Veagh for plaintiff in error. *Mr. A. H. Wintersteen* was with him on the brief.

Mr. David T. Watson and *Mr. M. Hampton Todd* for defendant in error. *Mr. George W. Biddle* was with them on the brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action on the case, brought in June, 1881, by George R. Duncan against the Pennsylvania Railroad Company, a Pennsylvania corporation, in the Court of Common Pleas No. 2, for the county of Philadelphia, Pennsylvania. The plaintiff sued as the owner in fee of a piece of land, with the buildings, wharves and improvements thereon, situated at the northwest corner of Twenty-third Street and Filbert Street, in the city of Philadelphia, and extending 230 feet and 11 inches along the west side of Twenty-third Street, and 426 feet from that corner along the north side of Filbert Street, to low-water mark on the Schuylkill River.

The declaration alleged that the defendant had constructed along and upon Filbert Street, and in front of the premises of the plaintiff, an elevated railroad, placed on iron and stone pillars set at the curb-lines in Filbert Street, at intervals longitudinally of 50 feet, more or less, and at an elevation of at least 20 feet above the established grade of Filbert Street, and had constructed an abutment for the sustaining of a bridge superstructure across the Schuylkill River, on the eastern side of said river and in the middle of Filbert Street, in front of the premises of the plaintiff, and had constructed, opposite Filbert Street, in the channel of the river, two piers to further support the bridge superstructure, the bridge and the elevated railroad making a continuous line of railway, operated by the

defendant, to transport freight and passengers in cars drawn by steam locomotives; that Twenty-third Street and Filbert Street, at the place in question, were public highways of the city of Philadelphia; that the construction by the defendant of the elevated railroad, and of the abutment and pier for the support of the bridge superstructure, and the operation and use of the elevated railroad to transport freight and passengers in cars drawn by steam locomotives, and the noise, burning cinders, smoke, dust and dirt, incident to the use of such railroad, had injured the plaintiff in the enjoyment of his premises, and had rendered the same incommodious, and of little or no value to him, and had deprived him of the free use of Filbert Street as a highway, and of free access to and from the wharves on the river front of his property, by the river as well as by Filbert Street, and had greatly depreciated the value of the wharves; and that the injuries were committed on the 1st of June, 1881, and at all times since.

The elevated railroad in question was built by the defendant in 1880 and 1881, and was opened for freight in April, 1881, and for passengers in December, 1881. It is known as the Filbert Street extension, and crosses the Schuylkill River a short distance above Market Street, and ends at Broad Street. From Twenty-first Street west to the river the tracks were laid upon a structure of wooden and iron beams directly over the cartway of the street, and were sustained by iron pillars some 18 inches square, resting upon the footway inside of the curb-line. This was the case along the whole length of the south side of the plaintiff's property, the structure being some 40 feet high, and the railing or guard along the track coming within one or two feet of the wall of the plaintiff's building. None of the plaintiff's property was actually taken by the defendant, but the action was brought for the consequential damages caused by the construction of the railroad and its use and operation.

The defendant set up, among other defences, that it had the right to do what it had done, without liability to the plaintiff, by virtue of its charter, contained in an act passed by the legislature of Pennsylvania, April 13, 1846, (Laws of 1846, No. 262,

p. 312,) and by virtue of a further act of that legislature, passed May 16, 1857 (Laws of 1857, No. 579, p. 519).

The case was tried before the court and a jury, and resulted in a verdict for the plaintiff, for $20,000, for which amount, with costs, he had judgment. On a writ of error, the judgment was affirmed by the Supreme Court of Pennsylvania, *Pennsylvania Railroad Co.* v. *Duncan*, 111 Penn. St. 352, and the defendant has brought the case to this court by a writ of error to the court of first instance, to which the record had been remitted. Duncan having died, his administrator has been substituted as defendant in error.

The Federal question involved is whether the acts of 1846 and 1857 constituted a contract between the State and the defendant, relieving the defendant from liability in this suit, and whether such contract was of such a character that its obligation could not be impaired by subsequent legislation by the State.

It is first necessary to see what are the provisions of the statutes on which the defendant relies.

The 11th section of the act of 1846 gave authority to the defendant to construct a railroad from Harrisburg to Pittsburg, with a branch to Erie, and gave to it the right to enter upon and occupy all land necessary for the purpose, and to "take" the necessary materials from any land adjoining or in the neighborhood of the railroad so to be constructed, "*Provided*, That such compensation shall be made, secured, or tendered to the owner or owners of any such lands or materials as shall be agreed upon between the parties, or in such manner as is hereafter mentioned: *Provided further*, That the timber used in the construction or repair of said railroad shall be obtained from the owners thereof only by agreement or purchase." The 12th section provided for the fixing of such compensation, when not agreed upon, through a petition to the court of quarter sessions of the proper county. The 17th section contained this provision: "And it shall be lawful for the said company, in the manner and subject to the conditions and provisions hereinbefore provided, in relation to the main line of their railroad by this act authorized to be made, to make such

lateral railroads or branches, leading from the main line of their said railroad, to such convenient place or points, in either of the counties into or through which the said main line of their road may pass, as the president and directors may deem advantageous, and suited to promote the convenience of the inhabitants thereof, and the interests of said company."

By the 4th section of the act of March 27, 1848, (Laws of 1848, No. 224, p. 274,) passed as a supplement to the act of 1846, provision was made for ascertaining, through the action of the court of common pleas of the proper county, the damages sustained by the owner of land or materials "taken" by the defendant, in case such compensation could not be agreed upon. Section 5 of that act provided as follows: "That if said railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road: *Provided*, That the damages incurred in changing the location of any road authorized by this section shall be ascertained and paid by said company in the same manner as is provided for in regard to the location and construction of their own road."

By § 1 of an act passed April 12, 1851, (Laws of 1851, No. 297, p. 518,) it was provided that the 5th section of the act of 1848, should be so construed as to include the streets, lanes and alleys in any town, borough, or city through which the road passed.

By the act of May 16, 1857, before referred to, provision was made for the sale at public auction of the whole main line of the public works of the State of Pennsylvania, which included the Philadelphia and Columbia Railroad. The act provided, among other things, (§ 3,) that it should be lawful for any railroad company then incorporated by the State to purchase such main line for a sum not less than $7,500,000; and that if the Pennsylvania Railroad Company should become the purchaser at such public sale or by assignment, (which assignment the act provided for,) it should pay in addition to the purchase-money of not less than $7,500,000

the further sum of $1,500,000, and should, in consideration thereof, have forever certain exemptions from taxation. This provision in regard to taxation was held unconstitutional by the Supreme Court of Pennsylvania in *Mott* v. *Pennsylvania Railroad Co.*, 30 Penn. St. 9, a decision made before the sale took place. The 3d section of the act further provided that it should be lawful for the purchaser "to straighten and improve the said Philadelphia and Columbia Railroad, and to extend the same to the Delaware River, in the city of Philadelphia." The 11th section of the act provided as follows: "That should any company already incorporated by this Commonwealth become the purchaser of said main line, they shall possess, hold and use the same under the provisions of their act of incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions and conditions granted by this act in addition thereto; and all provisions in said original act and any supplements inconsistent with the privileges herein granted shall be and the same are hereby repealed."

At a meeting of the stockholders of the defendant, held on the 20th of July, 1857, for the purpose of accepting or rejecting the provisions of the act of 1857, and of considering such action as the directors of the defendant had taken in pursuance of that act, subject to the approval of the stockholders, it was resolved, that the stockholders of the defendant accepted the provisions of the act, so far as the same in any way related to or affected the defendant, and ratified and approved of such action as had been taken by the board of directors of the defendant, in purchasing the said main line of the public works, pursuant to the provisions of that act, for the sum of $7,500,000. The sale at public auction had taken place on the 25th of June, 1857, and the property had been purchased by the defendant for the sum above mentioned. On the 31st of July, 1857, the State conveyed by deed poll to the defendant the property so purchased, described as in the margin.[1]

[1] "The whole main line of the public works between the said cities of Philadelphia and Pittsburg, in the State of Pennsylvania, consisting of the

By the constitution of Pennsylvania of 1873, which took effect January 1, 1874, it was provided as follows, by § 8 of Article XVI: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

With these premises, we are prepared to consider the views taken of this case by the Supreme Court of Pennsylvania. That court gave its assent to the principle that the charter of the defendant was inviolable. It further stated that the framers of the constitution of 1873 did not intend to repeal any of the provisions of that charter. It held that § 8 of Article XVI of that constitution included not only then exist-

---

Philadelphia and Columbia Railroad, the Allegheny Portage Railroad, including the new road to avoid the inclined planes, with the necessary and convenient width for the proper use of said railroads, the Eastern Division of the Pennsylvania canal, from Columbia to the junction, the Juniata Division of the Pennsylvania canal, from the junction to the eastern terminus of the Allegheny Portage Railroad, and the Western Division of the Pennsylvania canal, from the western terminus of the Allegheny Portage Railroad to Pittsburg, and including also the right, title and interest of the Commonwealth in the bridge over the Susquehanna, at Duncan's Island, together with the same interest in the surplus water power of said canals, with the right to purchase and hold such lands as may be necessary to make the same available; and all the reservoirs, machinery, locomotives, cars, trucks, stationary engines, workshops, tools, water-stations, toll-houses, offices, stock and materials whatsoever and wheresoever thereunto belonging or held for the use of the same, and together with all the right, title, interest, claim, and demands of the Commonwealth of Pennsylvania to all property — real, personal and mixed — belonging unto or used in connection with the same by the said Commonwealth, and together with all and singular other the buildings, improvements, powers, authorities, ways, means and remedies, estates and interests, rights, members, incidents, liberties, privileges, easements, franchises, emoluments, reversions, remainders, rents, issues, profits, hereditaments, and appurtenances of what name, nature, or kind soever thereto belonging or in anywise appertaining, which by force and virtue of the said recited act of assembly and the provisions thereof were meant and intended and of right ought to be hereby assigned and transferred therewith."

ing municipal corporations, but also then existing "other corporations." It further held, that the defendant did not derive its authority to build the branch road in question, from the western side of the Schuylkill River, through Filbert Street, from the act of 1846, because that act embraced only the power to build and operate a road from Harrisburg to Pittsburg; but that it derived such authority from the act of May, 1857, in the 11th section thereof, before quoted; and that the convention which made the constitution of 1873 had the power to subject the defendant's exercise of the right of eminent domain to the provision that it should make just compensation, not only for the property which it might choose to "take," in the strict sense of that word, but also for such as it might injure or destroy.

We think these views are sound. There was no such contract between the State and the defendant, prior to the constitution of 1873, as prevented the subjection of the defendant by that constitution to the liability for consequential damages arising from its construction of this elevated road in 1880 and 1881. Prior to the constitution of 1873, and under the constitutional provisions existing in Pennsylvania before that time, the Supreme Court of that State had uniformly held that a corporation with such provisions in its charter as those contained in the charter of the defendant, was liable, in exercising the right of eminent domain, to compensate only for property actually taken, and not for a depreciation of adjacent property. The 8th section of Article XVI of the constitution of 1873 was adopted in view of those decisions, and for the purpose of remedying the injury to individual citizens caused by the non-liability of corporations for such consequential damages. Although it may have been the law in respect to the defendant, prior to the constitution of 1873, that under its charter and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the constitution of 1873, that it should always be exempt from such liability, or that the State, by a new constitutional provision, or the legislature, should not have power to impose such liability upon it,

in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation, in respect of the subject matter involved.

This principle is well set forth in the opinion of the justices of the Supreme Judicial Court of Massachusetts, given by them in answer to a question submitted to them by the senate of that Commonwealth, in *In re Provident Institution for Savings*, 9 Cush. 604. See, also, *Nelson* v. *Vermont & Canada Railroad Co.*, 26 Vermont, 717; *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 140; *Branin* v. *Connecticut & Passumpsic Railroad*, 31 Vermont, 214; *Frankford Railway* v. *The City*, 58 Penn. St. 119; *Baltimore & Susquehanna Railroad* v. *Nesbit*, 10 How. 395, 399, 400; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Railroad Co.* v. *Hecht*, 95 U. S. 168, 170; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32, 33; *Newton* v. *Commissioners*, 100 U. S. 548, 557; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512; 1 Hare's American Const. Law, 609, 610; 2 Morawetz on Private Corporations, 2d ed. §§ 1062, 1065, 1067; Cooley's Const. Limit., 4th ed. *574, 716.

The provision contained in the constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the State. By its terms, it imposes a restraint only upon corporations and individuals invested with the privilege of taking private property for public use, and extends the right to compensation, previously existing, for property taken, to compensation for property injured or destroyed by the construction or enlargement of works, highways or improvements, made or constructed by such corporations or individuals. Such provision is eminently just, and is intended for the protection of the citizen, the value of whose property may be as effectually destroyed as if it were in fact taken and occupied. The imposition of such a liability is of the same purport as the imposition of a liability

for damages for injuries causing death, which result from negligence, upon corporations which had not been previously subjected by their charters to such liability. *Boston, Concord &c. Railroad* v. *The State*, 32 New Hampshire, 215; *South Western Railroad* v. *Paulk*, 24 Georgia, 356; *Duncan* v. *Pennsylvania Railroad*, 94 Penn. St. 435; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; Cooley's Const. Limit., 4th ed. * 581, 724; 1 Hare's American Const. Law, 421.

Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. In the present case, the statutory provisions existing prior to the constitution of 1873, in favor of the defendant, cannot be properly interpreted so as to hold that the State parted with its prerogative of imposing the liability in question, in regard to future transactions. *Providence Bank* v. *Billings*, 4 Pet. 514; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Christ Church* v. *Philadelphia*, 24 How. 300; *Gilman* v. *City of Sheboygan*, 2 Black, 510; *Tucker* v. *Ferguson*, 22 Wall. 527; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Newton* v. *Commissioners*, 100 U. S. 548, 561; 2 Hare's American Const. Law, 661, 663, 664.

Judgment affirmed.

ARON *v.* MANHATTAN RAILWAY COMPANY.

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

No. 43. Argued October 28, 29, 1889. — Decided November 11, 1889.

The first five claims of letters patent No. 288,494, granted to Joseph Aron, as assignee of William W. Rosenfield, the inventor, November 13, 1883, for an "improvement in railway car gates," are invalid, because what Rosenfield did did not require invention.

The same devices employed by him existed in earlier patents; all that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require inven-

tion, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application.

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

Mr. M. B. Philipp for appellant.

Mr. Edwin H. Brown for appellee. *Mr. Julien T. Davies* was with him on the brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought by Joseph Aron against the Manhattan Railway Company, in the Circuit Court of the United States for the Southern District of New York, to recover for the infringement of letters patent No. 288,494, granted to the plaintiff, as the assignee of William W. Rosenfield, the inventor, November 13, 1883, for an "improvement in railway car gates," the application for the patent having been filed April 3, 1883. The Circuit Court, held by Judge Wallace, dismissed the bill, and the plaintiff has appealed.

The specification of the patent says: "In many classes of railway cars, and particularly those used upon the elevated and other city railways, it has been found necessary, in order to prevent passengers from falling from the train, and also to prevent persons from attempting to get off or on a car while in motion, to provide the entrances to the car-platforms with gates, by which they can be closed except at the proper times. These gates are usually in charge of a guard or attendant, whose duty it is to close the gates before the train commences to move, and to open them only after the train has come to a full stop. As there is usually but one guard or attendant stationed between each two adjoining cars, it follows that to open or close both gates he must pass around from one to the other of the adjoining platforms. This passing from one platform to the other, besides being a source of annoyance to the guard, occasions some delay, which is very annoying to the passengers, particu-

larly at times when a large number are required to get off or on a car in a very short time. It is the object of the present invention, among other things, to provide means by which the guard or attendant can, without changing his position, open or close both gates simultaneously and with the least possible delay. To that end one feature of the invention consists in providing the gates with connections so arranged that any two adjoining gates can be simultaneously opened or closed by the guard while standing in the passage-way leading from one of the cars to the other."

The drawings annexed to the patent represent two ordinary railway cars, with platforms adjoining each other, and the usual entrances from the station platform, and gates of the ordinary construction for closing such entrances. The gates are hinged in the usual manner to posts which rise from the corners of the platforms, and close against the usual jambs which project from the sides of the cars. The platforms are provided with the usual guard-railings, extending inward from the above-mentioned posts to similar posts which are located a sufficient distance apart to leave a passage-way from one car to the other. When the gates are thus arranged, it is necessary, in order to close or open both gates, for the guard to pass from one platform around the inner post to the opposite platform, thus causing some delay in opening and closing one of the gates, adding to the labor of the guard, and causing annoyance to the passengers. In order to avoid this, each of the gates is provided, at a suitable distance from its hinge, with a curved lever, which extends rearward and terminates a short distance outside of the guard-railing. This lever is connected by a link, *e*, with a rod, *f*, which slides in or on a suitable bearing secured to the guard-railing, and is provided at its inner end with a handle by which it can be operated. The guard or attendant, while standing in the passage-way, can, by grasping the two handles and pushing or pulling the rods, *f*, open or close both gates simultaneously and without loss of time.

The specification states that the rods, *f*, will preferably be provided with some form of locking mechanism by which the

gates can be fastened in their opened or closed positions; and that such locking may be accomplished by having the handles pivoted to the rods, *f*, as shown, and provided with extensions which can be turned so as to extend in front of the inner posts, and hold the gates closed, or so as to lie in the rear of lugs and hold the gates open. It then describes an arrangement whereby the rods, *f*, and links, *e*, may be placed upon the inside of the guard-railings, as well as upon the outside; and also an arrangement by which the connections for operating the gates may, if desired, be placed beneath the platforms; and also an arrangement whereby the gates may be so hinged as to lie against the body of the car when open, instead of against the guard-railings; and also an arrangement whereby sliding gates may be used, instead of swinging gates.

There are six claims in the patent, only the first five of which are involved in the present case. They are as follows:

"1. The combination, with a gate arranged to close the side entrance to a car-platform, of an operating-handle located at or near the inner end of the platform guard-rail, and means connecting said gate and handle, whereby the attendant may open and close the gate while standing at the end of said guard-rail, substantially as described.

"2. The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of operating-handles located at or near the inner ends of the platform guard-rails, and means connecting said gates and handles, whereby the attendant may open or close both gates simultaneously while standing at the ends of said guard-rails, substantially as described.

"3. The combination, with a railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a gate for closing said entrance, a rod, as *f*, sliding in or on guides secured to said guard-rail, and a link, as *e*, connected to said gate and rod, all substantially as described.

"4. The combination, with a railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a swinging gate for closing said entrance, a rod, as *f*, sliding in or on a guide secured to said rail, a link, as *e*,

connected to said gate and rod, and means for locking said gate in its closed position, all substantially as described.

"5. The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of rods, as *f*, sliding in or on guides secured to the guard-rails of said platforms, and links, as *e*, connected to said gates and rods, substantially as described."

The opinion of Judge Wallace is reported in 26 Fed. Rep. 314. The only question he considered was that of the patentable novelty of the improvement, saying:

"A brief reference to the prior state of the art will indicate that the combinations referred to in the several claims are merely an application to a new situation of old devices which had been previously applied to analogous uses. Devices to open and close an aperture at a distance from the operator, in a great variety of forms, were old. As illustrations of those things which are matters of common knowledge and of which the court will take judicial notice, it is sufficient to allude to the strap used by the driver at the front of the omnibus to open and close the rear door; to the devices for opening or closing valves at a distance, in steam and hydraulic apparatus; and to the devices used at railway switches for opening and closing the rails.

"Referring to the prior state of the art, as shown by various prior patents which have been introduced in evidence, it appears also that mechanism to open and close the entrance to passenger cars at a point distant from the operator was likewise old; as, where the operator standing upon the front platform employed such mechanism to open or close a door at the rear platform. One prior patent alone, the one granted to John Stephenson September 15, 1874, shows five methods of closing and opening the rear doors of street cars from the front platform.

"Mechanism for closing and opening apertures at a distance from the operator, in which the same devices were employed as are employed by the patentee, was old, and is disclosed in a number of earlier patents, which have been put in evidence. It will suffice to refer to two only. The patent to Wollen-

sak of March 11, 1873, for an improvement in transom-lifters, describes the means for opening and closing the transom as consisting of a sliding rod, which is connected by a pivoted link to the arm of the transom frame. The patent to Corrigan, granted April 16, 1878, for an improvement in blind-adjusters, whereby outside blinds are opened and closed without lifting the window-sash, describes as the mechanism employed a sliding bar connected by a pivoted link with a hinged shutter. In both of these patents the aperture to be opened and closed at a distance from the operator — in the one case a shutter and in the other a transom — is opened and closed, as is the case in the patent in suit, by pushing or pulling the sliding rod or bar. In both of these patents there is likewise described a locking device, by means of which the sliding rod or bar is retained in a fixed position, so that the shutter or the transom will remain fastened when opened or closed, at the option of the operator; thus showing opening, closing and locking apparatus in all essentials like that of the patent in suit. Moreover, the patent to Corrigan shows this apparatus arranged to open and close the two shutters of the window, at the option of the operator, simultaneously, the sliding bars being so arranged as to be pushed or pulled each by one hand of the operator.

"Mechanism for opening and closing apertures distant from the operator, in which the devices used for the purpose are the mechanical equivalents of those employed by the patentee, is shown to be old by a large number of patents which have been put in evidence.

"This partial exhibit of the prior state of the art demonstrates that what the patentee did was to adapt well-known devices to the special purpose to which he contemplated their application. It was necessary that the gate should swing inward to open and outward to close; that the sliding rod should be located where it would be out of the way of passengers entering or leaving the platform; and that the end or handle of the rod should be located where it could be conveniently operated by the attendant, without inconveniencing outgoing or incoming passengers. The new situation required

adequate modifications of existing devices for opening and closing an aperture at a distance from the operator, appropriate to the new occasion. Accordingly, the patentee located the rods on bearings secured to the guard-rails, with their handles near the passage-way formed by the space or opening near the middle of the guard-rail. If this required invention, his improvement was the proper subject of a patent. He did nothing more and nothing less than this. It seems impossible to doubt that any competent mechanic familiar with devices well known in the state of the art, could have done this readily and successfully, upon the mere suggestion of the purpose which it was desirable to effect. When it was done as to one car-platform, it was only requisite to duplicate it upon another to make the improvement of the patentee in all its length and breadth.

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

We concur in these views, and affirm the decree of the Circuit Court.

KEYSTONE MANGANESE AND IRON COMPANY *v.* MARTIN.

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

No. 51. Argued and submitted November 1, 1889. — Decided November 11, 1889.

A bill in equity prayed for an injunction restraining the defendant from trespassing on the land of the plaintiff and taking mineral and ore therefrom, and that he account to the plaintiff for the value of the ore already taken therefrom. After a hearing on pleadings and proofs, the Circuit Court made a decree granting a perpetual injunction, and ordering an account before a master: *Held*, that the decree was not final or appealable.

In equity. The case is stated in the opinion.

Mr. U. M. Rose and *Mr. G. B. Rose*, for appellant, submitted on their brief.

Mr. G. N. Tillman for appellee. *Mr. J. M. Moore* filed a brief for same.

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 Arkansas, by Matt Martin against The Keystone Manganese and Iron Company.

The bill alleges that the plaintiff, owning a piece of land in Independence County, Arkansas, conveyed it, in June, 1853, with other lands, to one Smith and his heirs forever, subject to the condition that Martin retained to his heirs, representatives and assigns "a perpetual and unlimited right in fee to all the stones and minerals that may be in or upon said lands, and full and unquestioned power and right to enter said lands for the purpose of digging, quarrying and mining upon said lands, with full power and right of ingress and egress thereto and therefrom, and upon said lands to remain and erect buildings thereon, and to use such timber and other materials as may be convenient and proper for the excavation, preserva-

tion, manufacture and removal of such stones and minerals and improvements as may be connected with the working of said stones and minerals, it being well understood by the parties hereto that the right of sale and all else is hereby conveyed to said Thomas C. Smith, except the right to the stones and minerals on said lands, which, with all needful and proper rights and privileges to obtain, prepare for market and remove the same, are expressly reserved from sale." The deed was executed by Martin alone.

The bill further alleges that ever since said deed the plaintiff has been and now is in the possession of the mineral and ore in and upon the land; that there are large and valuable deposits of manganese therein; and that the defendant, in December, 1885, unlawfully entered upon said mineral deposits and began to mine and remove therefrom the manganese, and had carried it away, to the value of more than $5000. It prays for an injunction restraining the defendant from the commission of further trespasses during the pendency of the suit; that an account be had of the quantity and value of the ore taken by the defendant from the land; and that it be decreed to account to the plaintiff therefor, and be perpetually enjoined from further trespassing upon the mineral and ore in the land.

The defendant put in an answer, setting up its right to mine and remove the manganese ore by virtue of its having obtained such right, for a specified period of time, from persons who had become the owners of the land through a sale of it for the non-payment of taxes, and also setting up a statute of limitation.

After a replication, proofs were taken on both sides, and the Circuit Court decided in favor of the plaintiff upon the ground that, under the laws of Arkansas in force at the time the taxes were assessed, for the non-payment of which the land was sold, it was necessary that the mine, having been separated from the surface soil, should be separately assessed, and it could not be sold for taxes, except upon such an assessment; and that neither the mine, nor the mineral in it, was, in the present case, assessed or sold. The court made a decree

perpetually enjoining the defendant from entering upon or removing the mineral or any part thereof from the land, and further ordering that an account be taken of the quantity and value of the mineral and ore already removed by the defendant from the land, and that the defendant account to the plaintiff for its value, and appointing a master to take said account and to hear evidence and report the same to the court. From that decree the defendant has appealed to this court, and the case has been argued by the appellee on its merits, and submitted on a printed brief by the appellant.

We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties. The bill prays only for an injunction and an account of the quantity and value of the ore taken from the land by the defendant. The injunction is granted, but the account remains to be taken. The case is not one where nothing remains to be done by the court below except to execute ministerially its decree. In all cases like the one before us this court has uniformly held that the decree was not final and was not appealable.

The principal cases in which it has held that the decree was not appealable, because not final, are the following: *The Palmyra*, 10 Wheat. 502; *Perkins* v. *Fourniquet*, 6 How. 206; *Pulliam* v. *Christian*, 6 How. 209; *Barnard* v. *Gibson*, 7 How. 650; *Craighead* v. *Wilson*, 18 How. 199; *Beebe* v. *Russell*, 19 How. 283; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Railroad Co.* v. *Swasey*, 23 Wall. 405; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Dainese* v. *Kendall*, 119 U. S. 53; *Parsons* v. *Robinson*, 122 U. S. 112; while the decree has been held final, for the purposes of an appeal, in *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Forgay* v. *Conrad*, 6 How. 201; *Bronson* v. *Railroad Co.*, 2 Black, 528; *St. Louis Iron Mt. &c. Railroad* v. *Southern Express Co.*, 108 U. S. 24; *Ex parte Norton*, 108 U. S. 237; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180.

In *The Palmyra*, a prize case, the captors had filed a libel in

the District Court, and that court had dismissed it, without costs and damages against the captors. The Circuit Court affirmed the decree of restitution, with costs and damages. The libellants having appealed to this court, the appeal was dismissed, on the ground that the decree of the Circuit Court was not final, Chief Justice Marshall saying: "The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the Circuit Court; and we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it."

In *Perkins* v. *Fourniquet*, the Circuit Court decreed that the plaintiffs were entitled to two-sevenths of certain property, and referred the matter to a master to take and report an account of it, and reserved all other matters in controversy until the coming in of the master's report. It was held that that was not an appealable decree, Chief Justice Taney saying: "The appellant is not injured by denying him an appeal in this stage of the proceedings; because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And, upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time."

In *Pulliam* v. *Christian*, a decree of the Circuit Court set aside a deed made by a bankrupt before his bankruptcy, and directed the trustees under that deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors, and directed an account to be taken of these last-mentioned sums, in order to a final decree. It was held that the decree was not appealable, Mr. Justice McLean saying; "There is no sale or change of the property ordered which can operate injuriously to the parties."

Opinion of the Court.

In *Barnard* v. *Gibson*, the suit was one for the infringement of letters patent. By the decree of the Circuit Court a perpetual injunction was awarded, and it was referred to a master to ascertain and report the damages which the plaintiff had sustained. It was held that the decree was not appealable. The decree in that case was in all substantial particulars like the decree in the present case.

In *Craighead* v. *Wilson*, the decree of the Circuit Court ascertained the heirship of the plaintiffs and their relative rights in a succession, but referred it to a master to state accounts between the plaintiffs and defendants, and ascertain how much property remained in the hands of the latter, and how much had been sold, with the prices, and to ascertain what might be due from either of the defendants to the plaintiffs. It was held that the decree was not appealable.

In *Beebe* v. *Russell*, the bill prayed that the defendants might be ordered to convey to the plaintiff certain pieces of property, which it was alleged they fraudulently withheld from him, and account for the rents and profits. The Circuit Court decreed that the defendants should execute certain conveyances and surrender possession, and then referred the matter to a master to take an account of the rents and profits, giving instructions in regard to the manner of taking it. This court stated that the object of the statute in regard to appeals was to prevent a case from coming to this court from the courts below in which the whole controversy had not been determined finally, and that such final determination might be had in this court; and that whenever the whole controversy had been determined by the Circuit Court, and ministerial duties only were to be performed, although an amount due remained to be ascertained, the decree was final. The decree in that case was held not to be appealable.

In *Humiston* v. *Stainthorp*, which was a patent suit, the decree was like that in *Barnard* v. *Gibson*, and the appeal was dismissed.

In *Railroad Co.* v. *Swasey*, it was held that a decree of foreclosure and sale was not final, in the sense which allowed an appeal from it, so long as the amount due upon the debt

had not been determined, and the property to be sold had not been ascertained and defined.

In *Bostwick* v. *Brinkerhoff*, Chief Justice Waite stated the principle as follows: "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

This view was repeated in *Grant* v. *Phœnix Ins. Co.*, where an appeal by the defendant from a decree in a foreclosure suit was dismissed, the decree neither finding the amount due nor ordering a sale of the mortgaged property, although it overruled the defence, declared the plaintiff to be the holder of the mortgage, and, in order to ascertain the amount due to it and other lien creditors and for taxes, referred the case to a master, and appointed a receiver to take charge of the property.

In *Dainese* v. *Kendall*, the principle was again asserted that "a decree, to be final for the purposes of an appeal, must leave the case in such a condition that if there be an affirmance here the court below will have nothing to do but execute the decree it has already entered."

The same view was maintained in *Parsons* v. *Robinson*.

It remains to see the principle upon which this court has acted in holding decrees to be appealable as final decrees.

In *Ray* v. *Law*, it was held that a decree for a sale under a mortgage was an appealable decree. Of course, this involves the proposition that the court below had ascertained and fixed the amount due under the mortgage.

In *Whiting* v. *Bank of the United States*, this court held that a decree of foreclosure of a mortgage and for a sale was a final decree, and that it was not necessary to the finality of it that the sale should have taken place and been confirmed. The court said that if the sale had been completed under the decree, the title of the purchaser would not have been overthrown or invalidated even by a reversal of the decree; that,

consequently, the title of the defendants to the land would have been extinguished, and their redress upon a reversal would have been of a different kind from that of a restitution of the land sold; and that under a decree of foreclosure and sale, the ulterior proceedings were but a mode of executing such decree.

A leading case where this court held the decree below to be final was that of *Forgay* v. *Conrad*. The decree in that case ordered that certain deeds be set aside as fraudulent and void; that certain lands and slaves be delivered up to the plaintiff; that one of the defendants pay a certain sum of money to the plaintiff; that the plaintiff have execution for those several matters; and that the master take an account of the profits of the lands and slaves and an account of certain money and notes; and then concluded as follows: "And so much of the said bill as contains, or relates to, matters hereby referred to the master for a report, is retained for further decree in the premises; and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs." It was held that that decree was a final decree and appealable, Chief Justice Taney saying: "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In *Bronson* v. *Railroad Co.*, it was held that a decree for the sale of mortgaged premises was a final decree, settling the merits of the controversy, and that the subsequent proceedings were simply a means of executing the decree. The same principle was applied in *St. Louis, Iron Mountain &*

Counsel for Parties.

Southern Railroad v. *Southern Exp. Co.* and in *Ex parte Norton.*

In *Winthrop Iron Co.* v. *Meeker*, it was held that where a decree decides the right to the property in contest, and the party is immediately entitled to have it carried into execution, it is a final decree, although the court below retains possession of so much of the bill as may be necessary for adjusting accounts between the parties, the court remarking that such a case was different from a suit by a patentee to establish his patent and recover for infringement, because there the money recovery was a part of the subject matter of the suit.

Within the principles established by the foregoing cases, the decree now before us was not a final decree and the appeal must be

Dismissed.

DAY *v.* FAIR HAVEN AND WESTVILLE RAILWAY COMPANY.

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

No. 35. Argued October 23, 24, 1889. — Decided November 11, 1889.

The fourth claim in the reissued letters patent No. 8388, granted August 27, 1878, to Augustus Day for an improvement in track clearers, *viz.*, "The combination with the draw-bar C and scraper A of the diagonal brace E, as and for the purpose set forth," would naturally suggest itself to any mechanic, and involves no patentable novelty.

A claim in letters patent must be held to define what the Patent Office has determined to be the patentee's invention, and is not to be enlarged in construction beyond the fair interpretation of its terms.

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

Mr. Charles J. Hunt for appellant.

Mr. William Edgar Simonds for appellee.

Opinion of the Court.

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

Augustus Day filed his bill in equity against the Fair Haven and Westville Railway Company in the Circuit Court of the United States for the District of Connecticut, alleging an infringement of the fourth claim of reissued letters patent No. 8388, dated August 27, 1878, for an improvement in track clearers.

The defence was that the claim lacked patentable novelty, unless construed to contain parts not mentioned in it, and if so construed, then that there had been no infringement. The Circuit Court, Shipman, J., decided, that the claim did not cover patentable novelty, *Day* v. *Fair Haven &c. Railway*, 23 Fed. Rep. 189, and dismissed the bill accordingly, and from this decree the cause was brought to this court by appeal.

So much of the specification as is necessary to be quoted here states that:

"The nature of this invention relates to an improvement in the construction of railway-track-cleaning devices and the means of operating them, being more especially designed to be attached to horse-cars for the purpose of removing snow, ice, mud and other obstructions from the rails and immediately at the sides thereof; and it consists *in the combination of a pair of independently acting scrapers, pivotally secured to the floor of a car, and resting upon the track, when in operation, wholly by their own weight, with means for raising and lowering such scrapers simultaneously; in the combination, with an independently acting scraper resting, when in operation, wholly by its own weight upon the track, of a draw-bar in the direct line of draft and a supplementary and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of said draw-bars being secured on the same axial line;* in the peculiar construction and arrangement of a cast-shank with relation to the scraper, which is secured thereto, and the draft-irons, which connect it to the under side of the car; in the pendent guards, which lift the scraper from the track on meeting with an obstruction on the outside of the rail, and deflect outwardly

from the track, and in a peculiar crank for operating the shaft which raises and lowers the pair of scrapers at each end of the car, as more fully hereinafter set forth.

"In the drawing, A represents my scraper, being a plate of sheet metal of the form shown, slightly curved in cross-section. The front end of this scraper is rounded off at its lower edge, as shown in the drawings, to allow it to pass, without jar or danger of breaking, over the ends of rails that may be projected above the plane of the adjacent rails. The lower edge of the rear part of the wing of the scraper is cut away, as shown, to allow it to pass over pavement or earth at the side of the track which projects above the rail, thereby preventing such projecting matter from lifting the scraper proper from the face of the rail. B is the shank, to which it is secured by the bolts *a a*. This shank is a casting in the form shown in Fig. 2. It is formed with a pair of longitudinal ribs, *b*, on top, to receive the end of the draw-bar, C, whose other end is pivoted to a hanger, D, pendent from the car; or it may be pivoted directly to the sill of the car.

"The shank is also fitted or cast with diagonal studs *c* on top of said ribs *b* to receive the outer end of a diagonal brace, E, whose other end is pivoted to a hanger, D', parallel with the hanger D, but near the longitudinal centre of the car, *both draw-bar and diagonal brace being thus pivoted on the same axial line, so that when it is desired to raise and lower the scrapers, the same will be done without disturbing the vertical position thereof with relation to the track, as would be done were there but one pivotal point.* While the scraper and the parts to which it is attached are free to move in a vertical plane, this brace E effectually resists any lateral pressure to which the scraper may be subjected in moving obstructions from the rail, its own weight being sufficient to keep it down on the rail. The draw-bar and brace are securely bolted to the shank, and by the described arrangement of the ribs and studs perfect accuracy in the 'set' of the scraper is secured — an essential feature of my invention."

The claims were nine in number, of which the first four are as follows:

Opinion of the Court.

"1. In a railway car, a pair of independently acting scrapers, pivotally secured to the floor of the same, and resting upon the track, when in operation, wholly by their own weight, in combination with means for raising and lowering such scrapers simultaneously, substantially as and for the purpose set forth.

"2. In a track-cleaning device, the combination, with an independently acting scraper, resting, when in operation, wholly by its own weight upon the track, of a draw-bar in the direct line of draft, and a supplementary and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of said draw-bars being secured on the same axial line, substantially as and for the purpose set forth.

"3. The construction and arrangement of the shank B, as described, with relation to scraper A, draw-bar C, and diagonal brace E, as and for the purposes set forth.

"4. The combination, with the draw-bar C and scraper A, of the diagonal brace E, as and for the purpose set forth."

But it was stipulated that the complainant did not seek to recover except under the fourth claim.

The original patent, No. 125,547, was granted April 9, 1872, and the original specification did not contain the words italicized above, nor the first and second claims.

Upon the hearing, the complainant adduced the evidence of certain expert witnesses, who testified, on cross-examination, in substance, that the draw-bar C performed the office of drawing the scraper along the track, and was assisted in so doing by the diagonal brace E, which brace also performed the office of preventing the scraper from being removed from the track by the side thrust; that while the diagonal brace assisted in the direct draft, yet its most important function was to prevent the lateral movement of the scraper from the track; that, in considering the office performed by the draw-bar C and brace E, that office was the same if they were attached to any scraper in any way, provided an attachment was made; that so far as the fourth claim of the reissue was concerned, it was not material how the draw-bar and brace were pivoted, except that the pivoting should be on "the same axial line," so "that when the

scraper is lifted from the track it shall not be moved laterally in either direction."

As already stated, the fourth claim is : "The combination, with the draw-bar C and scraper A, of the diagonal brace E, as and for the purpose set forth."

Inasmuch as the scraper and draw-bar were both confessedly old, and the primary function of the diagonal brace is manifestly to prevent lateral displacement, the question, assuming that it is the diagonal brace only which is claimed to be new, is whether the application of a diagonal brace to a track-scraper to prevent lateral displacement involves patentable novelty. And this question must be answered in the negative; for we concur with the Circuit Court that the employment of a brace to effect that purpose would naturally suggest itself to any mechanic, and that its use in that way is within the range of common knowledge and experience. Considered aside from the method of the combination of the parts and the manner of pivoting, the contrivance is a well-known one of obvious suggestion, and used here to perform an office exactly analogous to that in which it has been frequently formerly used.

But it is contended on behalf of appellant that, as the combination would be inoperative "for the purpose set forth," namely, clearing the track of a railway of obstructions such as snow, ice, mud, etc., unless the bottom of the car were treated as part of such combination, the peculiar method of pivoting the draw-bar and the diagonal brace must also be included.

The mechanism by which the draw-bar and the diagonal brace are pivoted to the car and fastened to the scraper is not referred to in this claim, although it is in other claims of the series. As the claim must be held to define what the Patent Office has determined to be the patentee's invention, it ought not to be enlarged beyond the fair interpretation of its terms. It is true that elements of a combination not mentioned in a claim may sometimes be held included, in the light of other parts of the specification, which may be applicable, but here the claim is so broad that we are not justified in importing into it an element which would operate to so enlarge its scope as to cover an invention in no manner indicated upon its face.

Statement of the Case.

As therefore the diagonal brace to enable the scraper to be kept in its place on the track, is the only element of the combination which is claimed to be new, and that involves no patentable novelty, the decree must be

Affirmed, and it is so ordered.

ROEMER *v.* BERNHEIM.

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

No. 52. Argued and submitted November 1, 1889.— Decided November 11, 1889.

The granting or refusal, absolute or conditional, of a rehearing in equity, rests in the discretion of the court, and is not a subject of appeal.

After a suit in equity for the infringement of a patent has been heard and decided in favor of the defendant on the merits, the plaintiff cannot put in evidence a disclaimer, except at a rehearing granted by the court, upon such terms as it sees fit to impose.

Letters patent No. 208,541, granted to William Roemer, September 1, 1878, for improvements in locks for satchels, are void for want of novelty.

This was a bill in equity for the infringement of letters patent No. 208,541, granted to the plaintiff September 1, 1878, for improvements in locks for satchels, with the following specification and claims:

"Be it known that I, William Roemer, of Newark, county of Essex, and State of New Jersey, have invented a new and improved lock for satchels, travelling-bags, &c., of which the following is a specification:

"This invention relates to certain improvements in the construction of lock-cases of the kind described in letters patent Nos. 190,907 and 195,233, which were granted to me May 15, 1877, and September 18, 1877, respectively.

"The principal object of the invention is to reduce the expense of the lock-case, and to render the same more practical in form and construction.

"The invention consists, principally, in forming the body of

the lock-case with open ends, and in combining the same with cast blocks or end pieces, which are separately made, all as hereinafter more fully described.

"In the accompanying drawing, Fig. 1 represents a bottom view of my improved lock-case. Fig. 2 is a vertical longitudinal section of the same; and Fig. 3 is a vertical transverse section of the same on the line *c c*, Fig. 1. Similar letters of reference indicate corresponding parts in all the figures.

"The letter A in the drawing represents the body or central portion of the lock-case. The same is made of sheet metal or other suitable material, and bent into a U form, substantially as indicated in Fig. 3, so as to form the top *a* and the sides *b b* of the lock-case. The bottom of the lock-case is open, and the ends of the portion A are also open.

"B B are pieces of cast metal or other suitable material, constructed to fit into the open ends of the body A, into which these blocks or plugs B B are inserted, as clearly shown in Fig. 2. Each block B should have a shoulder, *d*, to limit the degree of its insertion into the shell A, or of the insertion of the shell into the block.

"In use on a satchel or carpet-bag, the ends B B, after being inserted into the shell A, or *vice versa*, in manner stated, are fastened to the satchel or bag by a bolt or pin that passes through an aperture, *e*, of the shell A, and through a corresponding aperture, *f*, of the block B, there being one such bolt or pin at or near each end of the piece A; but the plugs or end pieces B B may also be secured by additional or separate bolts, if desired, and so may also the shell A. The blocks B may also serve, if desired, to secure the ends of the handle or the catches which close the jaws of the bag, and for other suitable purposes.

"The lock portion proper is, of course, contained within the shell A, the drawing indicating the bolt C, which is moved by means of the handle *g*. The other parts of the lock are not necessary to show. By casting the pieces B B the same mold may be used for both pieces B B of one lock-case, and the entire case is made very inexpensive and yet practical. The ends are adapted to shells A of suitable or varying lengths.

Statement of the Case.

"I claim —

"1. In a lock-case, the combination of the body A, having open ends, with the end pieces, B B, that are applied thereto, substantially as herein shown and described.

"2. The end pieces, B B, of a lock-case, made with shoulders *d*, for defining their positions relative to the body A, substantially as and for the purpose specified."

After an answer denying in due form novelty and infringement, and a general replication, the case was heard upon the pleadings and proofs in the Circuit Court, which rendered and filed an opinion dismissing the bill, and holding that while the defendant's lock would be an infringement of the plaintiff's patent if the claims were good, yet, in view of the prior state of the art, the claims were void for want of novelty, unless they could be so limited by construction as to make end pieces, provided with notches or recesses to hold handle rings or catches, an essential feature of the invention: and that they could not be so limited, because, although the drawing showed end pieces provided with such notches, the notches were not in terms referred to, either in the specification or in the claims, as a part of the invention, nor in any way alluded to, except in the incidental observation in the specification that the blocks or end pieces "may also serve, if desired, to secure the ends of the handles or the catches which close the jaws of the bag." 26 Fed. Rep. 102.

Immediately afterwards the plaintiff filed in the Patent Office a disclaimer stating that he had reason to believe (being so informed by that opinion) that through inadvertence the specification and claims of the patent were too broad, including that of which the plaintiff was not the first inventor, and, therefore, disclaiming in each claim "any blocks, B, that have not the notches formed in them as shown in the drawing for holding the handle rings, as described in the specification;" and thereupon, in order to enable him to avail himself of the disclaimer, filed a motion for a rehearing, and, upon the court declining to entertain the question upon that motion, filed a formal petition for a rehearing, which the court, upon argument and consideration, granted upon condition that the plain-

tiff should pay to the defendant all costs of suit up to the time of filing that petition, to be taxed by the clerk. The costs having been taxed accordingly, and the plaintiff having stated through his counsel in open court that he was unable to comply with the condition, a final decree was entered, dismissing the bill, with costs; and the plaintiff appealed to this court.

Mr. Arthur v. Briesen, for appellant, submitted on his brief.

Mr. J. E. Hindon Hyde for appellees. *Mr. Frederic H. Betts* filed a brief for same.

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

After the case had been heard and decided upon its merits, the plaintiff could not file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court, upon such terms as it thought fit to impose. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal. The terms imposed as a condition precedent to a rehearing not having been complied with, the disclaimer was not in the case.

The construction which the court gave to the claims of the patent as originally issued was indisputably correct. So construed, it is hardly denied by the plaintiff, and is conclusively proved by the evidence, that the patent is void for want of novelty.

Decree affirmed

SCOTLAND COUNTY *v.* HILL.

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

No. 29. Argued April 16, 17, 1889. — Decided November 4, 1889.

The negotiable security of a municipal corporation, invalid in the hands of the original holder by reason of an irregularity in its issue to which he was a party, but which becomes valid in the hands of an innocent purchaser for value without knowledge or notice of the irregularity, remains valid when acquired by another purchaser for value, who was no party to the irregularity, but who, at the time of his purchase, has knowledge of the infirmity, and of a pending suit against the original holder and others to have the whole issue declared invalid by reason thereof.

The litigations respecting the Scotland County bonds in the state courts and in the courts of the United States reviewed.

In the absence of a provision to the contrary, overdue coupons bear interest at the legal rate in the place where they are payable.

This action was commenced in the year 1876 to recover on coupons issued by the county of Scotland, in Missouri, in payment of a subscription to the stock of the Missouri, Iowa and Nebraska Railway Company. Answer was made. In 1879 an amended complaint was filed, and, issue being joined, such proceedings were had in the cause that judgment was entered for the plaintiff. To this judgment the defendant sued out a writ of error. Argument on this was had at October term 1884, which resulted in the remand of the cause for a new trial (112 U. S. 183). After the remand an amended answer was filed. Issue was joined and trial had, which resulted in a verdict for the plaintiff for $46,944, and judgment on the verdict. To this judgment the defendant sued out this writ of error. The case is stated as follows by the court in its opinion:

This writ of error brings up for review a judgment against the county of Scotland, in the State of Missouri, for the amount of certain coupons of bonds, bearing date September 1, 1870, and purporting to have been issued by that county to the Missouri, Iowa and Nebraska Railway Company, a cor-

poration created by the consolidation of the Alexandria and Nebraska City Railroad Company, of Missouri, (formerly known as the Alexandria and Bloomfield Railroad Company,) with the Iowa Southern Railway Company, of Iowa. The coupons are payable to bearer, at the Farmers' Loan and Trust Company, New York, while the bonds are payable to the above consolidated company, or bearer, at the same place, on the 31st of December, 1895, with interest thereon from December 31, 1870, payable annually in that city, at the rate of eight per cent per annum. Each bond recites that it is issued under and pursuant to an order of the county court, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, "as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857."

It appeared in proof that the county court, in conformity with the petition of taxpayers and residents, made an order, on the 9th of August, 1870, for the subscription of $200,000 to the stock of the Missouri, Iowa and Nebraska Railway Company, payable in coupon bonds of the above kind, and at the same time designated an agent with authority to make the subscription upon the books of the company, to represent the county at the meetings of stockholders, and to receive dividends on its stock. The order stated that the subscription was upon certain specified terms and conditions, among which was one providing for the delivery to the railway company of $100,000 of the bonds when the road was "graded, bridged and tied, the track laid, and the cars running thereon from Alexandria, Missouri, to a permanent depot, located within one-half mile of the court-house in Memphis," and for the delivery of the remaining $100,000 of bonds when the road was completed from Memphis to the west or north line of the county and the cars were running over it. By the same order the county attorney was directed to have the bonds printed, the presiding justice of the county to sign them, and the clerk to make proper attestation of his signature.

At the same time Charles Mety was appointed trustee for

the county, and charged, in that capacity, with the duty of receiving the bonds from the county clerk as soon as they were issued, and of delivering them to the railway company, in exchange for stock, upon its complying with the conditions specified in the order for the subscription. The trustee was required to give bond in the sum of three hundred thousand dollars, for the faithful performance of his trust.

On the 11th of September, 1871 — the road being then nearly completed to Memphis, the county seat — Levi Wagner and other taxpayers and citizens brought a suit in the Circuit Court of Scotland County to perpetually enjoin Mety from delivering the bonds or coupons to the railway company. It was alleged, as a principal ground for such relief, that the subscription made by the county, to pay which the bonds had been executed, was without proper legal authority, and, therefore, null and void. The defendants in that suit were Mety, the county trustee and custodian of the bonds; Fullerton, county treasurer; Dawson, Cooper and Marguis, justices of the county, and sitting as the county court at the time the subscription was made; and the Missouri, Iowa and Nebraska Railway company. A few days prior to September 20, 1871, Mety went to Warsaw, Illinois, taking with him $100,000 of the bonds, to be there delivered to the railway company, upon the completion of the road to Memphis. He and the justices of the county court had then heard of the institution of the Wagner suit, and he went to Warsaw, under the direction of the members of that body, in order to evade the service upon him of the proposed injunction. While there he received from Dawson and Cooper, a majority of the justices composing the county court, an official communication, under date of September 20, 1871, in these words: "The iron is laid on the Missouri, Iowa and Nebraska Railway to the depot and the building is up. The company having complied with all the requirements, you will please deliver them the first hundred thousand dollars of the county's subscription and receive stock for the same." He complied with this order by delivering the bonds, at Warsaw, on the same day, taking from the company, as suggested by the justices, its bond

Counsel for Plaintiff in Error.

indemnifying him against all damages, costs, expenses, etc., which he, as trustee for the county, might incur "by reason of certain injunction suits now pending in the Scotland County Circuit Court." On the 11th of December, 1871, the county court, by an order entered upon its record, so modified the previous order of August 9, 1870, as to authorize Mety to deliver to the company the second instalment of $100,000 of bonds, upon the execution to him, as trustee, and to the county, of an indemnifying bond containing certain specified provisions. Such an obligation was immediately executed by the company, and the second instalment of bonds was thereupon delivered to it by the court while in session at the county seat.

The Wagner suit was taken, by change of venue, to the Circuit Court of Shelby County, Missouri, by which a final decree was rendered on the 2d of June, 1874, declaring the bonds void for the want of legal authority in the Scotland County Court to make the subscription of stock in the Missouri, Iowa and Nebraska Railway Company, and ordering them to be surrendered for cancellation. This decree was affirmed by the Supreme Court of Missouri, at its October term, 1878. That judgment of affirmance proceeded, mainly, upon the ground that, as the privilege given, by its charter of 1857, to the Alexandria and Bloomfield Railroad Company, afterwards the Alexandria and Nebraska City Railroad Company, (Laws of Missouri, 1865–6, 222,) of having municipal subscriptions without a previous vote of the people, was not exercised prior to the formation, by consolidation, in 1870, of the Missouri, Iowa and Nebraska Railway Company, such privilege passed, if at all, to the consolidated company, subject to the prohibition in the state constitution of 1865 against municipal subscriptions to corporations or companies, except upon the previous sanction of two-thirds of the qualified voters at a regular or special election for that purpose. *Wagner* v. *Mety*, 69 Missouri, 150. That ruling, the court said, was in harmony with its previous decision in *State ex rel. Wilson* v. *Garroutte*, 67 Missouri, 445.

Mr. Henry A. Cunningham for plaintiff in error.

Mr. F. T. Hughes for defendant in error. *Mr. J. H. Overall* was with him on the brief.

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

The question of power in the county court to subscribe to the stock of the Missouri, Iowa and Nebraska Railway Company, without a previous vote of the people, and to issue bonds in payment of its subscription, was directly presented and determined, upon full consideration, in *County of Scotland* v. *Thomas*, 94 U. S. 682, decided in 1876. The coupons there in suit were of the same issue of bonds as those from which the coupons in the present suit were detached. It is true that that case was determined upon demurrer to the complaint. But that fact does not weaken the force of the decision, so far as it bears upon the question of legal authority in the county court to make the subscription. The record and opinion in that case show that it was stipulated between the parties that the question of subscribing to the stock of the Missouri, Iowa and Nebraska Railway Company had never been submitted to a vote of the qualified voters of Scotland County, and that, in determining the demurrer, the court should consider that fact, as if it had been averred in the complaint. It was also agreed that the court should consider as facts admitted the articles of consolidation between the Iowa Southern Railway Company and the Alexandria and Nebraska City Railroad Company, and the above orders of the county court of Scotland County. It was held that the privilege given to the Alexandria and Bloomfield Railroad Company, by its charter of 1857, of receiving county subscriptions, was not extinguished by the subsequent consolidation in 1870 of that company with other companies, but passed with its other rights and privileges into the new condition of existence arising from such consolidation; that, in making the subscription in that case, which is the identical subscription here in question, the county court acted "as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under

the change of circumstances brought about by the consolidation;" that the subscription was binding upon the county; and that the bonds issued in payment were valid obligations. It was also distinctly ruled, in accordance with *County of Callaway* v. *Foster*, 93 U. S. 567, and with previous decisions of the Supreme Court of Missouri, that the prohibition in the state constitution of 1865, of municipal subscriptions to the stock of, or loans of credit to, companies, associations or corporations, without the previous assent of two-thirds of the qualified voters at a regular or special election, had the effect to limit the future exercise of legislative power, but did not take away any authority granted before that constitution went into operation. The doctrines of that case were reaffirmed in *County of Henry* v. *Nicolay*, 95 U. S. 619, 624, (1877;) *County of Schuyler* v. *Thomas*, 98 U. S. 169, 173, (1878;) *County of Cass* v. *Gillett*, 100 U. S. 585, 592, (1879;) and *County of Ralls* v. *Douglass*, 105 U. S. 728, 731, (1881) — all cases arising in the State of Missouri, and relating to municipal bonds, issued under legislative authority granted before the adoption of the constitution of 1865. See also *Menasha* v. *Hazard*, 102 U. S. 81; *Green County* v. *Conness*, 109 U. S. 104; and *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102. In *County of Ralls* v. *Douglass* attention was called to *State ex rel. Wilson* v. *Garroutte*, 67 Missouri, 445, and *State ex rel. Barlow* v. *Dallas County*, 72 Missouri, 329, holding views different as well from those announced by this court in the cases above cited, as those previously announced by the state court in *State* v. *Macon County Court*, 41 Missouri, 453, *Kansas City &c. Railroad Co.* v. *Alderman*, 47 Missouri, 349, *Smith* v. *Clark County*, 54 Missouri, 58, 70, and *State* v. *County Court of Sullivan*, 51 Missouri, 522. But this court declined to reconsider its former decisions to the prejudice of *bona fide* holders of bonds issued prior to the change of decision in the state court. The bonds, the coupons of which are here in suit, were all issued in 1871, at which time the highest court of Missouri held that the above constitutional provision, as to municipal subscriptions or the loaning of municipal credit to corporations without a previous vote of the people, was in-

tended, (to use the language of *County of Ralls* v. *Douglass*,) "as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the constitution took effect."

We pass to the consideration of the controlling question in the case, namely, whether Hill's rights, as a holder of these coupons for himself and others, are affected by the final decree in the suit instituted in the state court by Wagner and others.

At the first trial of the present action, the county offered to read in evidence the record of the Wagner suit in support of its plea averring, among other things, that Hill, and each previous holder of these coupons, had full, actual notice of the institution and object of that suit. It also offered to read in evidence the indemnifying bond of September 21, 1871, and, also, to prove by Mety, the trustee of the county, that he had actual notice of the pendency of the Wagner suit, at the time he delivered the bonds to the Missouri, Iowa and Nebraska Railway Company. There was also an offer to prove that the railway company "and *each* subsequent holder" received the bonds with actual notice of the pendency of that suit. The Circuit Court excluded all of this evidence. This court held that such exclusion was improper, and for that reason the judgment was reversed and the cause remanded for a new trial. *Scotland County* v. *Hill*, 112 U. S. 183.

Chief Justice Waite, delivering the opinion of the court, said: "The suit was about the bonds, and the liability of the county thereon. The decree was in accordance with the prayer of the bill, and certainly concluded both Mety [1] and the railroad company. After the rendition of this decree, the company could not sue and recover on the bonds, because, as between the company and the county, it had been directly adjudicated that the bonds were void and of no binding effect on the county. But it is equally well settled that the decree binds not only Mety and the company, but all who bought the bonds after the suit was begun, and who were chargeable

[1] In the original opinion of the Chief Justice, this name is uniformly printed "Metz." This error is followed in the report of the case in 112 U. S.

with notice of its pendency, or of the decree which was rendered. The case of *County of Warren* v. *Marcy*, 97 U. S. 96, decides that purchasers of negotiable securities are not chargeable with *constructive* notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with *actual* notice of the suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Here the offer was to prove *actual* notice, not only to the plaintiff when he bought, but to every other buyer and holder of the bonds from the time they left the hands of Mety, pending the suit, until they came to him. Certainly, if these facts had been established, the defence of the county, under its fourth plea, would have been sustained; and this whether an injunction had been granted at the time the bonds were delivered by Mety or not. The defence does not rest on the preliminary injunction, but on the final decree by which the rights of the parties were fixed and determined."

The court also said: "It is a matter of no importance whether the decision in the Wagner suit was in conflict with that of this court in *Scotland County* v. *Thomas*, *supra*, or not. The question here is not one of authority but of adjudication. If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct proceeding for that purpose. It cannot be disregarded any more in the courts of the United States than in those of the State."

It appears from the bill of exceptions taken at the last trial, resulting in the judgment now before us for review, that the county sought by evidence introduced in its behalf to support the charge of actual notice of the Wagner suit upon the part, as well of Hill, as of each previous holder of the bonds the coupons of which are here in suit. There was proof by the plaintiff tending to show that the bonds delivered by Mety to the railroad company were passed by that corporation to the company that built the road, in payment for construction, and that they were sold, for value, by the latter to various parties in different parts of the country, who had no notice whatever

of the institution or object of the Wagner suit. There was also evidence tending to show that the parties owning the coupons immediately before they were delivered to Hill for himself, and for others whom he represented, were all purchasers for value, without notice of the injunction suit, or of any infirmity in the bonds.

The county asked an instruction to the effect that "if at the time or times of making purchases of either of the coupons in this suit declared upon, William Hill, the plaintiff, had actual knowledge of the pendency of or judgment in the case of *Levi J. Wagner et al.* v. *Charles Mety et al.*, and if the jury so find, they are instructed that as to any such coupon purchased by plaintiff, whether for himself or as agent for other persons, no recovery of judgment can be herein had." The court refused to so instruct the jury, but instructed them, in substance, that the ownership of the coupons by a prior holder under such circumstances as would protect that holder against any defence by the county, entitled Hill to recover, even if he, when afterwards purchasing for himself or others, had knowledge of the pendency of the Wagner suit. That this was the meaning of the court is quite clear from the following extracts from its charge to the jury: "This paper is valid in the hands of a party who received it for value without actual notice of the pendency of the suit of Wagner and others; but if he and each intermediate party from the first delivery of these bonds and coupons also had notice of such suit or other infirmity, then no recovery can be had. . . . If the obligations sued on were duly executed, as above mentioned, and delivered by said Mety, and were thereafter purchased for value by the plaintiff from persons who had acquired the same for value without notice of said suit or of any fraud in the execution and delivery of the same, as above stated, then as to such obligations the plaintiff is entitled to recover. On the other hand, if the plaintiff and each of the persons through whom he derived title had actual notice of said Wagner suit, or of the delivery of said obligations by Mety to escape said suit, known to be about to be instituted, then as to such of said obligations there can be no recovery. . . . One link broken in the chain breaks the chain."

As there was no evidence tending to show that Hill was a party to the scheme devised by the county officers and the railway company for the delivery of the bonds to the latter before the injunction suit should be ripe for a decree, we are of opinion that the court did not err in its instructions to the jury.

The bonds were delivered to the railway company at the office of the bank in Warsaw, Illinois, of which Hill was president. And it is, perhaps, true, that Hill had then heard of the Wagner suit, and knew or suspected that Mety's purpose in bringing the bonds to Warsaw was to deliver them to the company before the injunction could be served upon him. But he had no connection with the conspirators, nor did he or any of the parties represented by him have, at that time, any interest in the coupons. It is said that the construction company received the bonds with actual notice, upon the part of one of its chief officers, of the injunction suit. But there can be no claim that any of the holders of the coupons, intermediate between the construction company and Hill, had any such notice. Be that as it may, the question as to such notice was properly submitted to the jury.

The principles of law by which this question must be determined are well settled. In *Commissioners of Douglas County* v. *Bolles*, 94 U. S. 104, which involved the rights of parties claiming to be *bona fide* holders of certain municipal bonds, issued to a railroad corporation, and by it passed to the contractor who built its track, the court, after observing that the plaintiffs could call to their aid the fact that their predecessors in ownership were *bona fide* purchasers, said: "And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights." In *Cromwell* v. *County of Sac*, 96 U. S. 51, 59, it was said that, with some exceptions that have no relevancy here, "the rule has been too long settled to be

questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired, if any restrictions were placed upon his power of disposition." So, in *Roberts* v. *Lane*, 64 Maine, 108, 111, it was said that "if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity, as between the original parties." See, also, *Montclair* v. *Ramsdell*, 107 U. S. 147, 159; *Porter* v. *Pittsburg Steel Co.*, 122 U. S. 267, 283; *Mornyer* v. *Cooper*, 35 Iowa, 257, 260; *Kost* v. *Bender*, 25 Michigan, 515; Byles on Bills, 119, 124.

It is objected that there was error in allowing interest at the rate of seven per cent upon the coupons after their maturity. Such allowance was proper for the reason that the coupons (which, as well as the bonds, were silent, as to the rate of interest after maturity) were made payable in New York, where the rate as then established by law was seven per cent. Rev. Stats. N. Y., 771, Part 2, c. 4, Title 3, § 1; Act of June 20, 1879, Laws of 1879, c. 538, p. 598. In *Bank of Louisville* v. *Young*, 37 Missouri, 398, 407, the rule was recognized that "interest is to be paid on contracts according to the law of the place where they are to be performed; where interest is expressly or impliedly to be paid." *Andrews* v. *Pond*, 13 Pet. 65, 73, 77, 78; Story's Conflict of Laws, § 291. In respect to interest on the amount for which judgment was rendered, we are of opinion that the law of Missouri governs, and the judgment must bear only six per cent interest. 1 Rev. Stats. Missouri, 1879, §§ 2723, 2725.

The judgment of the court below is affirmed, to bear interest from the date of its rendition at the rate of six per cent per annum. The objection that some of the coupons included in the present judgment were, in fact, included in former judgments against the county, is without foundation.

Citations for Defendant in Error.

HILL *v.* SUMNER.

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

No. 763. Submitted October 21, 1889. — Decided November 11, 1889.

When a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of or sell it," it is obvious that the words "dispose of" are not synonymous with the word "sell;" and their meaning must be determined by considering the remainder of the contract.

In this case an agreement by the owner of the property which formed the subject of the dispute that he would not dispose of or sell it, was held to have been violated by a lease of it for a term of two years.

IN CONTRACT. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. Thomas M. Patterson and *Mr. Charles S. Thomas*, for plaintiff in error, cited: *Atwood* v. *Clark*, 2 Greenl. 249; *Hill* v. *Hobart*, 16 Maine, 164; *Sheffield* v. *Lord Orrery*, 3 Atk. 282; *Phelps* v. *Harris*, 101 U. S. 370; *United States* v. *Gratiot*, 14 Pet. 526; *Dubuque* v. *Miller*, 11 Iowa, 583; *Middleton Savings Bank* v. *Dubuque*, 15 Iowa, 394; *Livingston* v. *Stickles*, 7 Hill, 253; *Jackson* v. *Silvernail*, 15 Johns. 278; *Jackson* v. *Harrison*, 17 Johns. 66; *Edwards* v. *Farmers' Insurance Co.*, 21 Wend. 466; *Elston* v. *Schilling*, 42 N. Y. 79; *Crusoe* v. *Bagley*, 3 Wilson, 234; *S. C.* 2 Wm. Bl. 766; *Doe* v. *Hogg*, 4 Dowl. & Ryl. 226; *Hargrave* v. *King*, 5 Iredell (Eq.) 430; *Church* v. *Brown*, 15 Ves. 258; *Rogers* v. *Goodwin*, 2 Mass. 475; *Beard* v. *Knox*, 5 California, 252; *S. C.* 63 Am. Dec. 125; *Nichols* v. *Eaton*, 91 U. S. 716; *Hill* v. *Tufts*, 18 Pick. 455; *Pullman Car Co.* v. *Missouri Pacific Railway*, 3 McCrary, 645.

Mr. L. C. Rockwell, for defendant in error, cited: *Sears* v. *Wright*, 24 Maine, 278; *De Wolfe* v. *French*, 51 Maine, 420; *Crooker* v. *Holmes*, 65 Maine, 195; *Ubsdell* v. *Cunningham*, 22 Missouri, 124; *Capron* v. *Capron*, 44 Vermont, 410; *Niles Works* v. *Hershey*, 35 Iowa, 340; *Brannin* v. *Henderson*, 12

B. Mon. 61; *Haggin* v. *Williamson*, 5 T. B. Mon. 9; *Nunez* v. *Dautell*, 19 Wall. 560; *Stirling* v. *Maitland*, 5 B. & S. 840.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Colorado. The action was originally brought by Mary J. Sumner, the present defendant in error, against David K. Hill, plaintiff in error, in the District Court of Arapahoe County, in the State of Colorado, and was afterwards removed by Hill, on the ground of diverse citizenship, into the Circuit Court of the United States.

It appears from the record that on and prior to the 12th day of February, 1880, the defendant Hill and Edward R. Sumner, and his son, Edward H. Sumner, were the owners of a mine, called the Buckeye Lode, situated on Fryer Hill, in the California mining district, in the county of Lake and State of Colorado; that the said Edward R. Sumner was the owner of one-eighth and his son, Edward H. Sumner, the owner of another one-eighth, undivided, of this mine, of which Hill was the owner of the remainder. It also appears that Hill was a man of considerable means, which was not the case with the others; that some work had been done upon the mine, and money expended upon it, which had been advanced mainly by Hill; that in this condition of affairs Edward R. Sumner sold his one-eighth in the mine to Hill, and took from Hill a written obligation to pay him ten thousand dollars for it, in the manner prescribed by an instrument in writing, of which the following is a copy:

"This is to certify that Edward R. Sumner, of Leadville, State of Colorado, has this day sold to me one undivided one-eighth part of the Buckeye Lode, vein, mine, or deposit, situated on Fryer Hill, in the California mining district, in the county of Lake, in the State of Colorado, for the sum of ten thousand dollars, to be paid as follows, to wit, ($1308.43,) one thousand three hundred eight [$\frac{43}{100}$] dollars cash in hand, the receipt of which is hereby acknowledged.

"Second. To pay all expenses for and on behalf of Edward

R. Sumner upon one undivided one-eighth part of said mine owned by Edward H. Sumner which have accrued since the first day of February, A.D. 1880, and which may hereafter accrue for sinking the shaft upon said mine, for all machinery purchased in sinking the shaft and in operating the same until pay mineral shall have been reached.

"Third. To pay on behalf of said Edward R. Sumner, for the benefit of Edward H. Sumner, owner of said one-eighth interest of the whole of said mine, one-eighth part of all the expenses for litigation regarding the title and the possession thereof, or for trespasses which may be committed upon said property from and after the date above written.

"Fourth. And to pay on behalf of the said Edward R. Sumner one-eighth part of all other assessments, taxes and expenses (meaning upon the one-eighth interest owned by Edward H. Sumner, being independent of the one-eighth conveyed to me this day by said Edward R. Sumner) of every name and nature which may justly accrue against said property, which sum or sums of money, as well as all other sums of money which may be advanced and paid out by me in pursuance of this agreement, shall be applied by indorsement upon this contract by the said Edward R. Sumner or his assigns in payment of the aforesaid sum of ten thousand dollars, as far as the same shall go to the payment thereof.

"Fifth. And after deducting all the aforesaid sums of money above mentioned I hereby agree to pay to the said Edward R. Sumner or his order the residue of the said ten thousand dollars out of the first production of my interest in said mine, so soon as the same shall be realized therefrom; and if at any time I shall dispose of or sell one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner or his order. In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one-eighth interest of Edward H. Sumner, including the $1308.43 mentioned as paid above.

"Witness my hand and seal this twelfth day of February, A.D. 1880, at Chicago, Illinois.

"(Signed) DAVID K. HILL. [Seal.]"

Opinion of the Court.

It seems from this paper pretty clear that Edward R. Sumner, in conveying his one-eighth, was anxious to secure the other one-eighth, held by his son Edward H. Sumner, from being lost by reason of his inability to pay such assessments as might be made on it in the progress of developing the mine and bringing it into profitable operation. It appears from the record that Hill continued work upon the mine and received credit upon this written contract until October 10, 1883, and about that time he ceased to work upon it or to make any further effort to develop it. On July 29, 1885, Hill made a lease of the mine to George A. Jenks, who had been agent of Hill in the previous efforts to develop it. The following is a copy of this lease:

"This agreement of lease, made this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, between David K. Hill, of the city of Chicago, county of Cook, and State of Illinois, and Robert Esser, of the city of Leadville, county of Lake, and State of Colorado, lessors, and George A. Jenks, of the city of Leadville, county of Lake, and State of Colorado, lessee, witnesseth:

"That the said lessors, for and in consideration of the royalties, covenants and agreements hereinafter reserved and by the said lessee to be paid, kept and performed, have granted demised and let, and by these presents do grant, demise and let unto the said lessee all the following described mine and mining property situate in California mining district, county of Lake, and State of Colorado, to wit:

"All their interest in the 'Buckeye' Lode mining claim, situate on the north slope of Fryer Hill, in said mining district, county, and State, together with the appurtenances:

"To have and to hold unto the said lessee for the term of two years from date hereof, expiring at noon on the 29th day of July, A. D. 1887, unless sooner forfeited or determined, through the violation of any covenant hereinafter against the said tenant reserved.

"And in consideration of such demise the said lessee does covenant and agree with the said lessors as follows, to wit:

"To enter upon said mine or premises, and work the same

mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved.

"To well and sufficiently timber said mine at all points, where proper in accordance with good mining, and to repair all old timbering wherever it may become necessary.

"To keep at all times the drifts, shafts, tunnels and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty.

"To deliver to said lessors as royalty ten per cent of the net smelter returns of all ore extracted from said premises, running to and including twenty dollars ($20) per ton, and on all ores running over twenty dollars ($20) per ton, twenty-five per cent of the net smelter returns.

"To deliver to the said lessors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued work, (accidents not arising from negligence alone excluded,) without demand or further notice, on said 29th day of July, A.D. 1887, at noon, or at any time previous, upon demand for forfeiture.

"And, finally, that upon the violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of the lessors, expire, and the same, with said premises, with the appurtenances, shall become forfeited to said lessors, and said lessors, or their agent, may, thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without process of law, or, at the option of said lessors, the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer.

"And the said lessors expressly reserve to themselves the property and right of property in all minerals to be extracted from said premises during the term of this lease.

"Each and every clause and covenant of this agreement of

lease shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

"In witness whereof the said parties have hereunto set their hands and seals.

"ROBERT ESSER. [Seal.]
"DAVID K. HILL. [Seal.]
"GEORGE A. JENKS. [Seal.]"

The obligation of Hill was assigned by Edward R. Sumner to Mary J. Sumner, the present plaintiff in error who brought this action. Two issues were raised by the pleadings in the case. The first of these was that there was a failure on the part of Hill to prosecute with due diligence his obligation to develop the mine, whereby the sum of ten thousand dollars less the sums credited on the contract became due. The second was, that by making the lease, the complainant had, within the meaning of the fifth clause of the contract, *disposed of* the mining property so as to become immediately liable for the residue of said ten thousand dollars. The court by instructing the jury that the execution of this lease by Hill caused the remainder of the ten thousand dollars to become due and payable, rendered it unnecessary for the jury to consider the first proposition, and if the court was right in that instruction, the verdict of the jury in favor of the plaintiff necessarily followed. We shall therefore consider the soundness of this instruction.

The definition of the words "dispose of" or "sell," in this article, must be considered with reference to the remainder of the contract, to ascertain its meaning. Obviously the word "dispose" must have some meaning in the contract, and is not synonymous with the word "sell." It would be useless, if such were its construction. It must mean something more or something less than the word "sell." In the circumstances of this case, it would seem to mean something more. The references of counsel in their briefs to decided cases attempting to define that word are of course of very little avail, as in each instance it must be taken in connection with the circumstances in which it is used. In the language of this court in the case of *Phelps* v. *Harris*, 101 U. S. 370, 380, "the expres-

sion 'to dispose of' is very broad, and signifies more than 'to sell.' Selling is but one mode of disposing of property."

Looking, then, to the purposes which Edward R. Sumner had in view in the use of this clause, by which the sale or disposal of one-eighth of the property rendered the ten thousand dollars due, less the credits that should have been entered upon it at that time, it is obvious that it was expected that Hill would continue to make efforts to develop the mine and put it in profitable working condition, until all parties were ready to abandon it as a useless experiment, or until the ten thousand dollars which Hill had agreed to pay Edward R. Sumner had been exhausted by payments of contribution on account of the one-eighth interest remaining in Edward H. Sumner. Any contract made by Hill, which would put it out of his power to perform this obligation, was the thing to be guarded against, and the only guard which the contract provided was that he should not make such disposal of even one-eighth of the property. If he chose to dispose of one-eighth or of the whole of it by selling it outright, or by leasing it for two or five or ten years, he had the right to do it. In such event, however, he became liable to Sumner for so much of the ten thousand dollars as had not been exhausted by paying the contributions properly assessable against the one-eighth of Edward H. Sumner. This option he exercised by making the lease to Jenks. If the results of that lease have been as profitable as Hill might have supposed it would be, he could well afford to pay the remainder of the ten thousand dollars. If they have not, it was a losing venture, which he voluntarily entered upon.

We are of the opinion that in doing this, he disposed of the property within the meaning of the clause under consideration, and instantly became liable for that part of the ten thousand dollars which he had not paid by advances on account of the interest of Edward H. Sumner. As this view of the case was in accordance with instructions of the presiding judge, and is conclusive of it, the judgment of the Circuit Court is

Affirmed.

SMITH *v.* BOLLES.

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

No. 47. Argued October 31, 1889. — Decided November 11, 1889.

In an action in the nature of an action on the case to recover from the defendant damages which the plaintiff has suffered by reason of the purchase of stock in a corporation which he was induced to purchase on the faith of false and fraudulent representations made to him by the defendant, the measure of damages is the loss which the plaintiff sustained by reason of those representations — such as the money which he paid out and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct; but it does not include the expected fruits of an unrealized speculation.

In applying the general rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of" those results are to be considered proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract.

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

Richard J. Bolles filed his petition against Lewis W. Smith on the twenty-first day of February, 1884, in the Circuit Court of the United States for the Northern District of Ohio, to recover damages for alleged fraudulent representations in the sale of shares of mining stock, in place of which an amended petition was substituted on the second day of March, 1886, by leave of court. The amended petition set up five causes of action: First. That in the fall of 1879 defendant and one Joseph W. Haskins entered into a fraudulent combination to form an incorporated mining company based upon alleged mining property in the Territory of Arizona, and for the alleged purpose of mining silver ore therefrom and milling the same for market; that the title to the property was claimed to be in Haskins; that Haskins and others organized said corporation under the laws of New York, by the name of "The Irene Mill and Mining Company," with a capital of two mil-

lions of dollars, divided into one hundred thousand shares of twenty dollars each; that Haskins took the whole of the stock and paid for the same by transferring to the company the alleged mining property, and apparently for the sum of two millions of dollars; that Haskins and defendant then represented that sixty thousand shares of said stock were issued to or paid for by Haskins, and were deposited with the treasurer of the company, to be sold to subscribers and purchasers, and the proceeds to be applied to the construction of a stamp mill to be connected with the supposed mining property, and for the purpose of further sinking the shaft and tunnel then in progress; that the defendant had in connection with Haskins some interest in the stock, the extent of which was then and is still unknown to plaintiff; that plaintiff was wholly ignorant of the value of the stock and of the mining property on which it was supposed to be based, never having dealt in such stock or property; that in the month of February, 1880, the defendant applied to him to buy and subscribe for some of the stock, stating that he was interested in it, and that before acquiring an interest he had learned from Haskins the enormous value of the property, and to satisfy himself had gone to Arizona and thoroughly examined it; that he then represented to plaintiff a variety of facts as existing in respect to the mine, making it of great value, which representations are set forth in detail; and that having known the defendant for several years, and believing him to be a truthful and honest man, and without knowledge or suspicion that said representations were untrue, but believing and relying on the same, the plaintiff had, at the request of the defendant, in the month of February, 1880, agreed to buy of the defendant four thousand shares of the stock, at $1.50 per share, which contract was completed in the month of March, 1880, by the payment in full of the purchase price, to wit, six thousand dollars, to one H. J. Davis, who claimed to act as treasurer of the company, and from whom plaintiff received certificates for the stock. Plaintiff then alleged that said representations were each and all false and fraudulent, specifically denying the truth of each of them, and averring that "said stock and mining property

was then, and still is, wholly worthless; and that had the same been as represented by defendant it would have been worth at least ten dollars per share, and so plaintiff says that by reason of the premises he has sustained damages to the amount of forty thousand dollars." Second. That defendant made similar false and fraudulent representations to John H. Bolles, by which the latter was induced to purchase two thousand shares of the stock, at the price of $1.50 per share, and was, by reason of the premises damaged to the extent of six thousand dollars; and that John H. Bolles had transferred his claim to the plaintiff, who was entitled to recover of defendant said sum. Third. That defendant made similar false and fraudulent representations to L. W. Marsteller, who was thereby induced to purchase eight hundred shares of said stock, at the price of two dollars per share, and was damaged by reason of the premises to the extent of two thousand dollars, and had transferred his claim to the plaintiff, who was therefore entitled to recover said sum of the defendant. Fourth. That the defendant had made similar false and fraudulent representations to Mrs. Mary Manchester, and induced her, in reliance thereon, to purchase two hundred and twenty-five shares of the stock, at a cost (according to the original petition) of four hundred and fifty dollars, and she had incurred damages thereby to the extent of fifteen hundred dollars; that this claim had been assigned to the plaintiff, who was entitled to recover said sum of the defendant. Fifth. That defendant made similar false and fraudulent representations to one John Van Gassbeck, who was induced thereby to purchase twenty-five hundred shares of the stock, at two dollars per share, making five thousand dollars, which he had paid to defendant, and he was by reason of the premises damaged to the extent of ten thousand dollars; and that Van Gassbeck had transferred this claim to the plaintiff, whereby the latter was entitled to recover said sum of the defendant.

Plaintiff further averred that the aggregate of said damages amounted to sixty thousand five hundred dollars, for which he prayed judgment.

Citations for Plaintiff in Error.

Defendant answered plaintiff's petition, admitting the incorporation and organization of the "Irene Mill and Mining Company," but denying all and singular the remaining allegations of the petition, and further set up affirmatively the statute of limitations.

The second and fourth causes of action as set forth in the original petition, founded on the claims of John H. Bolles and Mary Manchester, sought merely a rescission of the contracts and to recover back all the money they had respectively paid for shares of stock, but by the amended petition their causes of action were changed to counts for the recovery of damages resulting to said John H. and Mary from the alleged false and fraudulent representations.

The cause was tried by a jury and resulted in a verdict for the plaintiff, assessing his damages at the sum of eight thousand one hundred and forty dollars, upon which, after a motion for a new trial had been made by the defendant, and overruled, judgment was rendered, and the cause was then brought here on writ of error.

Mr. W. W. Boynton, (with whom was *Mr. J. C. Hale*, and *Mr. Edward H. Fitch* on the brief,) for plaintiff in error, cited: *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81; *Myers* v. *Malcolm*, 6 Hill, 292; *S. C.* 41 Am. Dec. 744; *Moody* v. *Osgood*, 50 Barb. 628; *Lincoln* v. *Claflin*, 7 Wall. 132; *Castle* v. *Bullard*, 23 How. 172; *Butler* v. *Watkins*, 13 Wall. 456; *Walker* v. *Stetson*, 14 Ohio St. 89; *S. C.* 84 Am. Dec. 362; *Bullard* v. *Boston & Maine Railroad*, 64 New Hampshire, 27; *Brown* v. *Swineford*, 44 Wisconsin, 282; *Cleveland Paper Co.* v. *Banks*, 15 Nebraska, 20; *Grosse* v. *State*, 11 Texas App. 377; *Conn* v. *State*, 11 Texas App. 390; *Willis* v. *McNeill*, 57 Texas, 465; *Thompson* v. *State*, 43 Texas, 268; *Union Central Life Ins. Co.* v. *Cheever*, 36 Ohio St. 201; *State* v. *Noland*, 85 North Carolina, 576; *Butler* v. *Slam*, 50 Penn. St. 456; *People* v. *Mitchell*, 62 California, 411; *Tucker* v. *Henniker*, 41 New Hampshire, 317; *Rolfe* v. *Rumford*, 66 Maine, 564; *Winter* v. *Sass*, 19 Kansas, 556; *State* v. *Lee*, 66 Missouri, 165; *State* v. *King*, 64 Missouri, 591; *Wolffe* v. *Minnis*, 74 Alabama, 386; *Besette* v. *State*, 101 Indiana, 85; *People* v. *Dane*, 59 Michigan, 550.

Opinion of the Court.

Mr. E. J. Estep, for defendant in error, cited: *Hubbard* v. *Briggs*, 31 N. Y. 518; *Crater* v. *Binninger*, 33 New Jersey Law (4 Vroom), 573; *S. C.* 97 Am. Dec. 737; *Hatcher* v. *State*, 18 Georgia, 460; *Logan* v. *Monroe*, 20 Maine, 257.

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

The bill of exceptions states that the court charged the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you."

In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay

legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be the *natural and proximate consequence* of the act complained of," says Mr. Greenleaf, Vol. 2, § 256; and "the test is," adds Chief Justice Beasley in *Crater* v. *Binninger*, 33 N. J. Law (4 Vroom) 513, 518, "that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract." In that case, the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. And see *Horne* v. *Walton*, 117 Illinois, 130; *Same* v. *Same*, 117 Illinois, 141; *Slingerland* v. *Bennett*, 66 N. Y. 611; *Schwabacker* v. *Riddle*, 84 Illinois, 517; *Fitzsimmons* v. *Chipman*, 37 Mich. 139.

We regard the instructions of the court upon this subject as so erroneous and misleading as to require a reversal of the judgment. The five causes of action covered the purchase of nine thousand five hundred and twenty-five shares of stock, for which $16,050 in the aggregate had been paid. The plaintiff did not withdraw either of his five counts, or request the court to direct the jury to distinguish between them. The verdict was a general one for $8140, and, while it may be quite probable that the jury did in fact, as counsel for defend-

ant in error contends, award to the plaintiff, under his first cause of action, the sum he had paid for the shares he had purchased himself and interest, we cannot hold this as matter of law to have been so; nor can we determine what influence the erroneous advice of the learned judge may have had upon the deliberations of the jury.

Other errors are assigned, which we think it would subserve no useful purpose to review. They involve rulings, the exceptions to which were not so clearly saved as might have been wished, had the disposal of this case turned upon them, and which will not probably, in the care used upon another trial, be repeated precisely as now presented.

For the error indicated,

The judgment is reversed and the cause remanded with a direction to grant a new trial.

CROSS v. NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 1084. Argued October 22, 1889. — Decided November 11, 1889.

A State is not deprived of jurisdiction over a person who criminally forges a bill of exchange or promissory note with intent to defraud, in violation of its statutes, or of its power to punish the offender committing such offence, by the fact that he follows this crime up by committing against the United States the further crime of making false entries concerning such bill or note on the books of a national bank, with intent to deceive the agent of the United States designated to examine the affairs of the bank, and in violation of the statute of the United States in that behalf.

The false making or forging of a promissory note in a State, purporting to be executed by an individual, and made payable at a national bank, is not a fraud upon the United States, or an offence described in Rev. Stat. § 5418.

The same act or series of acts may constitute an offence equally against the United States and against a State, and subject the guilty party to punishment under the laws of each government.

If, in a trial in a state court of a person accused of crime, the jury is brought into court; and, on being polled it is disclosed that they were agreed upon a verdict of guilty under two counts in the indictment, but

could not agree as to the other counts; and, in the presence of the jury, the prosecuting attorney proposes to enter a *nolle prosequi* as to those counts; and, the jury having retired, the court permits this to be done; and the jury, being then instructed to pass only upon the remaining counts, return a verdict of guilty as charged in the indictment; all this, however irregular, does not amount to a deprivation of the liberty of the defendant without due process of law.

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

The Supreme Court of North Carolina having affirmed a judgment of the Superior Court of Wake County, in that State, whereby, in conformity with the verdict of a jury, the plaintiffs in error were sentenced to hard labor, the present writ of error was sued out upon the ground that the judgment of affirmance sustains an authority, exercised under the State, which was drawn in question as being repugnant to the laws of the United States. The specific contention of the defendants is, that the offence of which they were convicted was cognizable only in the courts of the United States. If this position be well taken, the judgment must be reversed; otherwise, affirmed.

By the Code of North Carolina it is made an offence against that State "if any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to be forged or made, or shall show forth in evidence knowing the same to be forged, . . . any bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof; . . . with intent . . . to defraud any person or corporation." North Carolina Code, 1883, § 1029. It is provided by the same code that "in any case, where an intent to defraud is required to constitute the offence of forgery or any other offence whatever, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and, on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any State, county,

city, town, or parish, or body corporate, or any public officer, in his official capacity, or any copartnership or member thereof, or any particular person." Ib. § 1191.

The first count of the indictment against the defendants charged that they "unlawfully and feloniously, of their own head and imagination, did wittingly and falsely make, forge and counterfeit," and "did wittingly assent to the falsely making, forging and counterfeiting, a certain promissory note for the payment of money; which said forged promissory note is of the tenor following, that is to say:

"'$6250.00. March 8th, 1888.

"'Four months after date, we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at the State National Bank of Raleigh, N. C., with interest at the rate of eight per cent per annum after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payer or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

"'D. H. Graves.

"'W. H. Sanders.'

"And upon the back of which said false, forged and counterfeited promissory note is stamped and written — 'D. D. D. H. Graves. $6250. July 8,' — with intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The second count relates to a note of the same description, and charges the defendants with having unlawfully, feloniously

and wittingly, uttered and published it as true, "with intent to defraud," knowing, at the time, the same to be false, forged and counterfeited.

The third count charged that the defendants, of their own head and imagination, falsely, unlawfully and feloniously made, forged and counterfeited, and caused and procured to be made, forged and counterfeited, and wittingly aided and assented to the false making, forging and counterfeiting a note of like description, with "intent to fraud . . . the State National Bank, a corporation . . . duly created and existing under the laws of the United States, contrary," etc.

The fourth count charged that the defendants, devising and intending to defraud the State National Bank of Raleigh, North Carolina, a corporation existing under the laws of the United States, unlawfully and falsely combined and conspired together to make, forge, counterfeit, and by such conspiracy and fraud feloniously, falsely and wittingly did forge and make, and caused and assented to be forged and made, the above described note, "with intent to defraud, contrary to the form of the statute," etc.

The defendants filed a joint plea in abatement, contesting the jurisdiction of the state court upon the following grounds:

"That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in said indictment specified, there was a national banking association, duly organized and acting under the laws of the United States, in Raleigh, Wake County, North Carolina, known as the State National Bank of Raleigh, North Carolina, having its place of business and doing its said business in the said city of Raleigh, in the county of Wake and State of North Carolina, and within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina;

"That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel C. White was then and there an officer of said bank, to wit, its cashier;

"That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings were made, entered into, com-

Citations for Plaintiffs in Error.

mitted and done by the said Charles E. Cross, and afterwards assented to by the said Samuel C. White, for the purpose of supporting, sustaining and making a certain false entry and entries, in the books of said bank, and that the said false entry and entries were by the said Samuel C. White, cashier as aforesaid, acting as cashier, actually made in and upon the books of the said bank, the said Charles E. Cross being then and there aiding and abetting, for the purpose of deceiving, and with intent to deceive, the agent of the United States; to wit: the bank examiner of the United States, duly appointed to examine into the affairs of the said association, to wit, the State National Bank of Raleigh, North Carolina;

"That the said note, in said indictment specified, was never uttered or published in any way, nor to any other person or corporation, nor was there any intent or attempt so to do;

"That the said note, in the said indictment specified, was entered upon and in the books of the State National Bank aforesaid as the property of the said National Bank of Raleigh, North Carolina, and placed among the assets by the said Charles E. Cross and Samuel C. White as aforesaid, for the purpose and with the intent aforesaid.

"The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

"Wherefore they pray judgment if the said court now here will or ought to take cognizance of this indictment here preferred against them, and that by the court here they may be dismissed and discharged," etc.

This plea having been disallowed, the defendants severally pleaded not guilty. After the cause was finally submitted to the jury, the attorney for the State, with the permission of the court, entered a *nolle prosequi* as to the third and fourth counts. The jury thereupon returned a verdict of guilty as charged in the indictment, and judgment thereon was accordingly entered.

Mr. W. R. Henry, for plaintiffs in error, cited: *Moore* v. *Illinois*, 14 How. 13; *Houston* v. *Moore*, 5 Wheat. 1; *Commonwealth* v. *Tenney*, 97 Mass. 50; *Commonwealth* v. *Felton*,

101 Mass. 204; *Commonwealth* v. *Fuller*, 8 Met. (Mass.) 313; *S. C.* 41 Am. Dec. 509; *State* v. *Smith*, 43 Vermont, 324; *Drake* v. *State*, 60 Alabama, 42; *State* v. *Cooper*, 13 N. J. Law (1 J. S. Green), 361; *S. C.* 25 Am. Dec. 490; *State* v. *Chaffin*, 2 Swan (Tenn.) 493; *State* v. *Shelley*, 11 Lea, 594; *State* v. *Ingles*, 2 Hayward (N. C.) 148; *State* v. *Lewis*, 2 Hawks, 98; *S. C.* 11 Am. Dec. 741; *United States* v. *Harmison*, 3 Sawyer, 556; *State* v. *Pike*, 15 New Hampshire, 83; *United States* v. *Comerford*, 25 Fed. Rep. 902; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Prigg* v. *Pennsylvania*, 16 Pet. 539; *United States* v. *Wilcox*, 4 Blatchford, 385; *The William King*, 2 Wheat. 148; *Lee* v. *Lee*, 8 Pet. 44; *Delafield* v. *Illinois*, 2 Hill, 159; *People* v. *Lynch*, 11 Johns. 549; *United States* v. *Lathrop*, 17 Johns. 4; *In re Campen*, 2 Ben. 419.

Mr. Theodore F. Davidson, Attorney General of the State of North Carolina, for defendant in error, cited: *Fox* v. *Ohio*, 5 How. 410; *United States* v. *Lawrence*, 13 Blatchford, 211; *Territory* v. *Coleman*, 1 Oregon, 191; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Houghton*, 7 Fed. Rep. 657; *Moore* v. *Illinois*, 14 How. 13; *Commonwealth* v. *Bakeman*, 105 Mass. 53; *United States* v. *Barney*, 5 Blatchford, 294; *Virginia* v. *Rives*, 100 U. S. 313; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *State* v. *Bowers*, 94 North Carolina, 910; *State* v. *McNeill*, 93 North Carolina, 552; *State* v. *Thompson*, 95 North Carolina, 596; *State* v. *Taylor*, 84 North Carolina, 773; *State* v. *Carland*, 90 North Carolina, 668.

Mr. Justice Harlan, delivering the opinion of the court, after stating the case, continued:

The plea in abatement was evidently drawn with reference to § 5209 of the Revised Statutes, Title, National Banks. That section provides, among other things, that "every president, director, cashier, teller, clerk or agent of any association . . . who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer

of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

It is contended that the courts of the United States have exclusive jurisdiction to try the defendants for having made the false entries on the books of the bank, with the intent stated in the plea; that the forgery in question is an integral, essential element in such entries, which were false only because based upon the forged notes; that the defendants cannot be tried for the false entries, after being tried for the forgery; consequently, a recognition of the right of the state court to try them for the latter offence will defeat the jurisdiction of the federal court to try them for the former offence. In other words, that where exclusive jurisdiction is given to the court of the United States to try an offence, the state court cannot exercise jurisdiction in respect to any particular act constituting an essential ingredient of that offence, although the commission of such act is made a crime against the State.

The fallacy of this argument is in assuming that the offence described in § 5209 of the Revised Statutes, namely, the making, by an officer or agent of a national banking association, of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to deceive its officers or any agent appointed to examine its affairs, necessarily involves the crime of forgery, of which the defendants were found guilty. If the notes in question had not been forged, but, with or without the consent of the obligors, had been temporarily placed by the defendants among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, they could have been punished under § 5209. On the other hand, the crime defined in § 1029 of the Code of North Carolina would have been complete, if the defendants simply made and forged, or caused to be made and forged, or willingly assented to the making or

forgery of the notes described in the indictment, with intent to defraud, and did not follow it up by committing the crime against the United States of making false entries in respect thereto upon the books of the bank, with the intent to deceive the agent designated to examine its affairs. The crime against the State could not be excused or obliterated by committing another and distinct crime against the United States.

It is, also, contended that the crime of forgery, as defined in the Code of North Carolina, and described in the indictment, is made, by § 5418 of the Revised Statutes, an offence against the United States; and that as the courts of the United States are invested with exclusive jurisdiction "of all crimes and offences cognizable under the authority of the United States," Rev. Stat. § 711, the judgment must be reversed. This position cannot be sustained. Section 5418 of the Revised Statutes makes it an offence against the United States for any person to falsely make, alter, forge or counterfeit "any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States," or to utter or publish as true "any such false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited for such purpose," or to transmit to or present at "the office of any officer of the United States any such false, forged, altered or counterfeited bid, proposal, guaranty, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited, for such purpose." See also § 5479.

We do not think that the crime of which the defendants were found guilty is within either the words or scope of § 5418. The object of that section was to protect the general government against the consequences that might result from the forgery, alteration or counterfeiting of documents, records or writings, that had some connection with its business, as conducted by its own officers. The false making or forging of promissory notes or other securities, purporting to be executed by individuals, and made payable to or at a national banking association, cannot be said to have been done "for the purpose

of defrauding the United States," and to constitute the offence described in § 5418. Such an act may be in fraud of the bank or of its stockholders, but is not, in itself, or within the meaning of that section, a fraud upon the United States.

The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offence equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in *United States* v. *Marigold*, 9 How. 560, 569; *Fox* v. *Ohio*, 5 How. 410, 433; *Moore* v. *Illinois*, 14 How. 13, 19; and *Ex parte Siebold*, 100 U. S. 371, 390; in the first of which cases it was said that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." If it were competent for Congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority, which the States have always exercised, of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general government to examine its affairs, it results from the fact that they are amenable to the laws of

the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offence committed within its limits and against its laws.

The remaining assignment of error relates to what occurred when the jury were brought into court, and the fact disclosed, by polling them, that they were agreed upon a verdict of guilty under the first and second counts of the indictment, but could not agree as to the third and fourth counts. Thereupon, the attorney for the State, in the presence of the jury, proposed to enter a *nolle prosequi* as to the third and fourth counts. The jury having been sent out, the court permitted a *nolle prosequi* upon those counts to be entered. Of this fact the jury were informed, and being instructed to pass only on the remaining counts, they retired, and returned into court a verdict of guilty, in manner and form as charged in the indictment. The Supreme Court of the State expressed its disapproval of the mode adopted for ascertaining the individual opinion of each juror before an agreement had been reached by the entire body, but held that the entry of a *nolle prosequi* as to the third and fourth counts was, in legal effect, a consent to the acquittal of the defendants in respect to the offences therein named, and, therefore, did not work any injury to them. It also held that in accordance with the principles of previous decisions in that court, the general verdict would be restricted to such of the counts as the jury were directed to pass on. We are of opinion that there was nothing in all this amounting to a deprivation of the liberty of the defendants without due process of law. At most it was a mere error in procedure or practice that did not affect the substantial rights of the accused. What was permitted to be done was to the end simply that the jury might return a verdict upon those counts in the indictment upon which they were agreed. *Judgment affirmed.*

FIRST NATIONAL BANK OF CHARLOTTE *v.* MORGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 50. Argued November 1, 1889. — Decided November 11, 1889.

The exemption of national banks from suits in state courts in counties other than the county or city in which the association was located, granted by the act of February 18, 1875, 18 Stat. 316, c. 80, was a personal privilege which could be waived by appearing to such a suit brought in another county, but in a court of the same dignity, and making defence without claiming the immunity granted by Congress.

The provision in the act of July 12, 1882, 22 Stat. 163, c. 290, § 4, respecting suits by or against national banks, refers only to suits brought after the passage of that act.

A national bank was sued to recover interest alleged to have been usuriously exacted. The complaint which was sworn to January 13, 1883, charged that the usurious transactions took place "after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of May, 1878, and at other times and dates subsequent thereto." The defendant answered generally and set up the statute of limitations. The jury found that usurious interest had been taken during the two years next before the commencement of the action, and rendered a verdict for plaintiff, on which judgment was entered. The defendant moved in arrest of judgment, and also for a new trial, on the ground of a variance between the pleadings and proof: *Held*, that, although the complaint might have been more specific, enough was alleged to sustain the judgment.

THE case is stated in the opinion.

Mr. William E. Earle for plaintiff in error.

Mr. Joseph B. Batchelor for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the Superior Court of Cleveland County, North Carolina, by the defendant in error against the plaintiff in error, a national banking association, established at Charlotte, Mecklenburg County in that State. It was based upon the provision of the Revised Statutes of the United States authorizing any person, paying to any such association

a greater rate of interest than the law allows it knowingly to take, receive, reserve, or charge, to recover from it, in an action in the nature of an action of debt, twice the amount of the interest so paid. Rev. Stat. §§ 5197, 5198.[1]

The defendant filed an answer denying all the material allegations of the complaint, and, in addition, pleaded in bar the limitation of two years provided by Congress for actions of this character. Rev. Stat. § 5198.

The jury, in response to the issues submitted to them, found that the plaintiff paid, on the usurious contracts described in certain counts of the complaint, the sum of $554.28, during the two years next preceding the commencement of the action, and returned a verdict against the bank for twice that sum, namely $1108.56. Judgment was accordingly rendered for the latter sum in favor of Morgan.[2]

---

[1] The complaint contained four counts. It was sworn to on the 13th January, 1883. The defendant pleaded the general issue to each count; and to all, the statute of limitations. At the trial the court excluded evidence under the first and third counts, but received it under the second and fourth.

In the second count, the allegations as to the time when the alleged transactions took place were as follows: "That the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious contracts, made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the said defendant, on the one part, and the plaintiff on the other part, took, accepted, etc."

In the fourth count, those allegations were as follows: "That the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of March, 1877, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious agreements and contracts made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of March, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff on the other part, took, accepted, etc."

[2] After verdict the defendant moved in arrest of judgment, and also moved for a new trial, on the ground of a variance between the allegations and the evidence. Both motions were denied.

That judgment, having been affirmed by the Supreme Court of North Carolina, is here for reëxamination. The principal error assigned is that the only state court which, consistently with the laws of the United States, could take cognizance of this action, was one established in the county or city where the bank was located, and which had jurisdiction in similar cases.

By the 9th section of the Judiciary Acts of 1789, c. 20, § 9, it was provided that the district courts of the United States "shall also have exclusive original cognizance . . . of all suits for penalties and forfeitures incurred under the laws of the United States." 1 Stat. 76, 77. This provision was in force when the National Bank Act of June 3, 1864, was passed. 13 Stat. 99, § 57, c. 106, § 8. By that act it was declared that associations formed pursuant to its provisions "may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons" (§ 8); and that "suits, actions and proceedings against any association," formed under it, "may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." § 57.

Section 563 of the Revised Statutes provides, that the district courts shall have jurisdiction of "all suits for penalties and forfeitures incurred under any law of the United States," and § 629 declares that the circuit courts of the United States shall have original jurisdiction of "all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations." Section 711 defines the cases in which "the jurisdiction vested in the courts of the United States" shall be "exclusive of the courts of the several States," and among such are "all suits for penalties and forfeitures incurred under the

laws of the United States." But no subdivision of that section, in terms, embraces suits brought under the national bank law by or against associations organized under it.

The revision omitted entirely that part of the act of 1864 (§ 57) designating the particular state courts in which suits, actions, or proceedings against a national banking association might be brought. That omission was remedied by the act of February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States." 18 Stat. 316, 320, c. 80. By that act, § 5198 of the Revised Statutes, (Title, National Banks,) giving the right to recover back twice the amount of the interest illegally received by a national bank, was amended by adding thereto these words: "That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

A suit against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States; and it may be, that if the act of 1864 had been silent as to the courts which might take cognizance of such a suit, it must, at any time before the revision took effect, have been brought in the proper court of the United States. But the acts of 1864 and 1875, authorizing certain state courts to take cognizance of suits, actions and proceedings against national banking associations, had the effect, so far as suits for penalties incurred under the laws of the United States were concerned, to modify the provision in prior enactments that expressly excluded suits for such penalties from the cognizance of state courts. When the present action was brought, the jurisdiction of the courts of the United States of suits for penalties incurred under the national banking act for taking usurious interest, was not exclusive of, but concurrent with, the jurisdiction of such state, county, or municipal courts of the county or city in which the bank was located, as had jurisdiction, under the local law, in

similar cases. This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 394; *Crocker* v. *Marine National Bank*, 101 Mass. 200. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defence upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defence without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary.

It is proper to say that we lay no stress upon the proviso of the fourth section of the act of July 12, 1882, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes." 22 Stat. 162, 163, c. 290, § 4. That proviso refers only to suits by or

against national banking associations brought after the passage of that act. The present suit was commenced before that date.

The objection that the complaint does not state facts sufficient to constitute a cause of action, under the act of Congress, is not well taken. It might have been more specific, but enough was alleged to justify the court in overruling the motion in arrest of judgment. The bank filed its answer, and went to trial upon the merits; and, as the verdict embraces only illegal interest taken within the two years next preceding the commencement of the action, there is no ground to contend that the judgment exceeded the amount that Congress authorized to be recovered.

Judgment affirmed.

BOYLAN *v.* HOT SPRINGS RAILROAD COMPANY.

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

No. 1140. Submitted October 31, 1889. — Decided November 11, 1889.

The purchaser from a railroad company, at a reduced rate of fare, of a ticket for a passage to a certain station and back, containing a contract signed by him, by which he agrees that the ticket is not good for a return passage unless stamped by the agent of the company at that station, and that no agent or employé of the company is authorized to alter, modify or waive any condition of the contract, is bound by those conditions, whether he knew them or not; and if without having attempted to have the ticket so stamped, but upon showing it to the baggage-master and gateman at the station, he has his ticket punched and his baggage checked, and is admitted to the train, and, upon being told by the conductor that his ticket is not good for want of the stamp, refuses either to leave the train or to pay full fare, and is forcibly put off at the next station, he cannot maintain an action sounding in contract against the company, or except to the exclusion, at the trial of such an action, of evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

THIS was an action of assumpsit against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor.

Statement of the Case.

At the trial in the Circuit Court, the plaintiff testified that on March 18, 1882, he purchased at the office of the Wabash, St. Louis and Pacific Railway Company in Chicago a ticket for a passage to Hot Springs and back, (which is copied in the margin,[1] and which, as was alleged in the declaration and appeared upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person,) and upon this ticket travelled on the defendant's railroad to Hot Springs.

He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court.

He further testified that on April 19, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage-office and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate, and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master, or of the gateman, would constitute a waiver of any of the written conditions of the contract; and it was admitted by the court, subject to the objection.

---

[1] Issued by Wabash, St. Louis and Pacific Railway. Tourist's special contract. Good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back hereof, and presented with coupons attached.

In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to wit:

1st. That in selling this ticket the Wabash, St. Louis and Pacific Railway Company acts as agent, and is not responsible beyond its own line.

2d. That this ticket is not transferable, and no stop-over at any intermediate point will be allowed, unless specially provided for by the local regulations of the lines over which it reads.

3d. That any alteration whatever of this ticket renders it void.

The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it was not good, because he had failed to have it stamped at Hot Springs; the plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary; the conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health.

4th. That it is good for going passage only five (5) days from date of sale, as stamped on back and written below.

5th. That it is not good for return passage, unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent of the Hot Springs Railroad, at Hot Springs, Ark., within fifty-five (55) days from date of sale; and when officially signed and dated in ink, and duly stamped by said agent, this ticket shall then be good only five (5) days from such date.

6th. That I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads.

7th. That baggage liability is limited to wearing apparel not exceeding $100 in value.

8th. That the coupons belonging to this ticket will not be received for passage if detached.

9th. That my signature shall be in manuscript and in ink.

10th. That unless all the conditions on this ticket are fully complied with, it shall be void.

11th. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employé of said lines.

12th. And it is especially agreed and understood by me that no agent or employé of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract.

Signature: P. C. Boylan.
Witness: H. C. Keeran.

Date of sale, March 18th, 1882.

Geo. H. Daniels,
Gen'l Ticket Agent.

Citations for Defendant in Error.

On motion of the defendant, upon the grounds, among others, that this was an action of assumpsit for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs and had the ticket stamped and signed by the agent there, he had no subsisting contract between himself and the defendant for a return passage to Chicago, the court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train, (although corresponding to allegations inserted in the declaration,) and directed a verdict for the defendant.

The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Charles Carroll Bonney, for plaintiff in error, submitted on his brief, citing: *State* v. *Overton*, 4 Zabr. (24 N. J. Law) 435; *S. C.* 61 Am. Dec. 671; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Jennings* v. *Great Northern Railway*, L. R. 1 Q. B. 7; *Bass* v. *Chicago & Northwestern Railway*, 36 Wisconsin, 450; *Butler* v. *Manchester &c. Railway*, 21 Q. B. D. 207; *Lamberton* v. *Connecticut Insurance Co.*, 39 Minnesota, 129; *Hunter* v. *Stewart*, 47 Maine, 419; *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202; *Brewster* v. *VanLiew*, 119 Illinois, 554, *Chicago & Alton Railroad* v. *Pillsbury*, 123 Illinois, 9; *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468; *Steamboat New World* v. *King*, 16 How. 469; *York Company* v. *Railroad Co.*, 3 Wall. 107; *Railroad Co.* v. *Lockwood*, 17 Wall. 357.

Mr. G. W. Kretzinger, for defendant in error, submitted on his brief, citing: *Mosher* v. *St. Louis &c. Railway*, 127 U. S. 390; *Petrie* v. *Pennsylvania Railroad*, 42 N. J. Law (13 Vroom), 449; *Bradshaw* v. *South Boston Railroad*, 135 Mass. 407; *Frederick* v. *Marquette &c. Railroad Co.*, 37 Michigan, 342; *Yorton* v. *Milwaukee, Lake Shore &c. Rail-*

way, 54 Wisconsin, 234; *Shelton* v. *Lake Shore &c. Railway*, 29 Ohio St. 214; *Pittsburg & St. Louis Railway* v. *Nuzum*, 60 Indiana, 533; *McClure* v. *Philadelphia, Wilmington and Baltimore Railroad*, 34 Maryland, 532.

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

This is an action of assumpsit, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employé of the defendant was authorized to alter, modify or waive any condition of the contract.

Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial.

The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs.

There being no such contract in force, there could be no breach of it; and no breach of contract being shown, this action of assumpsit, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, has not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

The case is substantially governed by the judgment of this court in *Mosher* v. *St. Louis, Iron Mountain & Southern Railway*, 127 U. S. 390, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several States. See, besides the cases cited at the end of that judgment, the following: *Churchill* v. *Chicago & Alton Railroad*, 67 Illinois, 390; *Petrie* v. *Pennsylvania Railroad*, 13 Vroom, 449; *Pennington* v. *Philadelphia, Wilmington & Baltimore Railroad*, 62 Maryland, 95; *Rawitzky* v. *Louisville & Nashville Railroad*, 40 La. Ann. 47.

Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff; and otherwise essentially differed from the case at bar.

In *Jennings* v. *Great Northern Railway*, L. R. 1 Q .B. 7, the by-law required every passenger to obtain a ticket before entering the train, and to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterwards divided into two, in the first of which the plaintiff travelled, taking all the tickets with him; and when the second train was about to start, the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him; and Lord Chief Justice Cock-

burn, with whom the other judges concurred, said: "It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage."

In *Butler* v. *Manchester, Sheffield & Lincolnshire Railway*, 21 Q. B. D. 207, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger travelling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing to pay such fare, was forcibly removed from the train by the defendant's servants. The Court of Appeal, reversing a judgment of the Queen's Bench Division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare; and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company.

Judgment affirmed.

GLENN *v.* SUMNER.

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

No. 67. Argued November 5, 1889.— Decided November 18, 1889.

When the answer, in an action at law, both denies the plaintiff's allegations and sets up matters in avoidance, and the jury return a general verdict for the defendant upon all the issues, he is entitled to judgment, notwithstanding any error in rulings upon the matters in avoidance, or any statements of fact in that part of the answer setting up those matters, or in a bill of exceptions to such rulings.

Statement of the Case.

THIS was an action brought November 16, 1883, in the Circuit Court of the United States for the Western District of North Carolina by John Glenn, as trustee of the National Express and Transportation Company, against Thomas J. Sumner to recover $7500 for an assessment on shares held by him in that company.

The complaint contained the following allegations:

"1st. That the plaintiff is and was at the time of issuing the summons in this case a citizen of Maryland, and the defendant a citizen of the Western District of the State of North Carolina.

"2d. That the defendant is indebted to the plaintiff in the sum of seven thousand five hundred dollars, for that the defendant, on or about the first day of November, 1865, subscribed for two hundred aud fifty shares of the capital stock of the National Express and Transportation Company, a body corporate of the State of Virginia duly incorporated under the laws thereof, and thereby undertook and promised to pay to said company for each and every share so subscribed for by said defendant the sum of one hundred dollars in such instalments and at such times as said defendant might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the law under which said company was incorporated, whereby and by force of said subscription said defendant became and was received and admitted as stockholder in said company."

3d. That on September 20, 1866, the company made a deed of assignment of all its property, rights and credits to trustees for the benefit of its creditors.

4th. That on December 14, 1880, by a decree of the Chancery Court of Richmond in the State of Virginia, the plaintiff was substituted as sole trustee under that deed, and it was adjudged that the sum of eighty dollars a share had never been paid or called for, and an assessment of thirty dollars a share was made upon the stock and stockholders of the company to pay its debts under the deed of trust.

5th. That the plaintiff accepted and qualified as such trustee.

6th. That by force of that decree and of the statutes of Virginia, he was authorized to receive and collect the assessment.

"7th. That by force of said contract of subscription to the stock of said company, and of said call and assessment so made by said decree, the said defendant became and is indebted and liable to pay to the plaintiff the sum of seven thousand five hundred dollars, being the amount of thirty dollars on each of said shares of the stock of said company so as aforesaid subscribed for by said defendant; and, being so liable to pay, the said defendant, in consideration thereof, promised to pay said sum to the plaintiff when thereto requested; and the defendant, although requested by the plaintiff, failed and refused to pay the same to the plaintiff and still refuses so to do."

The answer set up four defences, as follows:

1st. Admitting the first paragraph of the complaint; and alleging that the second paragraph, as well as the seventh, "is not true as the defendant is informed, advised and believes;" and that "the defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third, fourth, fifth and sixth paragraphs of the complaint."

2d. The statute of limitations of three years; and the statute of limitations of ten years.

3d. That in November, 1865, the defendant subscribed for thirty shares in the company, but never received any certificate of stock or other evidence of subscription, or paid any assessment, or was notified to do so, and soon afterwards, in good faith, and while the company was free from debt, transferred all his right and interest in the subscription to one Hart, who was perfectly solvent, and Hart was immediately afterwards accepted by the company as a stockholder in the place and stead of the defendant; and "that more than ten years had elapsed since the transfer of the defendant's subscription as aforesaid to the said Hart, next before the commencement of this action, and defendant pleads the statute of limitations to such case in bar of the same."

4th. A discharge in bankruptcy, granted to the defendant

by the District Court of the United States on May 31, 1879, under proceedings commenced in August, 1875.

The record, after setting out these pleadings, stated that the case was tried by a jury; that the jury "for their verdict say that they find all the issues in favor of the defendant," and that thereupon judgment was entered as follows: "This case coming on to be tried at said term of the Circuit Court aforesaid by a jury, and a verdict having been rendered finding all the issues raised by pleadings in favor of the defendant, it is now, on motion of Jones & Johnston, attorneys for the defendant, considered and adjudged by the court that the plaintiff take nothing by his said writ."

The record set forth the following bill of exceptions tendered by the defendant and allowed by the court: "The plaintiff excepts to the ruling of the court, and for cause of exception shows that upon the trial it was proved that the defendant was a stockholder in the National Express and Transportation Company; that at the time of the organization of said corporation he paid twenty per cent on his said stock, and the residue was unpaid; that the said corporation suspended business because insolvent, and made a deed of trust to trustees to secure its creditors in the year 1866; that in the year 1875 the defendant filed his voluntary petition in bankruptcy in said district, and was thereafter adjudged a bankrupt, and discharged from all his debts and liabilities in the year 1879." The bill of exceptions then set forth the substance of the decree of the Chancery Court of Richmond, as stated in the complaint, and continued and concluded as follows:

"This suit was brought to recover of the defendant thirty per cent of the par value of the two hundred and fifty shares of stock held by him. The answer shows the defences set up, which include the plea of his discharge in bankruptcy, in bar of recovery. The plaintiff contended that it was not a provable debt at the time of filing the petition in bankruptcy. The court held that it was a provable debt and that the discharge barred it, and so instructed the jury. Verdict for defendant." The defendant sued out this writ of error.

Mr. Charles Marshall and *Mr. John Howard* for plaintiff in error.

Mr. S. F. Phillips for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

The sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the State in which they are held. Rev. Stat. § 914; *Bond* v. *Dustin*, 112 U. S. 604.

By the Code of Civil Procedure of North Carolina, the complaint is required to contain a plain and concise statement of the facts constituting the cause of action, and to have each material allegation distinctly numbered. § 93. The answer must contain "a general or special denial of each material allegation controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief," and "a statement of any new matter constituting a defence or counterclaim, in ordinary and concise language." § 100. In the absence of a counterclaim, no replication is necessary, unless ordered by the court. § 105. A general verdict is defined to be one "by which the jury pronounce generally upon all or any of the issues." § 232.

In the present action, brought by the trustee under an assignment from an insolvent corporation to recover an assessment upon its stock, the allegations concerning the defendant's subscription for shares, and his liability, by reason of his contract of subscription and of the assessment made thereon by a court of chancery, were contained in the second and seventh paragraphs of the complaint, and their truth was specifically denied in the first defence set up in the answer. The pleadings therefore distinctly presented the issue, whether the defendant made the subscription and was liable for the assessment, as well as the issues of the statutes of limitations and of a discharge in bankruptcy.

In the record sent up, the verdict unequivocally states that

the jury "find all issues in favor of the defendant," and the judgment repeats that "all the issues raised by the pleadings" were so found. This necessarily includes a finding that the defendant was never liable to pay the assessment. This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defences matters in avoidance, or in a bill of exceptions relating to one of those defences only. Such statements, made for the purpose of presenting the issue to which they relate, are not evidence upon any other issue in the same record. As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, he may use each plea in his defence, and the admissions unavoidably contained in one cannot be used against him in another. *Whitaker* v. *Freeman*, 1 Dev. 270, 280. See, also, *Knight* v. *McDouall*, 12 Ad. & El. 438, 442; *Gould* v. *Oliver*, 2 Man. & Gr. 208, 234; *S. C.* 2 Scott N. R. 241, 262.

The finding of the jury, that the defendant never subscribed for the shares or was liable to pay the assessment, constitutes of itself a conclusive determination of the case in his favor. Consequently, the ruling of the Circuit Court upon the question, stated in the bill of exceptions and principally argued at the bar, of the effect of the discharge in bankruptcy, is wholly immaterial, and cannot have prejudiced the plaintiff, for, however that question should be decided, the defendant would be entitled to judgment upon the verdict. *Evans* v. *Pike*, 118 U. S. 241; *Moores* v. *National Bank*, 104 U. S. 625; *Morisey* v. *Bunting*, 1 Dev. 3.

Judgment affirmed.

ROBERTSON *v.* GLENDENNING.

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

No. 55. Argued November 4, 1889. — Decided November 18, 1889.

When an article is designated in a tariff act by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it.

Under the act of March 3, 1883, 22 Stat. 489, embroidered linen handkerchiefs are subject to a duty of thirty-five per cent ad valorem as "handkerchiefs;" and not to thirty per cent ad valorem as "embroideries."

THIS was an action to recover duties alleged to have been illegally exacted. Judgment for plaintiff, to which defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Stephen G. Clarke for defendant in error.

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

This is an action brought to recover an alleged excess of duties exacted by the collector at the port of New York. Defendants in error had imported certain embroidered linen handkerchiefs, upon which the collector, the plaintiff in error, assessed a duty of thirty-five per cent ad valorem, under the eighth paragraph of Schedule J of § 2502 of title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3d, 1883, 22 Stat. 488, 507, which reads:

"Brown and bleached linens, ducks, canvas, paddings, cot bottoms, diapers, crash, huckabacks, handkerchiefs, lawns or other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, not specially enumerated or provided for in this act, thirty-five per centum ad valorem."

The defendants in error paid this duty under protest, claim-

ing that the goods were only liable to thirty per cent ad valorem, under the eleventh paragraph of the same schedule, as follows:

"Flax or linen laces and insertings, embroideries, or manufactures of linen, if embroidered or tamboured in the loom or otherwise, by machinery or with the needle or other process, and not specially enumerated or provided for in this act, thirty per centum ad valorem."

Samples of the goods in question were produced in evidence and it appeared that the body of the cloth was linen cambric, that is, made of flax; that the articles were known in trade as, and were in fact, embroidered handkerchiefs; and that the embroidery was a substantial part of the handkerchief, and was done with cotton.

All the requirements as to protest, appeal and time of bringing suit having been complied with, the court directed a verdict for the importers for the difference claimed, upon which judgment was rendered, and the cause is brought here on writ of error.

The articles in controversy were embroidered linen handkerchiefs; and it is contended in support of the judgment that the provisions of the statute should be treated as if they read: "On linen handkerchiefs thirty-five per cent ad valorem, but, if embroidered, thirty per cent ad valorem."

We cannot concur in this construction. The word "handkerchiefs" is denominative and not merely descriptive, and when an article is designated by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it. *Arthur* v. *Lahey*, 96 U. S. 112, 113, and cases cited.

The eighth paragraph covers handkerchiefs and also "other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value," and the eleventh paragraph applies to flax or linen laces, insertings, embroideries or manufactures of linen, if embroidered or tamboured, and not specially enumerated or provided for in the act.

Where manufactures of linen, other than those enumerated in the first provision, are embroidered or tamboured they are subjected to the rate specified in the second provision. "The test of the rate of duty is that of embroidery or not." *Arthur* v. *Homer*, 96 U. S. 137, 140. In that case, certain linen embroidered dress-patterns had been imported into the port of New York, and were held dutiable at the rate imposed on embroidered manufactures of linen. The acts of March 2, 1861, of July 14, 1862, and of June 30, 1864, and the Revised Statutes of 1874, bearing upon the subject, were considered. By none of these acts were such dress-patterns specifically enumerated as subject to a different duty. But linen handkerchiefs were, as by the act of 1883 they are, mentioned as among the linen goods for which a certain rate was designated.

In *Solomon* v. *Arthur*, 102 U. S. 208, 211, 212, Mr. Justice Bradley, delivering the opinion of the court, makes the distinction between the use of a description applicable to many kinds of goods having different names, and the use of the specific name itself, entirely clear, and upon that distinction the disposition of the case turned.

We consider that distinction applicable here, and hold that these handkerchiefs, although embroidered, did not fall within the second provision.

The judgment must be

Reversed and the cause remanded, with instructions to grant a new trial, and it is so ordered.

WATSON *v.* CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO RAILWAY COMPANY.

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

No. 48. Argued October 31, 1889. — Decided November 18, 1889.

The improvement in grain-car doors, as claimed by Chauncey R. Watson and patented to him by letters patent No. 203,226, dated April 30, 1878, may have been new and useful, but did not involve the exercise of the inventive faculty, and embraced nothing that was patentable.

IN EQUITY. The court stated the case in its opinion as follows:

This was a bill filed by appellant against the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, in the Circuit Court of the United States for the District of Indiana, alleging an infringement of letters patent No. 203,226, granted to him for an improvement in grain-car doors, bearing date the 30th day of April, 1878.

The complainant averred, in his bill, that the patent was intended to secure and did secure to him "the sole and exclusive right to make, use and sell a car for the transportation of grain and other freight, constructed substantially like an ordinary freight car, having an outside door for closing the car, and provided with an inside flexible or yielding sliding grain door, which is adapted to be carried up on guide rods or their equivalent over head and out of the way and under the roof of the cars; that of such a car having an outside enclosing car door proper, in combination with an inside sliding flexible grain door, he was the first and original inventor," etc. These averments were denied in the answer, which also alleged that the thing patented in said patent, and every material or substantial part thereof, had been shown and described prior to Watson's supposed invention in various letters patent, fifteen in number, among them being a patent issued to Martin M. Crooker, May

26, 1868, and a patent issued to Horace L. Clark, August 29, 1871; and further averred that the grain-car doors, referred to in the bill as being on the cars of the Chicago, Rock Island and Pacific Railway Company, were made under the Crooker patent, which was afterwards assigned to Dennis F. Van Liew, and it was with his license and consent that the cars were so equipped with said doors; that "the only differences between said Crooker's doors and the complainant's are, that Crooker's slide in grooves and have their slats fastened together by a continuous wire running through them, while complainant's slide on rods passing through staples, and are fastened together by ordinary hinges, both being inside doors, and, with the exception of the above differences, operating in substantially the same way; that complainant's door, as described in his patent, contains no patentable invention in view of the Crooker patent, nor is it any improvement thereon, nor in view of the state of the art was there any patentable novelty or invention therein." The answer also denied any infringement of Watson's patent. Proofs having been taken, the bill was, upon hearing, dismissed, from which decree appeal was prosecuted to this court. The opinion by Woods, J., will be found reported in 23 Fed. Rep. 443.

Mr. Charles P. Jacobs for appellant.

Mr. George Payson for appellee.

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

The proof of the use of grain-car doors by the defendant was contained in a stipulation, whereby it was agreed "that the defendant had hauled over its line of road, in said State of Indiana, freight cars belonging to the Chicago, Rock Island and Pacific Railway Company, having a solid outside door, like an ordinary freight car, and an inner flexible sliding grain door of less height than the opening in the side of the car, the grain door sliding in grooves like the grooves shown in the patent of Martin M. Crooker, of May 26, 1868, and the slats

composing the door being attached to each other by being strung upon wires passing through the slats."

Watson's application was dated February 18, 1878, and contained the following claims:

"1st. A grain door, constructed of longitudinal sectional pieces, hinged or strapped together in such manner as that the door as a whole may yield to follow any desired line of movement when it is not in use as a grain door, and it is desired to place it out of the way, substantially as herein described.

"2d. A grain door, D, constructed as above described, and hinged or strapped so as to be flexible or yielding, for the purpose set forth, in combination with the guiding rods C, whereby, when not in use, it may be carried up and placed in the horizontal portion of said guiding rods, so as to be out of the way, substantially as described.

"3d. A grain door, D, constructed as described, and provided with staples *c c*, in combination with guiding rods C, and devices for affixing it to the top of the car, substantially as described and for the purposes set forth."

The application was rejected March 8, 1878, the examiners stating: "This 'grain door' differs from Crooker's (May 26, 1868, No. 78,188, carpentry doors), 'railroad car' only in the name and in this, that the upper portion of Crooker's door is cut off to make applicant's. The rods and staples are substitutes for Crooker's channel-irons — obvious to any skilled workman." Watson then, on the 18th of March, 1878, amended his specification by inserting:

"This invention relates to improvements in the class of grain doors for cars, and the invention consists in the combination, with a car, of an inside vertically sliding flexible or yielding door and guiding rods, whereby the door, when not in use, may be carried up and placed on the horizontal portion of said guiding rods, so as to be out of the way."

"I am aware that a car door of similar construction, sliding in grooved ways, is old, and such I do not desire to claim, broadly, as my invention. Said door, however, constitutes an outside or closing car door proper, and the car could not be

loaded or used for bulk grain unless the grain is put in from the roof of the car, as the door completely closes the doorway or opening. Furthermore, said door is obviously objectionable for other reasons, viz.: The grain will lodge or get in the grooved ways in which the door slides, binding or locking it so as to prevent its being raised, and also, being an outside door, the grain, pressing against it, would force or bulge the door outward, producing a similar effect as the grain lodging in the grooved ways; whereas my door, being an inside door and not reaching the top of the doorway or opening, admits an open space at the top for loading in the grain, with an ordinary outside door, to be locked or otherwise secured after the car is loaded. By also employing guiding rods for the door to slide upon, and, being an inside door, the defects incident to the grooved ways and an outside door before referred to are entirely obviated."

And at the same time he substituted for his first and second claims the following:

"1st. The combination, with a car, of an inside flexible or yielding and vertically sliding grain door and guiding rods C, whereby said door, when not in use, can be carried up and placed on the horizontal portions of said guiding rods, out of the way, substantially as and for the purpose herein shown and described."

March 20, the application was again rejected, the examiners stating:

"It is not considered that Crooker in removing the upper few slats of his door would be making a patentable improvement on his own invention, albeit he might change its name and allege the result of loading in over the top of his door.

"The change is an obvious one to any user of freight cars; further, the use of rods and eyes is old in this connection. See patent of H. L. Clark, Aug. 29, 1871, No. 118,514 (carpentry doors), which further confirms the former action in relation thereto.

"In regard to the clogging and binding referred to in argument, no clear or considerable results are seen to be accomplished by applicant's device over the reference, such as should argue any invention thereon."

Watson then, on the 21st of March, 1878, further amended by substituting for the first and second claims the following:

"The combination, with a car, of an inside flexible or yielding sliding grain door, having staples *c*, and the vertical and horizontal bent guiding rods C, extending from the floor of the car upwardly and under the roof of the car, as herein shown and described, whereby said door, when not in use, can be carried up on the horizontal portions of said guiding rods, out of the way, substantially as specified."

The examiners again responded, March 23, 1878:

"The application does not present patentable novelty over Crooker, cited.

"In view of the state of the art as shown by the references cited, the *use of* eyes and rods for guiding the sliding door are the simple mechanical equivalents of the channel irons of Crooker. As claim does not differ in a matter of substance from the preceding, it is a second time rejected."

An appeal was prosecuted to the examiners-in-chief, who reversed the decision, saying:

"The invention in this case is small and the claim is correspondingly limited. It consists of a combination of various instrumentalities not found in either of the references.

"Applicant's car, as a whole, is adapted by convertibility to uses not compatible with the cases cited, without injury. In this case the flexible door is applied in addition to the usual slide doors, and when coarse freight is to be carried the flexible shutters are secured in place at the top under the roof of the car."

The door in use upon the freight cars which appellee hauled over its road, was a grain door sliding in grooves. The Watson door was carried on rods with staples. Even if there were no material difference between a door sliding in grooves and a door sliding on rods and staples, there was no infringement, for Watson had in effect disclaimed a door sliding in grooves by his amendments and the terms of his specification as they stood amended, and in the narrow claim of his patent the staples *c* and the guiding rods C were part of his combination, which he could not, under the circumstances, say were not es-

sential to it, nor that the grooves were an equivalent. *Gage* v. *Herring*, 107 U. S. 640; *Fay* v. *Cordesman*, 109 U. S. 408. But counsel for appellant insists that Watson's real invention "was not a question of rods or grooves, but was the combination in a freight car having an outside rigid door, of an inner flexible sliding grain door."

The Crooker door was patented May 26, 1868, and made of separate strips attached to each other by long continuous metal straps, so as to be flexible and capable of being slid up out of the way under the roof of the car, in grooves or channel irons affixed to the inside of the door-posts, but was a full and not a half door. One of the doors was an inside door, as appears from the drawings, and was described in his specification as follows: "B B and B' B' are metallic grooved ways applied at the margin of the door spaces *d d* and partially across the car, immediately under the roof of the same, the vertical portions of the ways B' B' being on the inside of the car, just at the edge of the said spaces, and firmly bolted in place upon the car framing, or, if preferred, these vertical portions may be in the door space itself, as is the case with those of the ways B B." The Clark patent was issued August 29, 1871, for a rigid grain door filling only half the opening, and sliding on rods to the top of the car, where it was then swung up into a horizontal position, turning on eyes at the upper corners of the rods. The evidence established that inside grain doors, filling only part of the opening, had long been used on freight cars in connection with the outside door. Watson's door was made of separate slats, united to each other by hinges, and provided with staples at both ends that encircled the guiding rods on which the door might be slid up under the roof of the car so as to be out of the way. Making Crooker's door smaller so as to fill only half the opening, and using it in connection with an ordinary outside door, in combination with a car, is the invention claimed.

We agree with the learned judge holding the Circuit Court when he says: "There is nothing in either specification or claim concerning 'ordinary freight cars' nor solid sliding outside doors, and in the claim nothing about outside doors at all,

unless inferred from the description given of an inside door. If, however, such an inference is permissible, and the patent must or may be construed to consist in such a combination of inside and outside doors as is asserted, it cannot be upheld, because it does not involve invention, but consists in a mere aggregation of parts, each to perform its separate and independent function substantially in the same manner as before combination with the other and without contributing to a new and combined result. The outside door certainly remains unaffected in construction and in use; and the inner door is the same as the Crooker door, with a few slats left off or taken off by design or by accident; and whether done in one way or the other the change cannot reasonably be called invention, unless the distinction between mere mechanical skill and inventive genius is to be disregarded."

There was nothing new in flexible or rigid doors, outside and inside. There was nothing new in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening. The substitution of the old flexible sliding inside door, reduced in size to correspond with the old inside rigid grain door, may have required some mechanical skill, and may have been new and useful, but it did not involve the exertion of the inventive faculty, and embraced nothing that was patentable. *Thompson* v. *Boisselier*, 114 U. S. 1, 11, 12, and cases there cited; *Stephenson* v. *Brooklyn Crosstown Railroad Company*, 114 U. S. 149.

The decree was right, and it is

Affirmed.

MERRITT *v.* TIFFANY.

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

No. 60. Argued November 4, 1889. — Decided November 18, 1889.

The "professional productions of a statuary or of a sculptor only," as that phrase is used in the tariff act, (§ 2504 Rev. Stat. 2d ed. p. 478,) embraces such works of art as are the result of the artist's own creation,

or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of the manufacturer or mechanic.

This was an action to recover duties alleged to have been illegally exacted. Verdict for the plaintiff and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Edward Hartley for defendant in error. *Mr. Walter H. Coleman* was with him on the brief.

Mr. Justice Field delivered the opinion of the court.

In 1880 and 1881, the plaintiff below, Charles L. Tiffany, imported from France and England various bronze statues and statuettes, which he claimed a right to enter, as statuary, on paying a duty of ten per cent ad valorem, but on which the collector charged a duty of forty-five per cent, as non-enumerated manufactures of copper. He was accordingly compelled, in order to obtain his goods, to pay $420.25 in excess of the ten per cent, which payment he made under protest, and appealed to the Secretary of the Treasury, who affirmed the decision of the collector. He then brought this action in the Supreme Court of New York, from which it was removed on *certiorari* to the Circuit Court of the United States for the Southern District of New York.

The plaintiff relied for recovery on the paragraph in "Schedule M, Sundries," contained in Title thirty-three of the Revised Statutes, "Duties upon Imports." That paragraph reads as follows:

"Paintings and statuary, not otherwise provided for: ten per centum ad valorem. But the term 'statuary,' as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only." Rev. Stat. 2d ed. 478, 479.

The collector claimed that the goods were subject to the

duty charged under the paragraph in "Schedule E, Metals," contained in the same title of the Revised Statutes. That paragraph reads as follows:

"Copper in rolled plates, called braziers' copper, sheets, rods, pipes and copper bottoms, and all manufactures of copper, or of which copper shall be a component of chief value, not otherwise provided for: forty-five per centum ad valorem." Rev. Stat. 2d ed. 467.

The articles imported were all made of copper, and fell under the general designation of "manufactures of copper," or of "manufactures of which copper is a component of chief value," subject to a duty of forty-five per cent ad valorem, as charged by the collector, unless provision for a different duty on articles of that character is made in some other clause of the statute. There is no other clause applicable to them, unless they come under the head of "statuary," as defined by Congress. That definition, as seen above, includes the "professional productions of a statuary or of a sculptor only." What productions are to be deemed professional productions of a statuary or a sculptor it is difficult to state in general terms, so as to embrace every article of the kind. It is sufficiently accurate, however, for this case, to say that the definition embraces such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of the manufacturer or mechanic. The definition does not limit the professional productions to those of the sculptor's creation. As said in *Tutton* v. *Viti*, 108 U. S. 312, 313: "An artist's copies of antique master-pieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors."

The articles in question in this present case were reproductions of noted figures, and, with the exception of the two Roman Gladiators by Guillemin, were all made by manufacturers or mechanics. A model of a figure being prepared, any number of copies can be cast from it without any aid of the sculptor. One of the witnesses in the case testified that he had

been employed in New York City for eleven years in the manufacture of bronze statuettes; and that the company with which he was connected manufactured about forty thousand figures a year, varying in size from ten inches to thirty-six and thirty-nine inches, some similar to, and some larger than, the sample produced.

Another witness, who stated that he had been familiar with the process of manufacturing statues for twenty years, testified that the men who do the work of casting are skilled mechanics; that a model of a figure can be made so as to produce any number of copies; and that the process is purely mechanical.

The testimony of Léon Barré, who purchased the articles for the plaintiff, is instructive. He had been salesman and buyer for him for sixteen years, and had purchased in Europe bronze statues for him since 1880. He thus testified:

"The method of production of bronze statuary abroad is as follows: The artist or statuary first conceives a design; he puts it on paper; he studies his subject historically, and then makes a clay model; from that clay model he makes a plaster one which he either sells to a founder or reproducer, who is technically called an editor, or else he edits it himself. . . . The editor must for the purpose of reproduction either use the clay or plaster model of the statuary. That was so here. I find next two Roman Gladiators on this invoice. The original model of that was made by Guillemin and edited by him, and manufactured under his immediate personal supervision. He is a well known sculptor and statuary, and these are his professional productions. I find next the statues of Penelope, Madeline and the Retour des Champs, and busts of Delilah and Shakespeare. The busts are cast by Barbedienne. He is the most noted founder of bronze statuary. The others are cast by David, who is also a superior founder. I don't know what artist made the original clay models in these cases. I find also on the invoice a Vénus de Milo, and Mercury, and David before the Combat, and a Bernard Palissy, all cast by Barbedienne. The original artist is unknown to me. Barbedienne is a maker of statues. When a sculptor has produced his clay model, unless he is himself an editor, he expends no

further work on the subject; but all subsequent processes of founding, chasing and finishing are done by the editor. This is artistic work. There is another way of making bronze statuary, but the statues in this suit were made as I have stated. . . . In all cases of editing it is absolutely necessary for the editor to have and use the model of a sculptor." Upon cross-examination this witness gave further evidence tending to show that, with the exception of Guillemin referred to, the only other sculptor is Basset; all the others are editors. The witness states: "I know Basset to be a sculptor; I have seen his models. He did not make the models for the Love and Flora. Any number of reproductions in bronze can be made from the artist's model without any further work of the sculptor."

The evidence thus given by different witnesses was sufficient to justify the defendant in asking the court to instruct the jury that, "If they find from the evidence that the imported articles were made, not by professional sculptors or statuaries, or by their assistants under their direction, but were made by skilled workmen or mechanics in the employ of the manufacturer, then their verdict should be for the defendant." This instruction the court refused, to which refusal counsel excepted. In its ruling in this respect, we think the court erred. Under the instruction the jury might possibly have found that some of the articles, like the Roman Gladiators, were the productions of a statuary or a sculptor, within the meaning of the statute, while excluding others.

The judgment must therefore be reversed and the cause remanded for a new trial; and it is so ordered.

ANTHONY *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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

No. 77. Argued and submitted November 7, 1889. — Decided November 18, 1889.

An exception to the refusal of the presiding judge at a jury trial to instruct the jury in language prayed for by counsel is of no avail, if the refusal be followed by instructions in the general charge, substantially to the same effect, but in the language of the court.

A general exception to the whole of a charge to the jury will not avail a plaintiff in error if the charge contains distinct propositions and any one of them is free from objections.

THE case is stated in the opinion.

Mr. D. P. Dyer and *Mr. Nathan Frank*, for plaintiff in error, submitted on their brief.

Mr. Henry W. Bond for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action by the plaintiff to recover damages from the Louisville and Nashville Railroad Company for injuries suffered by him by reason of the derailment of a car attached to a train belonging to that company, in which he was being carried as a passenger on its line from Louisville, Kentucky, to St. Louis, Missouri.

The answer of the defendant set up that the accident was caused by reason of a latent or hidden defect or flaw in the body of a steel rail laid on the track of the road, a defect which no outward inspection could detect. Issue being joined, the case was brought to trial and certain instructions to the jury were requested by the plaintiff, which set forth, with substantial accuracy, the liability of railroad companies for having defective roads, by which accidents are caused to passengers travelling in their cars. These instructions were refused, and

to the refusal exceptions were taken. These exceptions, however, cannot avail the plaintiff in error, because the substance of the instructions refused was contained in the charge subsequently given by the court. The object of the instructions was to impart such information as would govern the jury in their deliberations and guide to a right conclusion in their verdict. Such information can generally be most advantageously given after the conclusion of the testimony and the argument of counsel; and it is not material whether it be then given immediately in response to the request of counsel or be contained in the formal charge of the court.

The charge itself, though embodying the substance of the instructions asked, also referred to other matters presenting distinct propositions of law; but to none of them was any exception taken, pointing out specifically the matter objected to. Only a general exception to the whole charge was made; and a general exception of that kind will not avail a plaintiff in error, where the charge contains distinct propositions and any one of them is free from objection. The whole charge must be substantially wrong before such a general exception will avail for any purpose. This is the settled law established by numerous decisions of this court. *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Cooper* v. *Schlesinger*, 111 U. S. 148, 151; *Mobile & Montgomery Railway Co.* v. *Jurey*, 111 U. S. 584, 596; *Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474, 476. It is also required by the fourth rule of this court, which provides as follows: "The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

Whatever, therefore, may be the actual merits of the plaintiff's claim to damages, nothing is presented to us by the record which we can examine.

Judgment affirmed.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 1086. Submitted October 28, 1889. — Decided November 18, 1889.

This court has jurisdiction to review, on writ of error, a decision of the highest court of a State, in which it is decided that a provision in a tax act of the State that it shall not apply to railroad corporations exempted from taxation by their charters is not applicable to a particular corporation, party to the suit, although its charter contains a provision respecting exemption from taxation.

Exemptions from taxation, being in derogation of the sovereign authority and of common right, are not to be extended beyond the express requirements of the language used, when most rigidly construed.

The appellant's charter provided that it should "be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this act:" *Held*, that the exemption was intended to commence from and after the completion of a railroad to the Mississippi River, and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the act, but liable to be diminished by whatever time beyond five years was consumed by the completion of the road to the river.

The preamble to a statute is no part of it, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.

Vicksburg, Shreveport & Pacific Railway Co. v. *Dennis*, 116 U. S. 665, approved and applied.

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

The Yazoo and Mississippi Valley Railroad Company was incorporated by an act of the Mississippi legislature, approved February 17, 1882, the preamble and sections 2, 8, 13 and 14 being as follows:

"Whereas, the construction of railroads to, in, through and along the Mississippi River basin, and the Yazoo and Sunflower River basins, penetrating these and other alluvial lands in this State, west of the Chicago, St. Louis and New Orleans Railroad, and connecting them by railroads and branches with other railroads west, east, north and south, is deemed and here-

by declared to be a work of great public importance, and, in strict accordance with the true policy and interest of this State, should be encouraged by legislative sanction and liberality; and, whereas the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country: Now, therefore, in order to induce the investment of capital in the construction, maintenance and operation of such a railroad and branches, and thus develop the resources and wealth of this State:"

"SEC. 2. *Be it further enacted*, That the said corporation shall also have, and it is hereby authorized and invested with the right and power to build and construct, and thereafter to use, operate, own and enjoy a railroad or railroads, with one or more tracks, into, along and across that part of the State of Mississippi lying between the Mississippi River and the Chicago, St. Louis and New Orleans Railroad, on such line or lines as shall be deemed best by the board of directors of the company hereby chartered; one of said lines, or a branch therefrom, to reach the Mississippi River at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi River with some point or points on the line of the Chicago, St. Louis and New Orleans Railroad; one of said lines of railroad, or a branch therefrom, to be extended to or pass through Yazoo City, Mississippi; and said company shall have the right and power, and are hereby authorized, to build one or more branches or lines of railroads between the Mississippi River and Deer Creek, and between Deer Creek and the Sunflower River, and between the Sunflower and Yazoo Rivers, in the direction of or to the north line of this State, and extend the same, or any one thereof, in the direction of or to the south boundary line of this State, as shall from time to time, in the judgment of said company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such main line or branches

not exceeding one hundred miles in length, as may from time to time be necessary or proper to fully develop said country lying west of the Chicago, St. Louis and New Orleans Railroad, and east of the Mississippi River, in this State; and the said company, as soon as and whenever, from time to time, they have located said line or lines of railroad or branches, spurs or laterals thereto, or any of them, shall file in the office of the secretary of State a statement showing the general line thereof as far as the same has up to that time been located."

"SEC. 8. *Be it further enacted*, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared, that said company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted — not to include compresses and oil mills — shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns."

"SEC. 13. *Be it further enacted*, That unless said company shall construct and have in operation twenty miles of railroad within three years from the passage of this act, the legislature shall have the right to declare this charter forfeited.

"SEC. 14. *Be it further enacted*, That all acts in conflict with this act, or any part thereof, be and the same are hereby repealed, and that this act take effect and be in force from and after its passage, the public welfare requiring it." Laws of Mississippi, 1882, 838.

Statement of the Case.

By section one, the corporation is authorized to hold, purchase, receive and enjoy real and personal estate in Mississippi and other States, however acquired; and to sell, rent, lease, mortgage or otherwise dispose thereof.

By section five, it is empowered to consolidate with any other company or companies, and acquire or lease other railroads in or out of the State for a term of years or in perpetuity; to do an express business over its own and other lines of railroads and steamboats or other conveyances in and out of the State; and to acquire, put up, use and operate a line or lines of telegraph in this or other State or States; by section six, to fix its own rate of charges, not to exceed a maximum indicated, provided, it may make special agreements with shippers as to lumber, coal, iron, etc., and other freights transported in car loads, without discrimination; by section seven, to enter on state lands anywhere and take in fee simple one hundred feet on each side of the centre of any of its tracks, as right of way; to use any rocks, timber, earth, sand, gravel, water or other materials anywhere found on such state lands; to build bridges across any stream whether navigable or not, with power and authority "to build, construct, maintain and operate of itself or with others, in or out of this State, a ferry across, or a tunnel under, or a bridge over, the Mississippi River at any point within this State, where its railroads, branches, laterals or spurs may reach said river;" to acquire all lands and materials necessary for landings, wharves, inclines or approaches thereto; to establish such landings, wharves, etc., as may be necessary or convenient in transporting freights, passengers, cars or rolling stock, loaded or unloaded, upon and across said Mississippi River, or any other river or body of water within this State; and to own, use and operate, and control by itself or others, "all such steamboats, ferries or other water craft as are or may be convenient or necessary in crossing such water, so as to develop trade over said lines of railroad;" by section nine, to insure persons and property, or either, transported or to be transported over any part of its line, and all other property coming into the possession or control of said company for transportation or storage,

and to charge reasonable compensation for such insurance or storage; to erect or acquire and use such depots, storage houses, wharves, etc., as shall be necessary or convenient; and to construct and operate compresses and oil mills; by section ten, to run its railroad, branches, laterals or spurs into the corporate limits of any incorporated town or city; and to build and operate its tracks, across or along any streets of such incorporated municipality; and by section eleven, the board of directors, stockholders, executive committee, officers and agents of the company may hold their meetings and transact the company's business in or out of the State, and establish such offices as they deem best in or out of the State, and all acts done by said company, its officers or agents, out of the State shall be of the same force and effect as if done within the State.

By the Code of Mississippi of 1880, under the heading "Taxation of Railroads," taxation was provided for in certain sections, summarized by counsel, in substance as follows:

"Section 597 provides that each railroad company owning and operating a railroad in this State shall, on or before the third Monday in August in each year, file with the auditor of public accounts a complete schedule of all its property, real or personal, setting forth the length in miles or fractions of its road-bed, switches and side tracks, and showing the number of miles and fractions lying in the State, and in each county, and in each incorporated town, and the value of the whole, and each part as herein subdivided, capital stock, bonded indebtedness, the gross amount of receipts, the rolling stock, depot buildings, workhouses and machine shops, car shops, and stationary machinery, and the county and town in which situated, and the land on which they are situated, together with all other real, mixed and personal property.

"Section 599 requires: The auditor, when this schedule has been filed, and also in cases when it has been refused, is directed to notify the governor of the State of the fact, who shall proceed to convene the auditor, treasurer and secretary of State, who, thus convened, shall assess the value of each railroad for purposes of taxation and shall certify the same to the auditor of public accounts.

Statement of the Case.

"Section 600 provides the means of ascertaining the items and value of the property. The board is directed to value the entire road and property, that value is to be divided into the number of miles in the State, and the valuation for each county is to be according to the number of miles of the road in each. The number of miles for the State shall be the product for state taxes, and the number of miles in each county the product for county taxes; and, having thus ascertained the sums to be taxed, they shall certify the same and the facts to the auditor.

"Under section 601 may be added ten per cent on the amount of taxes assessed against railroad companies failing or refusing to file schedules as directed by section 597, or filing unfair ones.

"Section 603 provides that when the valuation so ascertained and certified has been furnished to the auditor, he shall ascertain the taxes due the State and counties, and notify the companies of the amounts due to the State, by letter or otherwise, and shall certify the sums to be taxed in the several counties for county purposes to the clerk of the Chancery Court of the county, and the amount to be taxed by cities and towns to the mayor thereof, and the sums so certified shall be entered on the collector's books, to be collected as other taxes; and by section 604 the auditors shall collect the taxes due the State by distress warrants issued to any sheriff, authorizing the seizure and sale of personal property in the county: and, should the personal property be insufficient, the auditor may sell the entire road and franchise to the highest bidder, and the purchaser shall be put in possession.

"Section 605. The county taxes are to be collected as all other taxes.

"Section 606. Railroad property situated in any city or incorporated town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property of individuals, and this section is to apply to the foregoing as well as to the following modes of taxation herein provided for.

"Section 607 provides that every railroad accepting this

act, and annually paying to the auditor of public accounts the taxes hereinafter provided for, and signifying its acceptance in writing, shall be exempt from all the foregoing provisions, except section 606 in relation to cities and towns, and such payment shall be in full of all state and county taxes; fifty per cent of the amount paid to be placed to the credit of the counties through which the railroad may pass, to be divided amongst them according to the number of miles in each. Lands owned by such railroad companies, and not used in operating the roads, shall be taxed as other property and for all purposes.

"Section 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the state treasurer, on the warrant of the auditor, on or before the 31st day of December, in each and every year, a privilege tax as follows, to wit: [Here follows a list of the existing railroads in the State, their names being given and the sums required of each.] *Provided*, That no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so used shall be taxed although the whole road may not be finished." Code Mississippi, 1880, 194 *et seq.*

In 1884, section 604, so far as it provided for putting a purchaser of a railroad under the tax sale therein mentioned, in possession of the road, was repealed, and section 607 was so amended as to give to the counties two-thirds, instead of fifty per cent, of the privilege tax.

Section 608 was amended so as to read:

"Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the state treasurer, on the demand of the auditor, on or before the fifteenth day of December in each and every year, a privilege tax as follows, to wit: [then follow the names of the companies, not including appellant.] All the railroads not named herein, and not exempt from taxation by their charters, sixty dollars per mile: *Provided*, That no railroad company shall be subject to taxation under this chapter while

the same is in process of construction — but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished — nor where the same is now exempt from taxation by its charter." Laws Mississippi, 1884, 29, 30, c. 22.

In 1886, the privilege tax for all railroads was increased twenty-five per cent. Laws Mississippi, 1886, 23.

April 3, 1888, the legislature of Mississippi passed an act entitled "An act to provide for the assessment of past due and unpaid taxes on railroads which have escaped the payment thereof," the first section of which is in these words:

"That every railroad which has failed to pay the taxes for which the same was liable, for any year for which it was so liable, such railroad not being exempt by law or its charter from taxation for such years, and so being liable to taxation, shall be assessed for, and shall pay an *ad valorem* tax, to be assessed as hereinafter provided, unless such railroad shall, within sixty days after the passage of this act, pay the taxes for which the same was liable according to its charter, or shall pay the privilege taxes for which the same was liable, as follows: If a standard or broad gauge road, for the years prior to 1884, eighty dollars per mile; for the years 1884 and 1885, one hundred dollars per mile; and for the years 1886 and 1887, one hundred and twenty-five dollars per mile; and, if a narrow gauge, or not standard or broad gauge road, for the years prior to 1884, forty dollars per mile; for the years 1884 and 1885, fifty dollars per mile; and for the years 1886 and 1887, sixty-two dollars and fifty cents per mile." Laws of Mississippi, 1888, 49, c. 28.

Section two provides that sixty days after the passage of the act, the tax-collectors of the several counties through which any railroad runs, which has failed to pay the taxes for which it was liable, and failed to avail itself of the provisions of the first section and paid taxes according thereto, shall assess, as additional assessment, every such railroad in their respective counties for the several years for which taxes have not been paid, on lists duly prepared for that purpose by the Railroad Commission, whose duty it shall be to prepare such lists imme-

diately after the passage of the act: and then proceeds with other particulars in relation to the valuation, assessment and collection, referring to various sections of the code, so far as applicable.

Under this act, taxes, amounting to $58,000, were assessed against appellant for the years 1885, 1886 and 1887, in respect to parts of its line which were operated in those years for business as a carrier, the road not having been completed to the Mississippi River.

On the 17th of July, 1888, appellant filed its bill in the Chancery Court of Hinds County against Thomas and others, the appellees here, who were sheriffs and tax-collectors of the several counties through or into which the road extended, to enjoin the collection of the taxes so assessed upon its railroad property, as unauthorized and illegal. The illegality complained of was, that the tax was in violation of the company's charter, by which it was insisted, the property of the company incident to its railroad operations was exempted from taxation; and it was averred that the charter, as respects the exemption claimed, was a contract "irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the State."

To this bill the defendants demurred. The demurrer was sustained, and the bill dismissed by the Chancery Court, and the complainant appealed to the Supreme Court of the State of Mississippi. The decree of the court below was affirmed by that court, and to this judgment of affirmance the plaintiff in error sued out the pending writ of error. The opinion of the Supreme Court was delivered by Arnold, C. J., and is as follows:

"Statutes exempting persons or property from taxation, being in derogation of the sovereign authority and of common right, are, according to all the authorities, strictly construed.

Counsel for Parties.

As taxation is the rule and exemption the exception, the intention to create an exemption must be expressed in clear and unambiguous terms, and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Legislation which relieves any species of property from its due proportion of the burdens of the government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning. Cooley on Taxation, 2d ed. 204; *Bailey* v. *Magwire*, 22 Wall. 215; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665; *Frantz* v. *Dobson*, 64 Mississippi, 631.

"In the light of these principles we are unable to find anything in the charter of appellant to warrant the exemption claimed in this case. It is quite plain to us that the exemption created by section eight of appellant's charter, Acts of 1882, p. 847, was intended to commence from and after the completion of a railroad to the Mississippi River and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the act, but liable to be diminished by whatever time beyond five years was consumed in the completion of the road to the river.

"At the time appellant's charter was enacted, railroads in process of construction were not taxable under the general laws of the State, (Code, § 608,) and this may account for the charter providing exemption from taxation after the completion of the road and none during the period of its construction."

Together with arguments upon the merits a motion to dismiss was also submitted.

Mr. James Fentress and *Mr. W. P. Harris*, (with whom was *Mr. J. B. Harris* on his brief,) for plaintiff in error, submitted on their briefs.

Mr. Marcellus Green, (with whom was *Mr. S. S. Calhoon* on the brief,) for defendants in error, submitted on his brief. *Mr. T. M. Miller* also filed a brief for the same.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the state constitution for the State to contract with the company that the latter should not be subjected to taxation, but upon the ground that the exemption claimed could not be allowed. The taxes in question were assessed under the act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled.

By the eighth section of the company's charter it was declared "that said company, its stock, its railroads and appurtenances, and all its property in this State necessary or incident to the full exercise of all the powers herein granted —not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State." If the provision had terminated with the words "Mississippi River" it

would not be open to argument in this court that the exemption claimed did not commence until the river was reached.

In *Vicksburg, Shreveport & Pacific Railway Company* v. *Dennis*, 116 U. S. 665, it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State," did not exempt the road, fixtures and appurtenances from taxation before such completion. It was argued there, as it is here, that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing; on the other hand, it was argued there, as it is here, that one reason for defining the exemption of the railroad and its appurtenances from taxation, as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through Mr. Justice Gray: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite and unambiguous." It appeared there, as it does here, that the taxing officers of the State had omitted in previous years to assess the property, but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well-settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris.*

Tested by that rule, did the addition of the words "but not to extend beyond twenty-five years from the date of the approval of this act," operate to create an exemption of twenty-five years from the date of the act subject to being reduced to less than that if the road were completed to the river before the lapse of five years, but for twenty years at all events; or did it operate to reduce the term of the twenty years' exemption by so much as the completion of the road to the river took over five years? Upon the one view there would be a loss of exemption through rapidity of construction; in the other view, a gain, or, rather, the prevention of a loss. Does it appear by clear and unambiguous language that the State intended to surrender the right of taxation for twenty-five years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of twenty years, subject to a diminution of that term if the river were not reached in five years, as reasonable as the opposite construction; and if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption expressly limited to a term of twenty years after the accomplishment of a designated work, but not to extend beyond twenty-five years from a certain date, be read as an exemption for twenty-five years, but not to extend beyond twenty years from the completion of that work? It seems to us, notwithstanding the able and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained.

By the general law of the State of Mississippi in force at the time the charter of appellant was granted, it was provided that no railroad company should be subject to taxation while the same was in process of construction, but if any part of any road should be completed so as to be used for profit, the part so used should be taxed, although the whole road might not be finished. It is admitted that the taxes here were levied in respect to parts of the road which were in operation.

Opinion of the Court.

The second section of its charter empowered the corporation to build and construct, and thereafter use, operate, own, and enjoy a railroad or railroads into, along, and across that part of the State lying between the Mississippi River and the Chicago, St. Louis and New Orleans Railroad, "one of said lines, or a branch therefrom, to reach the Mississippi River at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi River with some point or points on the line of the Chicago, St. Louis and New Orleans Railroad;" and by section seven it was empowered to "build, construct, maintain, and operate of itself, or with others, in or out of this State, a ferry across, or a tunnel under, or a bridge over, the Mississippi River, at any point within this State where its railroads, branches, laterals or spurs may reach said river;" and to acquire lands, etc., for landings, wharves, inclines, etc., and to establish said landings, wharves, inclines, etc., as might be necessary or convenient in transporting freights, passengers, etc., upon and across said Mississippi River. In our opinion it cannot be doubted that a principal object of the grant to the company was the building of a line across the State from the Chicago Railroad to the Mississippi River, and that the point of contact was to be opposite Arkansas City, if that were practicable. Five years was contemplated as sufficient to complete the road to the river, so that the twenty years' exemption should commence.

By the thirteenth section it was provided that the legislature might declare the charter forfeited, if twenty miles were not constructed and in operation within three years from the passage of the act. This indicates that the legislature did not assume that the line might probably be extended to the river in less than five years, and were not thereby induced to insert the twenty years as a limitation on the twenty-five. No reason is perceived for limiting the exemption to begin with the completion of the railroad to the Mississippi River, if it were intended that the exemption should be for more than twenty years at all events, commencing with the approval of the act.

The question when the property may be taxed is answered

by ascertaining when the period of the specified exemption begins, for until then the general law provided that while the road could not be taxed during the process of construction, such parts as were finished and in operation could be, though they might be for a time exempt under the charter after the line was completed to the Mississippi River. When the Mississippi River was reached then the period of exemption would begin; but how long it would continue would depend upon the length of time to elapse before the end of twenty-five years from the approval of the charter. And this disposes of the argument that it is immaterial whether the period of exemption is twenty or twenty-five years, because it is agreed that the property could not be taxed until the period of exemption, whatever that is, shall have expired, for that ignores the real inquiry, which is as to when the exemption commences.

Again, the preamble to the act is referred to by counsel, as sustaining their construction, because it is therein declared that the work is one of "great public importance," and "to be encouraged by legislative sanction and liberality," and that "the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation.

It is true that it is stated in section eight, that, in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement

and consideration therefor, the taxes and burdens which this State will and will not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to remove ambiguity upon the presumption of a legislative intent contrary to the fixed presumption where the rights of the public are involved. In short, there can be no uncertainty in the result when the language used is construed, as it must be, in accordance with thoroughly settled principles. After stating the exemption in controversy, section eight concludes as follows: "And when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns."

Since upon the expiration of the period of exemption, it would have followed that the property of the company would be subject to taxation at the same rate as other property, it may be that the object of the final clause was to create a scheme of taxation peculiar to the road. Upon the comprehensiveness and validity of such scheme we do not undertake to pass. It was not to take effect until the exemption expired, and the terms in which it was couched do not render the commencement of the exemption other than the Supreme Court held it to be.

The case is clearly controlled by our decision in *Vicksburg, Shreveport & Pacific Railway Company* v. *Dennis*, *supra*, and the judgment must therefore be

Affirmed.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* BOARD OF LEVEE COMMISSIONERS OF THE YAZOO MISSISSIPPI DELTA.

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

No. 1087. Submitted October 28, 1889. — Decided November 18, 1889.

Yazoo & Mississippi Valley Railroad Co. v. *Thomas*, *ante*, 174, affirmed and applied.

In equity. The case is stated in the opinion.

Mr. James Fentress, *Mr. W. P. Harris* and *Mr. J. B. Harris* for appellant.

Mr. Marcellus Green and *Mr. S. S. Calhoon* for appellees.

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

This is an appeal, by plaintiff in the suit, from the decree of the Circuit Court for the Southern District of Mississippi, dismissing its bill of complaint filed in that court against the appellees, the Board of Levee Commissioners, and certain sheriffs and tax-collectors, to enjoin the collection of taxes levied under an act of the legislature, creating such Board of Commissioners, for the purpose of providing for the payment of the principal and interest of bonds authorized to be issued by the board, the proceeds of which were to be applied to the construction and repair of levees on the Mississippi River.

The bill set up the same exemption relied on in *Yazoo & Mississippi Valley Railroad Company* v. *Thomas*, *ante*, 174, and it was insisted that the taxes sought to be collected were unauthorized and illegal by reason of such exemption; and that the law imposing the taxes impaired the obligation of the alleged contract of exemption and thus violated the Constitution of the United States; the litigation,

therefore, making a controversy arising under that Constitution. Without considering whether any other ground for affirming the decree exists, it is sufficient to say that this case is disposed of by the decision which has just been announced in that referred to.

Decree affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* CHICAGO AND ALTON RAILROAD COMPANY.

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

No. 66. Submitted November 5, 1889. — Decided November 25, 1889.

In regard to motions for a new trial, and bills of exceptions, the courts of the United States are independent of any statute or practice prevailing in the courts of the State in which the trial is had.

THE case is stated in the opinion.

Mr. John F. Dillon for plaintiff in error.

Mr. Alexander Martin and *Mr. Robert H. Kern* for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

In this action, tried by the Circuit Court without a jury, there is no case stated by the parties, or finding of facts by the court. The bill of exceptions, after setting forth all the evidence introduced at the trial, states that "there were no declarations of law asked for, or given by the court;" and the single exception taken is to the overruling of a motion for a new trial, which is a matter of discretion, and not a subject of exception, according to the practice of the courts of the United States. In regard to motions for a new trial, and bills of exceptions, those courts are independent of any statute or practice prevailing in the courts of the State in which the

trial is had. *Indianapolis Railroad* v. *Horst*, 93 U. S. 291; *Newcomb* v. *Wood*, 97 U. S. 581; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544.

Judgment affirmed.

RAIMOND *v.* TERREBONNE PARISH.

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

No. 88. Argued November 12, 1889. — Decided November 25, 1889.

Either a statement of facts by the parties, or a finding of facts by the Circuit Court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred.

This was an action by a citizen of Mississippi against a parish in Louisiana upon certain bonds and coupons, amounting with interest to more than $5000 in value, alleged in the petition and denied in the answer to have been issued in accordance with the statute of Louisiana of March 23, 1874, c. 74, and to have been purchased by the plaintiff in good faith and before maturity.

After the case had been tried by the Circuit Court pursuant to an agreement of counsel in open court to waive the intervention of a jury, and judgment for the defendant had been rendered but not signed, and pending a motion for a new trial, the counsel of the parties filed an agreement in writing, waiving a jury, and submitting the case to the decision of the court upon what they called a "statement of facts," and stipulating that "the court shall find the facts in accordance therewith, and change [charge?] the law so that a bill of exceptions may be made up or error be assigned to the Supreme Court."

That "statement of facts" consisted of a description of the instruments sued on; a reference to the plaintiff's deposition on file, testifying to the circumstances under which he purchased them; an abstract of the testimony of another witness

for the plaintiff to those circumstances; and a statement of the proof offered by the defendant as to the circumstances under which the bonds were issued.

The court, after setting forth the statement so filed, added this finding: "The court further finds that it was admitted on the trial herein that, as far as the facts were stated in the case of *Rabasse* v. *Police Jury of Terrebonne Parish*, in the opinion of Mr. Justice Manning, reported in 30 La. Ann. 287, they were a correct statement of the facts of this case, though each party claimed that there existed additional facts beyond those stated in said opinion."

The court found, as conclusions of law, "that the construction given to the statute authorizing the issue of bonds for the debts of said parish should in this cause, and as to the points determined in said cause by the Supreme Court of this State, —*i.e.*, *Rabasse* v. *The Parish*, — be deemed and held as the construction of a municipal law and not as that of a commercial law, and is therefore binding upon this court; and, further, that if said construction should be deemed and held as that of a commercial law, then the court adopts it as a just and proper inference from the facts of the case;" and "that the petition herein should be dismissed, and that there be judgment for the defendant."

The court thereupon signed the judgment previously rendered, which was as follows:

"The parties in this cause having in open court waived the intervention of a jury, and submitted the cause to the court on the facts set forth in the opinion by Mr. Justice Manning, in *Rabasse* v. *Parish of Terrebonne*, 30 La. Ann. 287, and the court, having considered the said agreed statement of facts and being advised in the premises, finds the issues of law raised by the pleadings in favor of the defendant; and, for the reasons assigned by the court in the opinion this day read and filed, it is ordered, adjudged and decreed, both the Circuit and District Judges concurring, that there be judgment in favor of the defendant, The Parish of Terrebonne, with costs, and against the demands of the plaintiff, Peter Raimond." 28 Fed. Rep. 773.

The plaintiff, without tendering a bill of exceptions, sued out this writ of error.

Mr. Alfred Goldthwaite for plaintiff in error.

Mr. J. D. Rouse and *Mr. William Grant* for defendant in error.

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

Assuming the agreement in writing, waiving a jury, and submitting the case to the decision of the Circuit Court, to have been seasonably filed, the record is not in such a shape as to authorize this court to review that decision.

By the settled construction of the acts of Congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the Circuit Court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred. *Burr* v. *Des Moines Co.*, 1 Wall. 99; *Norris* v. *Jackson*, 9 Wall. 125; *Martinton* v. *Fairbanks*, 112 U. S. 670.

In the present case, the pleadings present issues of fact. There is no bill of exceptions. The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial. The case was not submitted to the decision of the court upon that statement only, but the court made a further finding as to what took place at the trial. That finding merely states that the parties admitted that, so far as the facts were stated in a certain reported opinion of the Supreme Court of Louisiana, they were a correct statement of the facts of this case; but that each party claimed that there existed additional facts, as to which there is no finding. On referring to that opinion, such facts as are there stated appear to be scattered through it, intermingled with statements of conflicting evidence, and with the court's conclusions of fact upon that

evidence, as well as with its conclusions of law. *Rabasse* v. *Police Jury of Terrebonne Parish*, 30 La. Ann. 287.

In short, there is nothing in the present case, which can be called, in any legal or proper sense, either a statement of facts by the parties, or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it.

Judgment affirmed.

MARCHAND *v.* EMKEN.

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

No. 37. Argued October 25, 1889. — Decided November 25, 1889.

Claim 1 of letters patent No. 273,569, granted to Charles Marchand, March 6, 1883, for an improvement in the manufacture of hydrogen peroxide, namely, "1. The method of making hydrogen peroxide by cooling the acid solution, imparting thereto a continuous movement of rotation, as well in vertical as in horizontal planes — such, for example, as imparted by a revolving screw in a receptacle — and adding to said acid solution the binoxide in small quantities, while maintaining the low temperature and the rotary or eddying movements, substantially as described," is invalid, as not covering any patentable subject matter.

In equity for the infringement of letters patent. Decree dismissing the bill. Plaintiff appealed. The case is stated in the opinion.

Mr. W. H. L. Lee for appellant. *Mr. B. F. Lee* was with him on the brief.

No appearance for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by Charles Marchand against Frederick Emken, to recover for the infringement of letters patent No. 273,569, granted to the

plaintiff March 6, 1883, for an improvement in the manufacture of hydrogen peroxide.

The specification says: "This invention has reference to the manufacture of hydrogen peroxide, or oxygenated water, by addition of barium or calcium binoxide to an acid (sulphuric, nitric, acetic, oxalic, hydrochloric, hydrofluoric, hydrofluosilic, and the like), the binoxide having been mixed with water. Heretofore hydrogen peroxide has been made by adding the barium or calcium binoxide, mixed with water, to the diluted acid, the binoxide being added from time to time in small quantities, the vessel in which the operation is conducted being set in a refrigerating medium, and the liquid being agitated or stirred to facilitate the reaction. The stirring has been performed by hand. The present invention is based on the fact or discovery that the reduction of the barium or calcium binoxide takes place under conditions much more favorable in point of rapidity and yield when the acid to be neutralized is given a movement of rotation, both vertically and horizontally, by a screw or other suitable means, which at the same time creates both constant and ever-changing eddies, the said movement of rotation being imparted continuously during the addition of the binoxide. The present invention consists, therefore, first, in imparting to the acid a movement of rotation, the time required for the chemical reaction being thereby lessened, while the reaction itself is more complete."

The specification gives a description of the apparatus which it says is preferably to be employed and forms part of the invention, in substance as follows: There is a receptacle for the acid, and a jacketing vessel, in which the receptacle rests, for containing the refrigerant or cooling medium. There is a rotating screw and a vertical power-shaft. The acid receptacle need not be of any particular size, but a good capacity is from five hundred to one thousand gallons. It is preferably hemispherical, but may be cylindrical, frustoconical, or of other suitable form; and it is made of or lined with material adapted to resist the action of the acid. For use with hydrofluoric acid, a sheet-iron or, better, a copper vessel lined with lead may be used, or one of platinum, gold, or silver, or one

otherwise rendered non-corrodible. The screw is provided with helicoidal blades, ordinarily two, three, or four in number, set obliquely on the arbor or screw-shaft. The blades are preferably pierced with holes. The screw is suspended in the receptacle, being detachably connected with the lower end of the power-shaft by two pieces, one fixed to the power-shaft, and the other to the screw-shaft, and clamped together by bolts. On the screw-shaft, above the top of the receptacle, is fixed a disc of wood or other suitable material, which catches the oil from the bearings of the power-shaft, and other foreign matters that otherwise would be liable to fall into the receptacle. The power-shaft is suspended in its bearings by suitable collars, which enable it to support the screw, and is driven from a horizontal shaft, through bevelled gearing, or by other well-known or suitable mechanical means. The length of the screw-shaft is such that the blades of the screw do not in operation touch or scrape the interior of the receptacle. The jacketing vessel is of ordinary or suitable construction. The cooling medium commonly employed therein may be placed in it. The vessel being filled with the cooling medium, the proper quantities of acid and water (say twenty parts, by weight, of acid to one hundred parts of water, or other suitable proportions) are placed in the receptacle. The screw is put in motion, and the binoxide of barium or calcium, in the state of a more or less thick emulsion or milk, is added in small quantities. The revolving screw imparts a movement of rotation more or less rapid to the liquid, producing eddies therein and constantly changing the material, and the chemical reaction takes place very regularly and completely. Sufficient binoxide is added to secure the complete neutralization of the acid without rendering the hydrogen peroxide too alkaline. After a certain time, which varies with the quantity of the article manufactured and the amount of binoxide employed, and during which the screw may be stopped, but is preferably kept in revolution, the production of the hydrogen peroxide is finished. It only remains to allow the matters in suspension to settle and to decant the clear liquor. If it is desired to obtain the hydrogen peroxide

in a state of greater purity than results from the above, the clear liquor is subjected to special chemical treatment, which, as it constitutes no part of the present invention, is not described.

Only the first claim of the patent is involved in this suit. That claim reads as follows: "1. The method of making hydrogen peroxide by cooling the acid solution, imparting thereto a continuous movement of rotation, as well in vertical as in horizontal planes — such, for example, as imparted by a revolving screw in a receptacle — and adding to said acid solution the binoxide in small quantities, while maintaining the low temperature and the rotary or eddying movements, substantially as described."

The answer sets up, among other defences, that the alleged invention and patent do not contain any patentable subject matter. After a replication, proofs were taken, and, on a hearing, the court, held by Judge Coxe, entered a decree dismissing the bill with costs. From this decree the plaintiff has appealed. The opinion of the court is found in 23 Blatchford, 435, and 26 Fed. Rep. 629.

It appears from the record that the first claim was three times rejected by the Patent Office, and was then, on appeal, allowed by the examiners-in-chief, who said in their decision: "In the present case, the essence of the invention resides in imparting to the liquid, while making hydrogen peroxide as above, a peculiar motion — one which cannot be given by hand — a continuous movement of rotation, horizontally in opposite directions from the centre, or radially and vortically, or nearly so, according to the shape of the vessel, a vortical motion designated in German as *wirbelbewegung*, the movement of a smoke ring, making what may be termed a ring vortex." They suggested an amendment to the specification, to make it clear that the invention was "no more than in this particular art, all the other steps being old, imparting to the liquid undergoing chemical change this old motion, this motion produced, for example by the egg-beater."

The opinion of the Circuit Court says: "It is not pretended that the complainant discovered hydrogen peroxide, or the

method of adding barium, mixed with water, from time to time, to the diluted acid, or the necessity for stirring or agitating the liquid. Neither did he invent the obliquely bladed screw, the hemispherical receptacle, the jacketing vessel or any part of the apparatus described in the specification. All this was old and well known. The patent itself illustrates how extremely circumscribed was the theatre of invention." It then refers to the fact that the descriptions, in the specification, of the prior process and of the patented process are substantially the same, except that in the former the stirring was performed by hand, and in the latter it is performed by machinery. The opinion then proceeds: "The question, then, seems to be narrowed down to this: Does it constitute invention to stir, by a well-known and simple mechanical device, what had before been stirred by hand? The complainant desired to manufacture in large quantities what had before been produced chiefly in the laboratory. He knew how hydrogen peroxide had been made; every step in the formula was familiar. A mixture that needed stirring, and a vessel provided with a revolving stirrer, were ready at his hand. He put the former into the latter. This was all. The object of agitating the liquid, while making hydrogen peroxide, is to keep the barium, which is three times as heavy as water, suspended in the acid, so that its particles may come in contact with the particles of acid. Whether they come in contact while going round, rising, settling or remaining stationary, can make no difference. Divest the case of the air of mystery with which it is environed, and it seems simple enough. The complainant's predecessors knew that to keep the barium up in the solution they must stir it. The complainant knew this. Unlike them, however, he manufactured on a scale large enough to make it essential to employ a power-shaft. The oar-shaped sticks which formerly went round and round by hand now go round and round by machinery." The court then refers to the contention of the plaintiff that, by the method set out in the patent, a movement was given to the acid which had never before been imparted to it in the manufacture of hydrogen peroxide, because "the liquid is thrown out towards the circumference of the vessel at the

bottom, rises at the sides, returns to the centre, and then descends, to be again thrown out at the bottom, while at the same time it is carried round and round;" and says that this, "being reduced to still simpler language, means, that the machine will stir large quantities of the liquid more thoroughly than the hand-worked paddles." It adds: "The pretence that the complainant had discovered some occult and wonder-working power, in the motion of a screw revolving in the bottom of a tub, is not sustained by the proof. Whether the contents of the tub be oxygenated water, or soap, or lye, or tartaric acid, the action will be the same. That rotary, eddying motions in liquid will result from the revolving screw, that the liquid will rise highest at the periphery of the tub, and thus have the tendency, at the top, to fall towards the centre, were well-understood operations of centrifugal force. As every device, apparatus, formula, law of nature, motion and ingredient adopted by the complainant was old, the patent must be held invalid, unless it can be said that giving to oxygenated water a well-known rotary motion springs 'from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision.' *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 72. No such faculty has been tasked in giving form to this patent. There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery, and by hand also, provided substantially the same movement can be produced by hand-stirring, and this seems to be a disputed question upon the proof. The complainant's claim to be enrolled upon the list of inventors is based upon propositions too theoretical and visionary for acceptance." See, also, *Dreyfus* v. *Searle*, 124 U. S. 60; *Crescent Brewing Co.* v. *Gottfried*, 128 U. S. 158.

A careful consideration of the evidence and of the arguments on the part of the appellant (no brief having been submitted on the part of the appellee) induces us to concur in the views of the Circuit Court.

Decree affirmed.

ROYER *v.* ROTH.

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

No. 83. Submitted November 7, 1889. — Decided November 25, 1889.

The claim of letters patent No. 172,346, granted to Herman Royer, January 18, 1876, for an improvement in machines for treating rawhides, namely, "In combination with the drum A of a rawhide fulling machine, operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous, substantially as described," does not cover any patentable combination, it being a mere aggregation of parts.

The automatic shifting device was old, as attached to a washing machine, and there was no modification of its action produced by attaching it to the fulling machine. Therefore, its application to that machine did not require the exercise of invention.

In equity for the infringement of letters patent. Decree dismissing the bill, from which plaintiff appealed. The case is stated in the opinion.

Mr. M. A. Wheaton, for appellant, submitted on his brief.

Mr. Manuel Eyre, for Roth, appellee, submitted on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of California, by Herman Royer against Solomon Roth and L. P. Degen, to recover for the infringement of letters patent No. 172,346, granted to the plaintiff January 18, 1876, on an application filed November 15, 1875, for an improvement in machines for treating rawhides.

The bill states that the invention consisted in "combining with the drum of a rawhide fulling machine, operating to twist the hide alternately in one direction and then in the other, a shifting device for the purpose of making the operation automatic and continuous."

Each defendant put in a separate answer denying that the plaintiff was the inventor of such shifting device, and alleging want of novelty, with proper averments.

After a replication to the answers, proofs were taken, the case was brought to a hearing, and the Circuit Court dismissed the bill. The decree states that the plaintiff first conceived of the combination of an automatic reverser attached to the drum of a rawhide fulling machine, operating to twist the leather in one direction and the other, for the purpose of making the operation automatic and continuous, as described and claimed in the patent; that, at the request of the plaintiff, one Clerc, a mechanic, made the automatic reverser described in the patent, and, in October, 1867, delivered the same to the plaintiff, who attached it to his fulling machine; that the combination was new with the plaintiff, and was useful, and his use thereof was secret until he applied for the patent; that it was not obvious and was not known whether the new combination could be used successfully for the practical treatment of rawhide, which was the work for which the combined machine was intended, until after it had been tested and tried by the plaintiff; that it was obvious to any skilled mechanic that an automatic reverser could be applied to the drum of a rawhide fulling machine so as to make it reverse its motion automatically at any desired fixed intervals; that the patent does not cover any patentable invention; and that, for that reason alone, the bill is dismissed.

The specification says: "The object of my invention is to provide an improvement in a rawhide fulling machine, for which letters patent were granted to me, and it consists in an automatic device by which I am enabled to run the machine in one direction for a sufficient length of time and then reverse it, this process continuing automatically until the leather is finished."

The drawings show the machine as operated by belts, but the specification states that gears or friction couplings could be used if desired, and the action of the machine still be automatic. The machine employed for fulling rawhides, or forming them into leather, has a drum, A, the central shaft of

which has upon its lower end a bevel gear. With this gear two pinions mesh at opposite sides, one of the pinions being mounted upon a solid shaft, which passes through the hollow shaft of the other pinion, and has a driving pulley keyed to it. Another driving pulley is keyed to the hollow shaft, and a loose pulley runs between them. When the belt turns one of the keyed pulleys, the machine will operate in one direction, and when the belt is shifted to the other keyed pulley, it will operate in the opposite direction. In order to make such action automatic, there is a belt-shifter, which is a part of, or attached to, a sliding bar. That bar is operated by a lever, which is hinged or pivoted, and works in a slot or link upon the bar, so that when turned from side to side it will slide the bar in one direction or the other. A weight is secured to the top of the lever, so that as soon as the lever passes the centre it will fall by its own weight and suddenly shift the belt. In order to operate this lever, there is another sliding bar, which moves below and parallel with the sliding bar first mentioned, the second bar having pins upon each side of the lever, so that when the second bar is moved it will shift the lever. The second bar has a nut projecting downward from it, and there is a screw formed upon a horizontal shaft so as to fit the nut. A belt from a pulley on the solid shaft extends to a pulley on the last-named horizontal shaft, and by its action the screw will be turned in one direction until the lever has passed the centre and fallen over so as to shift the belt to the other pulley, when the whole mechanism will be moved in an opposite direction until the screw has again moved the second sliding bar and reversed the lever. The specification states that the machine is thus made automatic in its action, and can be left until the work is entirely finished; and that a frictional coupling or reversing gear might be used in place of a belt, but would not work as well.

The claim of the patent is as follows: "In combination with the drum A of a rawhide fulling machine, operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous, substantially as described."

The evidence is conclusive that one Clerc, as early as 1864, in San Francisco, made an automatic shifting device the same as that described in the patent, and attached to it a washing machine, and continued from that time to make such automatic reversers and put them into use; and that, in 1867, at the request of the plaintiff, he made the shifting device described in the patent, which the plaintiff attached to his fulling machine. The only difference between the shifting device made by Clerc for the washing machines, and that made by him for the plaintiff, was that in the washing machine reverser the screw-shaft was driven by two gears, one on each end of it, while the one described in the patent is driven by a belt; and that the washing machine was horizontal, while the plaintiff's machine was upright, in consequence of which the horizontal machine required a spur gear, while the upright machine had a bevel gear. But these changes were such as any skilful mechanic could make. The plaintiff, in giving his order to Clerc to make the reverser, gave him no directions as to how to construct it, and only gave him a drawing of the fulling machine to which it was to be attached.

The operation of the automatic reverser in connection with the fulling machine is precisely the same as its operation in connection with the washing machine, or with any other machine to which it can be applied. There is no modification of its action produced by attaching it to the fulling machine.

The plaintiff testifies that, before he had the automatic reverser, his fulling machine would run in one direction until the belt was shifted by hand; that if the hides got too hot he had to stop the motion and reverse it; and that he had also to stop the action of the machine when the automatic reverser was attached to it, if the hides got too hot. It also appears, from the plaintiff's testimony, that from 1867, when he attached the automatic reverser to his machine, he was occupied for four years in experimenting with the machine, before he perfected the process of fulling the hides so that the machine would turn out satisfactory work regularly and smoothly; that the difficulty was not with the automatic reverser, because that worked and reversed in the same manner when first attached, in 1867,

that it did in 1871; that the difficulty with the machine, which caused these experiments occupying four years, was that the hides would not double backward uniformly; that when they were wedged or packed the automatic reversing apparatus would not stop the machine or reverse it soon enough to prevent injury; that the hides would double twice, and would tear off from the shaft before the machinery could be stopped; that the machine would often reverse before the unwinding was completed, and thus the enlargements of the two folds or doubles would meet, and the hides be torn from the shaft; that as yet he had not perfected any process for satisfactorily producing the article now known as fulled rawhide; that to do so he varied the condition of the hides as to moisture, until he found that, at the right degree of dampness, the hides would double backward with practical regularity; that he also several times changed the means by which he fastened the hides to the shaft; that to make the article in question, the hides had to be made soft and pliable by being subjected to a severe and long-continued mechanical operation, such as twisting or doubling back and forth; that, to do this, the hides had to be in a certain condition as to moisture, neither too dry nor too wet; that he had, therefore, to experiment by changing the degree of moisture by slight variations, until he found the proper degree; that he had to discover some mechanical means by which all parts of every hide could be subjected to an equal and uniform amount of mechanical action, so that no hard spots would be left in the hide; that, some parts of a hide being three times as thick as other parts of the same hide, it was difficult to discover whether there was a degree of moisture at which the hides could be successfully treated in the machine, because it took much more soaking to moisten the thick parts of the hide than it did the thin; that he finally learned how to moisten the entire hide uniformly by peculiar ways of folding it while being moistened, and hanging it so that some parts of the hide would be longer in water than other parts; that there was also a great difference in the texture of different parts of a hide; that no two hides are alike as to thickness and texture; and that he did not overcome these difficulties until 1871.

It is quite apparent, from this recital of the difficulties encountered by the plaintiff, none of which are alluded to in the specification of the patent, that if he invented anything patentable, it consisted in some process of treating the hides, so as to produce the merchantable article of fulled rawhide. But there is no suggestion of any such invention in the specification or the claim.

There is no patentable combination of the automatic shifting device with the drum of the fulling machine. It is a mere aggregation of parts. The shifting device operates automatically to reverse the action of the fulling machine in precisely the same way that it operates when applied to any other machine; and, the shifting device being old, its application to the fulling machine did not require the exercise of invention. *Double Pointed Tack Co.* v. *Two Rivers Manufacturing Co.*, 109 U. S. 117, 120, 121.

The same view was taken of this patent by Judge Drummond in the case of *Royer* v. *Chicago Manufacturing Co.*, 20 Fed. Rep. 853, decided by him in the Circuit Court of the United States for the Northern District of Illinois, in June, 1884, in which he held that the invention was not patentable, because it was merely the application of an old device used in connection with a washing machine to an analogous use.

The principle has been applied by this court in various cases. *Pomace Holder Co.* v. *Ferguson*, and cases there collected, 119 U. S. 335, 338; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 295; *Dreyfus* v. *Searle*, 124 U. S. 60; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370, 375.

Decree affirmed.

WINTERS *v.* ETHELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 96. Argued and submitted November 12, 1889. — Decided November 25, 1889.

A complaint in a suit in a District Court in Idaho Territory prayed for an injunction restraining the defendant from interfering with the possession of a mining claim which the plaintiff had, by a written agreement, licensed the defendant to work, for a compensation, the agreement also containing a provision for the conveyance of the claim to the defendant, on certain terms. The complaint also prayed for an accounting concerning all ore taken from the mine by the defendant, and the payment to the plaintiff of the amount due to the plaintiff under the agreement. The defendant filed a cross-complaint praying for a specific performance by the plaintiff of the contract to convey. The District Court, by one judgment, granted to the plaintiff the injunction asked, and ordered an accounting before a referee, and dismissed the cross complaint. On appeal by the defendant the judgment was affirmed by the Supreme Court of the Territory, and the defendant appealed to this court: *Held*,

(1) The judgment was not final or appealable;

(2) It made no difference that the judgment dismissed the cross complaint.

(3) The right of the defendant to appeal from the judgment, so far as the cross complaint is concerned, will be preserved; and time will run against him, as to all parts of the present judgment of the District Court only from the time of the entry of a final judgment after a hearing under the accounting.

THE case is stated in the opinion.

Mr. M. Kirkpatrick, for appellants, submitted on his brief.

Mr. Samuel Shellabarger (with whom was *Mr. Jeremiah M. Wilson* on the brief) for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit brought in the District Court of the Second Judicial District of Idaho Territory, in and for the county of Alturas, by George F. Settle and Jacob Reeser against John B. Winters, Frank Ganahl and John Winkelbach.

The complaint alleges that the plaintiffs, being the owners of a mining property, licensed the defendants to work it on the terms and conditions expressed in a written agreement and a supplemental agreement, for a definite period; that, under the agreement the defendants were to work the mine during that period at their own expense, keep the property free from liens, and pay to the plaintiffs, as a consideration, one-half of the gross proceeds from the mine; that, if the defendants should pay to the plaintiffs, on or before November 27, 1883, the termination of the said period, out of the proceeds of the mine, or otherwise, $40,000, the plaintiffs should convey the property to the defendants; that, in the event of such payment by the defendants to the plaintiffs within the time specified, any and all sums theretofore received by the plaintiffs from the defendants as consideration for the use and working of the mine should be credited upon and deducted from the $40,000; that, if the defendants should fail to comply with any of their agreements, or should not, on or before the day named, pay the $40,000 to the plaintiffs, they should forfeit all rights under the agreement, and no longer work the property; that the defendants proceeded to work the mine, and continued, during the period mentioned, to extract large quantities of gold and silver ore from it; that, on the 24th of November, 1883, the agreement was extended, in writing, to December 27, 1883; that the defendants had paid to the plaintiffs only $21,000 out of the $40,000, which sum was realized out of the working of the mine, and was not in excess of the one-half of its gross proceeds; that the defendants were continuing to work the mine, and were insolvent, and, during the thirty days' extension of time, had extracted and removed large quantities of ore, for which they had failed to account to the plaintiffs; and that the defendants threatened to continue to extract the ore.

The prayer of the complaint is for an injunction restraining the defendants during the pendency of the suit, and also by a final order on the hearing, from entering upon or interfering with the possession of the property, or from extracting or removing from the mine any rock or ore, and for an accounting

by the defendants with the plaintiffs concerning all rock or ore taken from the mine by the defendants, and for the payment by them to the plaintiffs of a moiety thereof; and that the amount found to be due to the plaintiffs upon such account be decreed to be a lien upon all rock or ore remaining in the hands of the defendants.

After a demurrer to the complaint had been overruled, the defendants put in an answer to it. They also filed a cross-complaint, praying that the plaintiffs might be decreed specifically to execute and perform their contract to convey the property to the defendants, on receiving from them the remainder of the purchase money which might be equitably due therefor, and for an injunction, to be made perpetual on the hearing, restraining the plaintiffs from interfering with the possession by the defendants of the mining claim and the works and openings leading thereto.

This cross-complaint was answered by the plaintiffs, and the case was tried by the court on evidence, oral or documentary, adduced by the respective parties. It made certain findings of fact and conclusions of law, and entered a decree adjudging that the defendants be enjoined perpetually from entering upon or interfering with the possession of the mining claim mentioned in the complaint, and that the plaintiffs were entitled to an accounting with the defendants of and concerning all rock and ore taken from the mine by the defendants during the term mentioned, and not already accounted for, and referring it to a referee to take and state such account. The decree further adjudged that the defendants take nothing by their cross-complaint; that it be dismissed; that they were not entitled to any order restraining the plaintiffs from the enjoyment of the premises, prior to or pending any appeal that might be taken; and that the plaintiffs recover from the defendants their costs.

On an appeal by the defendants to the Supreme Court of the territory from that judgment, it was affirmed. The defendants have brought the case here by appeal, and briefs have been filed by both parties, on the merits. But we are of opinion that the decree was not a final one, and is not appealable.

The judgment of the Supreme Court simply affirmed the judgment of the District Court. As regards the relief sought by the plaintiffs, the latter judgment merely enjoined the defendants, and ordered an accounting by them before a referee concerning the rock and ore taken by them from the mine. The bill prays for such injunction, and for such accounting, and for the payment to the plaintiffs of what shall be found due to them upon such accounting. In this respect, the decree is of the same character with that considered by us in *Keystone Manganese & Iron Co.* v. *Martin*, decided November 11, 1889, *ante*, 91, where the decree was held not to be final or appealable.

Nor does it make any difference that the decree in the present case dismisses the cross-complaint of the defendants. The filing of the cross-complaint was not the institution of a separate suit, but grew out of the original complaint. There was but a single decree, and that was entitled in the original suit. The right of the defendants to appeal from the decree, so far as their cross-complaint is concerned, will be preserved; and time will run against them, as to all parts of the present judgment of the District Court, only from the time of the entry of a final decree after a hearing under the accounting which is to be had. *Ayers* v. *Chicago*, 101 U. S. 184, 187.

Appeal dismissed.

CHANUTE CITY *v.* TRADER.

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

No. 1509. Argued November 11, 1889. — Decided November 25, 1889.

A judgment for damages and costs was recovered in a Circuit Court of the United States, on bonds and coupons issued by a municipal corporation. In answer to an alternative writ of mandamus issued three and one-half years afterwards, for the levy of a tax to satisfy the judgment, it was set up, in bar, that the original judgment was void because the Circuit Court had no jurisdiction of the subject matter of the action, on the

ground that the bonds were not payable to order or bearer. A peremptory writ was granted by a judgment, to review which a writ of error was taken. A motion to dismiss the writ was made, united with a motion to affirm: *Held*,

(1) Although there was no ground for contending that this court had no jurisdiction, yet the reasons assigned for taking the writ of error were frivolous, and it was taken for delay only;

(2) The principal of the bonds was payable to bearer;

(3) The judgment ought to be affirmed;

(4) The proceeding by mandamus being in the nature of execution, if the prosecution of writs of error to the execution of process to enforce judgments were permitted when no real ground existed therefor, such interference might become intolerable, and this court in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below;

(5) No different interpretation is put on that subdivision from that which has hitherto prevailed.

THE plaintiff in error moved the court "to grant such order, writ or mandate as may be fit and proper to secure to plaintiff in error a stay of the peremptory writ of mandamus heretofore issued by the court below, and to secure plaintiff in error the supersedeas to which plaintiff in error is entitled under the statute."

The defendant in error moved to dismiss the writ of error under rule 6, and to affirm the judgment below. The two motions were heard together. The case is stated in the opinion.

Mr. John W. Gleed and *Mr. A. G. Safford* in support of the motion for a stay, and against the motion to dismiss.

Mr. John Hutchins and *Mr. Samuel Shellabarger* in support of the motion to dismiss, and against the motion for a stay.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

Wilbur F. Trader recovered a judgment in the Circuit Court of the United States for the District of Kansas against the city of Chanute, on the 4th of December, 1885, for $7702.12, damages and costs, on certain bonds and coupons

issued July 1, 1872, by the city of Tioga. Each bond stated that the city of Tioga was "indebted to the Tioga Flouring Mill Company, in the sum of five hundred dollars, lawful money of the United States, with interest from the date hereof, at the rate of ten per cent per annum, as provided by law, and payable semi-annually, as per interest coupons hereto attached, the principal being due in ten years from date hereof and with the interest thereon payable at the office of the Farmers' Loan and Trust Company in the city of New York, to the bearer."

On the 27th of July, 1888, Trader served a notice on the city of Chanute, addressed to the mayor and councilmen of the city, requesting them to levy a tax on the taxable property within the city to pay and satisfy the judgment. It does not appear that any execution has been issued on the judgment.

On the 9th of July, 1889, Trader applied to the Circuit Court for a writ of mandamus requiring the officers of the city to levy a tax to satisfy the judgment. An alternative writ was issued on that day. In answer to the writ the city set up, by way of plea in bar, that the original judgment was void because the Circuit Court had no jurisdiction of the subject matter of the action, as appeared from the petition in it, which set forth a copy of one of the bonds sued on. The point urged was that the bond was not payable to the Tioga Flouring Mill Company or order, nor to bearer, and that only the interest was payable to the bearer.

On a hearing on the writ and return, the Circuit Court, on October 14, 1889, rendered a judgment granting a peremptory writ commanding the officers of the city to levy the tax. A bill of exceptions was allowed, and the city has brought a writ of error. The defendant in error now moves to dismiss the writ of error and unites with it a motion to affirm the judgment.

Subdivision 5 of rule 6 of this court (108 U. S. 575) was first promulgated November 4, 1878, 97 U. S. vii. It reads as follows: "There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground

that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

At the same term, in *Whitney* v. *Cook*, 99 U. S. 607, this court, speaking by Chief Justice Waite, said that the rule implied that there should appear on the record "at least some color of right to a dismissal." He added: "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The practice of not entertaining a motion to affirm unless there is some color of right to a dismissal has since been frequently sustained by this court. *Hinckley* v. *Morton*, 103 U. S. 764; *School District of Ackley* v. *Hall*, 106 U. S. 428; *Davies* v. *Corbin*, 113 U. S. 687; *Walston* v. *Nevin*, 128 U. S. 578; *New Orleans* v. *Construction Co.*, 129 U. S. 45; *The Alaska*, 130 U. S. 201.

In *Micas* v. *Williams*, 104 U. S. 556, there was a motion to affirm united with a motion to dismiss a writ of error. The affidavits in opposition to the latter motion showed jurisdiction, as to the amount involved, though on the record as it stood when the motion was made there was color of right to a dismissal. But the court affirmed the judgment on the ground that the writ was taken for delay only.

In *The S. C. Tryon*, 105 U. S. 267, there was a motion to affirm a decree united with a motion to dismiss the appeal in an admiralty suit. The ground for making the motion to dismiss was that there was no bill of exceptions but only a finding of facts and conclusions of law. The court overruled that ground, but it is difficult, from the report of the case, to see what color of right there was to a dismissal. Yet

it affirmed the decree on a consideration of the findings of fact.

In *Swope* v. *Leffingwell*, 105 U. S. 3, there was a motion to affirm united with a motion to dismiss a writ of error to a state court. The motion to dismiss was made on the ground that there was no Federal question involved. The court held that it had jurisdiction, but affirmed the judgment on the ground that the case on the merits was governed by previous decisions.

In the present case there does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only. The principal of the bonds is payable to bearer as well as the interest. The principal is stated to be due in ten years, and, with the interest, to be payable to the bearer. This is too plain for discussion, and disposes of the point that the original payee in the bonds was a citizen of Kansas, and thus of the same State with the debtor, and could not have sued on the bonds in the Circuit Court, and so the plaintiff could not.

But without putting a different interpretation on subdivision 5 of rule 6 from that which has hitherto prevailed, we are of opinion that the judgment in the present case must be affirmed. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject matter, were fixed by its being rendered. If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below. This is a proper case for doing so.

Judgment affirmed.

OREGON IMPROVEMENT COMPANY v. EXCELSIOR COAL COMPANY.

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

No. 1198. Submitted November 11, 1889 — Decided November 25, 1889.

Where a complaint in an action at law, for the infringement of a reissued patent for an invention, avers that the reissue is "for the same invention," as the original patent, and the answer denies "each and every, all and singular, the allegations" of the complaint, it is error, on the trial, to exclude the original patent from being put in evidence by the defendant.

THE case is stated in the opinion.

Mr. Sidney V. Smith and *Mr. John A. Wright*, for plaintiff in error, submitted on their briefs.

Mr. J. J. Scrivner, for defendant in error, submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought by The Excelsior Coal Company, a corporation, against The Oregon Improvement Company, another corporation, in the Circuit Court of the United States for the Northern District of California, for the infringement of a reissued patent.

The complaint avers that, on the surrender of the original patent, a new patent was issued to the patentee "for the same invention, for the residue of the term then unexpired for which the said original letters patent were granted." The answer of the defendant denies "each and every, all and singular, the allegations" contained in the complaint. The case was tried before a jury, and resulted in a verdict of $7000 for the plaintiff, for which, with costs, judgment was entered. To review this judgment the defendant has brought a writ of error.

Syllabus.

There is a bill of exceptions, which states that the plaintiff read in evidence, without objection, the reissued patent, a copy of the specification of which with the drawings is set forth, and put in other evidence tending to show its right to recover damages; that the defendant, "to sustain the issues on its part," offered in evidence a duly certified copy of the original patent, a copy of which with the drawings is set forth; that the plaintiff objected to the introduction of the original patent, on the ground that the same was immaterial and irrelevant to any defence raised by the answer; that the court sustained the objection; and that the defendant excepted to such ruling.

We are of opinion that the Circuit Court committed an error in excluding the original patent. It was relevant evidence upon the question whether the reissue was "for the same invention" as the original, and the issue on that subject was sufficiently raised by the averment of the complaint and the denial in the answer. The defendant was entitled to try that question in a formal manner, and it could not do so unless the original patent was introduced in evidence.

The judgment is reversed and the case is remanded to the Circuit Court with a direction to award a new trial.

BROWN *v.* RANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No 99. Submitted November 13, 1889. — Decided November 25, 1889.

The defendant in a possessory action in the nature of ejectment, brought in a court of Washington Territory where the laws permitted a mingling of common law and equity jurisdictions, pleaded the general issue, and also set up four defences, one of which was the statute of limitations, and one of which was an equitable defence. The plaintiff filed a general demurrer to the second, third and fourth defences. The demurrer being overruled, the plaintiff elected to stand upon it, and the case was thereupon dismissed: *Held*, that the final judgment was one dismissing the action at law, and was not a judgment in the exercise of chancery jurisdiction.

THE case is stated in the opinion.

Mr. Leander Holmes, for appellants, submitted on his brief.

Mr. W. W. Upton and *Mr. A. H. Garland*, for appellee, submitted on their brief.

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

Appellants commenced a possessory action, in the nature of ejectment, against appellee, in the District Court of the Second Judicial District of Washington Territory, by complaint in the ordinary form. To this the defendant filed an answer, denying title in plaintiffs, and otherwise equivalent to the plea of not guilty; and in addition pleaded affirmatively four defences, setting up, among other things, the ten years' statute of limitations upon actions for the recovery of real property. §§ 25, 26, Code Wash. Ter. 1881, 39. The fourth affirmative defence was addressed to the judge of the District Court, and alleged a variety of facts constituting, appellants contended, an equitable defence, if any at all, which they denied.

The plaintiffs filed a demurrer in these words:

"And now come the plaintiffs and demur to the second, third and fourth separate answers and defences of defendant herein, for the reason that they do not state facts sufficient to constitute a defence to this action."

This demurrer was disposed of, and judgment rendered as follows:

"This case coming on for hearing upon demurrer to the answer, and having been submitted to the court on briefs of counsel of plaintiffs and defendant, and the court, having fully considered the questions presented by the pleadings on file in this case, overrules the demurrer to the answer; to which ruling or decision the counsel for plaintiffs then excepted and gave notice of his intention to appeal; and the counsel for plaintiffs having elected to stand upon the ruling of the court upon said demurrer, and not to reply or further plead to the

answer, the case is now here dismissed with costs against the plaintiffs, to be taxed, and that execution issue therefor. Whereupon counsel for plaintiffs excepted and gave notice of appeal to the Supreme Court."

Appeal was accordingly prosecuted to the Territorial Supreme Court, under the act of the Territory "in relation to the removal of causes to the Supreme Court," approved November 23, 1883. Laws Wash. Ter. 1883, 59. It was held in *Breemer* v. *Burgess*, 2 Wash. Ter. 290, that this act was cumulative and complete within itself, and did not repeal §§ 458, 459 and 460 of the Code of 1881, relating to appeals and writs of error (Code Wash. Ter. 1881, 114), and that cases might be brought up to the Supreme Court of the Territory, either by the procedure prescribed in the Code or that in the statute of 1883. The Code provided for service of a notice of appeal or writ of error, which should contain, among other things, in case of appeal, "a particular description of every decision, ruling, order or decree," by which appellant claimed to have been aggrieved, and which he relied upon as ground for reversal or modification; and "in case of a writ of error, a particular description of the errors assigned." These requisitions were omitted in the act of 1883, but at its July term of that year the Supreme Court adopted a rule, which required, in all law causes brought up under that act, an assignment of errors to be made in writing, filed and served, substantially as provided for in section 458 of the Code.

No assignment having been made, the appeal was dismissed for non-compliance with the rule in that particular, *Brown* v. *Hazard*, 2 Wash. Ter. 464, and the case comes before us on appeal from the judgment of dismissal.

As the rule did not require such assignment in an equity cause, the question passed upon was whether this cause should be held as one in equity or at law, and the court decided that it was the latter.

The act of Congress of April 7, 1874, 18 Stat. 27, c. 80, "concerning the practice in Territorial courts and appeals therefrom," provided that it should not be necessary "in any of the

courts of the several Territories of the United States to exercise separately the common law and chancery jurisdictions vested in said courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; . . . *Provided*, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

By subdivision 4 of section 76 of the Code of the Territory, it was provided that "when the relief sought is of an equitable nature, the complaint shall be addressed to the judge of the district in which the action is brought;" by subdivision 3 of section 83, that "the defendant may set forth by answer as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both;" and by section 445, that "every final judgment, order, or decision of a District Court, or judge thereof, in actions of an equitable nature, where equitable relief is sought, or where chancery jurisdiction has been exercised, shall be reviewed in the Supreme Court by appeal."

Referring to these provisions, appellants' counsel contends that the fourth affirmative defence, (and he insists the first should be taken with it,) being an equitable defence, the cause, by the action taken thereon, became "transformed into a cause in chancery."

But the demurrer was to the second, third and fourth affirmative defences, and the defendant had also pleaded the general issue. The judgment upon demurrer held the three affirmative defences good. The final judgment was one dismissing the action at law, and, upon the pleadings as they stood, was not a judgment in the exercise of chancery jurisdiction. The Supreme Court correctly held that the cause was at law and not in equity, and this being so, it is not denied that the dismissal for non-compliance with the rule necessarily followed.

The judgment is affirmed.

VANE *v.* NEWCOMBE.

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

No. 69. Argued and submitted November 6, 1889. — Decided November 25, 1889.

In Indiana, a person who contracts with a telegraph corporation to do the specified work of putting up certain lines of wire on poles, is not an "employé" of the corporation, within the meaning of the act of the legislature of Indiana, approved March 13, 1877, (Laws of Indiana 1877, Special Session, 27, c. 8; also, Rev. Stats. Indiana, §§ 5286–5291,) giving a first and prior lien on the corporate property and earnings of a corporation to its employés, for all work and labor done and performed by them for the corporation, from the date of their employment by the corporation.

Such a lien is not given to him by virtue of the mechanics' lien act of Indiana, of March 6, 1883, (Laws of 1883, 140; Elliott's Supplement of 1889, §§ 1688 and 1690,) unless he complies with that act in regard to describing, in his notice of lien, the lot or land on which the structure stands on which he claims a lien.

By perfecting a claim to his lien under the act of 1877, he waived the right, if any, which he had to a common law lien, as to the personal property and earnings of the corporation.

The poles and wires were real estate on which he could have no lien at common law.

Moreover he gave up any right he had to a common law lien, as to the wires, by giving up possession of them.

On the filing of a bill in equity, in October, 1884, in the Circuit Court of the United States for the District of Indiana, by The Bankers' and Merchants' Telegraph Company of Indiana, an Indiana corporation, against The Bankers' and Merchants' Telegraph Company of New York, a New York corporation, praying for an accounting between the defendant and the plaintiff as to moneys due by the former to the latter, and for a determination of the relative rights of the parties to certain telegraph lines and property in Indiana, and for the appointment of receivers *pendente lite*, to take possession of the lines and property, an order was made by the court appointing Richard S. Newcombe and James G. Smith receivers of all the lines and property of the plaintiff and the defendant, or either of them, situated within the jurisdiction of the court.

The same persons had been appointed receivers of the defendant, in a suit brought by one Day in the Supreme Court of the State of New York.

In March, 1885, James E. Vane filed in the suit in the Circuit Court an intervening petition. It set forth that in June, 1884, the defendant had employed Vane to put six additional wires on and along the telegraph poles then owned by the defendant, from Freeport, Ohio, to Hammond, Indiana, and to attach such wires to the proper fixtures and appendages to the poles, so that the company might have six additional, independent wires between those places, and agreed with Vane to pay him, as compensation for the work, $45 for every mile of wire put and strung upon the poles, the defendant agreeing to furnish all of the wire and other necessary material, which were to be delivered at the nearest distributive point along the route of the line, and to pay all freight for their shipment to the various points along the route, and to deliver them to Vane free of any charge at such points. The petition further alleged that, in June, 1884, the defendant directed Vane to construct two lines westwardly from Hammond in the direction of Chicago, Illinois; that he proceeded to erect and construct such two lines to a point about ten miles east of the court-house in Chicago; that the defendant had failed to pay the freights on the wire and materials; that Vane, at its request, had furnished money to pay such freights and also money to purchase necessary materials used in making the line; that the defendant had committed other breaches of its agreement with Vane, and in consequence owed him a large sum of money; that he had executed the work in all things as directed by the defendant; that when he had completed the six lines to Lake Station, in Lake County, Indiana, the defendant owed him about $16,000; that he then disconnected the six wires from their westerly connections, and held physical possession of them, for his own protection; that while he so held them, in their disconnected condition, the receivers, Newcombe and Smith, entered into the following agreement with him, in consideration that he would allow the lines to be connected with other lines running westerly into Chicago:

Statement of the Case.

"CHICAGO, ILL., *Nov.* 19*th*, 1884.

"It is hereby agreed and understood that the telegraph wires on the poles of the Bankers' and Merchants' Telegraph Company in the State of Indiana, which were strung by J. E. Vane, and upon which he claims a lien, shall be connected up with the wires of the said company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraph business by the receivers of said company; but it is also expressly understood that such use of said wires shall not be construed in any way, or to any extent, as impairing or interfering with the lien of the said Vane thereon.

"RICHARD S. NEWCOMBE,
"JAS. G. SMITH, *Receivers;*"

that, in September, 1884, he caused notice to be given to the defendant of his intention to hold a lien upon its corporate property and earnings, for all work and labor done and performed and all moneys advanced by him to and for its benefit, at its instance and request, and for that purpose filed notices, on the 18th and 19th of September, 1884, in the offices of the recorders of seven counties in Indiana through which the telegraph line runs, the notices being dated September 15, 1884; that the receivers also owed him $1898.33 for work which he did for them after their appointment, in connecting said wires at Lake Station and Hammond with their westward connections, under which employment he erected and completed the wires to a distance of about four miles from the court-house in Chicago, such indebtedness including also the purchase by him of a large amount of materials and the payment of freight bills, and the doing of other work; and that the receivers also owed him other moneys, which he had paid for the wages and expenses of men who performed work for the receivers in respect of the telegraph line, between December, 1884, and February, 1885. The petition prayed for the payment of the claim of Vane out of the first moneys coming into the hands of the receivers, as a superior lien to all claims except those of a like class.

Statement of the Case.

The lien covered by the notices purported to be claimed under the act of the legislature of Indiana approved March 13, 1877. Laws of Indiana, 1877, Special Session, 27, c. 8; also, Rev. Stats. Indiana, 1881, §§ 5286–5291.

Sections 1 and 5 of the act of 1877, being sections 5286 and 5287 of the Revised Statutes, provide as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the employés of any corporation doing business in this State, whether organized under the laws of this State or otherwise, shall be, and they are hereby entitled to have and to hold a first and prior lien upon the corporate property of such corporation, and the earnings thereof, for all work and labor done and performed by such employés for such corporation, from the date of their employment by such corporation; which lien shall lie prior to any and all liens created or acquired subsequent to the date of the employment of such employés by such corporation, except as in this act provided.

"SEC. 2. Any employé wishing to acquire such lien upon the corporate property of any corporation, or the earnings thereof, whether his claim be due or not, shall file in the recorder's office of the county where such corporation is located or doing business, notice of his intention to hold a lien upon such property and earnings aforesaid, for the amount of his claim, setting forth the date of such employment, the name of the corporation and the amount of such claim; and it shall be the duty of the recorder of any county, when such notice is presented for record, to record the same in the record now required by law for notice of mechanics' liens, for which he shall receive twenty-five cents; and the lien so created shall relate to the time when such employé was employed by such corporation, or to any subsequent date during such employment, at the election of such employé, and shall have priority over all liens suffered or created thereafter, except other employés' liens, over which there shall be no such priority: *Provided*, That where any person, other than an employé, shall acquire a lien upon the corporate property of any corporation located or doing business in this State, and such lien remain

a matter of record for a period of sixty days, in any county in this State where such corporation is located or doing business, and no lien shall have been acquired by any employé of such corporation during that period, then and in that case such lien so created shall have priority over the lien of such employé in the county where such corporation is located or doing business, and not otherwise: *Provided, further*, That this section shall not apply to any lien acquired by any person for purchase-money."

The notices of lien filed by Vane were all in the following form, the name of the county being different in each case:

"De Kalb County.

"Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the county of De Kalb, in the State of Indiana, and all others interested:

"You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and battery, and all other fixtures and property of said company together with all the earnings of said company in said county of De Kalb. I hold this lien for work and labor done and performed and materials furnished in the construction of their line of telegraph through said county, and at their special instance and request, to the amount of sixteen thousand dollars. The labor was performed and materials furnished on and after the 15th day of June, 1884. That he intends to hold this lien upon all the poles, wire strung and unstrung, switch-boards, telegraph instruments and batteries, whether in use or not, and all fixtures and property belonging to said company in said county of De Kalb, together with earnings thereof, until his claim is paid and satisfied.

"September 15, 1884. James E. Vane."

The receivers put in an answer to the petition, setting up that, as to so much of it as sought to enforce a lien upon the telegraph property and its rents and incomes, Vane did not

occupy, in his transactions with the defendant, the relation of an employé, but of a general contractor, and was not entitled to claim or enforce a lien; that he was not entitled to a first lien, because, before he filed his petition, the receivers had executed, under an order of the Supreme Court of New York and under the direction of the Circuit Court, receivers' certificates to the amount of $130,000, to be used in the payment of the debts of the defendant, and $20,000 to be used to complete the construction of its telegraph lines, which certificates were made, by an order of said Supreme Court, dated November 3, 1884, and an order of the Circuit Court, dated December 15, 1884, a first charge and lien upon all the property of the defendant within the State of Indiana; that, in pursuance of those orders, the receivers had executed, acknowledged and recorded a mortgage, bearing date November 7, 1884, to secure the payment of the receivers' certificates; that those certificates, to the amount of $150,000, were outstanding in the hands of persons who took them as innocent purchasers without notice; and that, long before the rendering of the services by Vane, the defendant had executed, acknowledged and recorded a general mortgage upon all its property in Indiana as well as the other States through which its lines extended, covering its franchises, rents and profits, to secure an issue of bonds amounting to $10,000,000, which were outstanding, unpaid and in the hands of persons who took the same for value and without notice of any equities against the same. A replication was put in to this answer, and on the 16th of May, 1885, the petition of Vane was referred to a master to take evidence and report the same with his findings thereon.

On the 30th of January, 1886, the master, having taken the evidence produced by the parties, filed his report, containing the following statements:

"Mr. Vane, the petitioner, was employed by the telegraph company to put on arms and insulators and to string additional wires on the poles of the company from Freeport Junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for $45 per mile. The company agreed to furnish and deliver to Vane, at the nearest accessible railway stations, all the neces-

sary material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person. The amount owing to him on this account is eleven thousand one hundred and sixty dollars ($11,160).

"He also put in cross-arms and insulators and strung four wires from Lake Station to Hammond, sixteen miles, at thirty-seven dollars and fifty cents per mile, the company furnishing material and Vane doing or furnishing the labor. The amount owing to him on this account is six hundred dollars ($600).

"He also strung two wires from Hammond to the junction of the Chicago Board of Trade lines, 28 miles, at $20 per mile, for which there is due him five hundred and sixty dollars ($560).

"During the progress of the work the company failed to furnish the material as it was required, so that the men working for Vane were without employment a portion of the time. Vane asked for instructions and was directed by the company to keep his men together during the delay thus caused, it being the understanding that the company would pay their board while they were waiting. The master is of the opinion that it is to be fairly inferred from the evidence that the company would pay for the time thus lost, Vane being required to pay his men as if they were at work.

"Vane also made some advances for freight on material shipped to him, but which he could not obtain possession of until the freight was paid. He also paid out various sums of money for livery hire, telegrams, etc., made necessary by the company's failure to furnish material promptly.

"He also did extra work on the line, at the request of the company, which was not covered by the original agreement. The amount due him for this extra work and for the time of his men lost by delay is $1951.12. The amount due him for cash advanced to pay freight, livery hire, telegrams, etc., is $1298.50.

"August 11, 1884, he was paid $300; September 11, $200: total credits, $500.

"Exhibit No. 1, which was filed March 7, 1885, contains all

the foregoing items in detail, and has been audited and approved by the company. There is no controversy as to the amount. The only real question is as to what preference or lien, if any, has the intervener.

"The master is of the opinion that, in doing this work, Mr. Vane was an employé of the company, within the meaning of section 5286, Revised Statutes of Indiana, 1881. He has filed his notice, as required by section 5287, in the counties through which the telegraph is built. This lien covers the following items:

"For stringing wires, 248 miles, $45 per mile .	$11,160 00
" putting in cross-arms from Lake Station to Hammond	600 00
" stringing 2 wires from Hammond to Junction, etc.	560 00
" extra work and delay	1,951 12
	$14,271 12
"Deduct credits	500 00
"Bal. due.	$13,771 12

"I find and report that he has no lien as to the sum of $1298.50 for cash paid for freight, livery, etc.

"Vane's claim accrued prior to the order made by the Supreme Court of New York, November 3, 1884, authorizing the issue of $150,000 of special receivers' certificates, to secure which a trust deed or mortgage was executed, and I report and find that for said sum of $13,771.12 Vane is entitled to priority over the lien of the certificates above named.

"Vane also asserts a right to a common law lien, which he bases on the following facts, which are not controverted: The contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession

until November 20, 1884, when he delivered possession to the receivers, with an agreement that such delivery was not to impair any rights or liens he might thus have by virtue of such possession. He had such possession when the order allowing the issue of receivers' certificates was made, and also when the certificates were issued, November 11, 1884. I report and find that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right he had, if any, to assert his common law lien.

"In addition there is due to Vane from the receivers, for work done for them, $1898.33. The work was done after the certificates were authorized by the order of November 3, 1884, but before the issue of the certificates issued by subsequent orders. I report and find that for the sum last named Vane should be postponed as to the issue of $150,000 of certificates, but that he should be preferred as to those which were subsequently issued."

In February, 1886, the receivers filed exceptions to the report of the master, because of his allowance to Vane of a lien for the $13,771.12, on the ground that he was an employé of the defendant, within the meaning of section 5286. The exceptions claimed that Vane was a contractor in his agreement with the defendant, and not its employé; that the item of $600 for putting in cross-arms was not covered by his notice of lien nor by the contract under which the labor was performed; and that he had no lien for that service; and they made a like claim in regard to the item of $1951.12.

Vane filed exceptions to the report because the master had found that he was not entitled to a lien for the $13,771.12, paramount to the holders of receivers' certificates and all other mortgage liens; and had not found that Vane was entitled to a paramount lien over all such other liens for the entire amount of $15,069.62; and had deducted the $500 from the $14,271.12, and not from the $1298.50; and had not awarded a lien for the $1298.50.

The case was heard on these exceptions by Judge Woods, holding the Circuit Court. His opinion, delivered in April, 1886, 27 Fed. Rep. 536, recites the material findings of the

master, and then says: "In the opinion of the court, the petitioner had no lien at common law or in equity, and was not an employé of the telegraph company within the meaning of the statute referred to by the master. That statute provides that the employés of any corporation doing business in this State . . . shall be entitled to have and hold a first and prior lien upon the corporate property, . . . and the earnings thereof, for all work and labor done . . . by such employés for such corporation. To be entitled to the benefits of this statute, and others of like character since enacted, I think it clear that the employé must have been a servant, bound in some degree at least, to the duties of a servant, and not, like the petitioner, a mere contractor, bound only to produce or cause to be produced a certain result, — a result of labor, to be sure, — but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party. In respect to the sums found due the petitioner, the report is confirmed, but, to the allowance of a lien, exceptions sustained."

In pursuance of this decision, the court made an order overruling the exceptions of Vane, and sustaining so much of the exceptions of the receivers as related to the claim for a lien in favor of Vane, but confirming the report as to amounts found to be due to Vane. The order adjudged that Vane had no lien upon the property of the defendant for the $15,069.62; that that sum was a general floating debt of the defendant, not entitled to any priority; but that the $1898.33 was a valid debt of the receivers, payable out of any funds in their hands as such, available for payment of the debts of the trust. Vane appealed to this court from so much of the decree as disallowed his claim for a lien for the $15,069.62, and from the overruling of his exceptions and the sustaining of the exceptions of the receivers.

Mr. Addison C. Harris for appellant.

I. Vane had a lien under the statutes of Indiana. The policy of the State is to secure the pay of all persons employed as contractors, material men, laborers or otherwise. *Colter* v.

Frese, 45 Indiana, 96. Statutes for the benefit of laborers and the like are also liberally construed in this court. *Davis* v. *Alvord*, 94 U. S. 545; *Mining Co.* v. *Cullins*, 104 U. S. 176. Thus the federal and state courts are in accord in this matter.

The history of a remedial act may be inquired into, in order to ascertain the purpose for which it was enacted. *Platt* v. *Union Pacific Railroad*, 99 U. S. 48, 60; *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79; *Maryland* v. *Railroad Company*, 22 Wall. 105, 113; *Railway Co.* v. *Prescott*, 16 Wall. 603, 609. Looking at the various laws enacted in Indiana before 1877, we find that all persons engaged in constructing any building (act of 1853), railroad (1873), boat (1863), or any article of personal property; agistors, attorneys, bailees, warehousemen, etc., were protected by the State. The financial distress of that time fell heavily upon the workingmen, and particularly those whose labor was not secured by statute. Labor incorporated into a telegraph line is as much entitled to protection as if done on a building, railroad or boat, or in a law suit. And in morals, those operating a railroad or factory, seem, to many at least, to have as much claim to protection as those engaged in constructing or repairing the plant itself. Labor creates wealth. And for its encouragement and assurance its value is made a charge on that which it creates. The chief purpose of such statutes is to prevent those persons whose labor is indispensable to the continuance of a corporation from abandoning it, and thus suspending its operations whenever they become alarmed by fear of losing their pay. *Lehigh Coal &c. Co.* v. *Central Railroad*, 2 Stewart (29 N. J. Eq.) 252; *Watson* v. *Watson Manufacturing Co.*, 3 Stewart (30 N. J. Eq.) 588.

The "six months' rule" in railway receiverships reposes upon the same wholesome policy. It seems to have been the purpose of the legislature of 1877 to combine these purposes in one general act, the first section of which is now § 5286 Rev. Stats. Ind. under which the master held Vane had a lien.

This act for the first time introduced the word "employé" into the lien laws of this State. In the embezzlement act of 1865 (acts 1865, Spec. Ses. 204), it was used as embracing the

president, directors, cashier, secretary, treasurer, teller, clerk, bookkeeper, agent and others in the employ of any corporation or person in business. In subsequent criminal statutes it still holds the same place broadened to embrace many other persons. Rev. Stats. 1881, §§ 1944, 1946, 1948, 3645.

It is evident the word was not used in any limited sense in this act; although, if Vane had appropriated the wire before it was strung, he might have been guilty of embezzlement. See *Ritter* v. *State*, 111 Indiana, 324. The word has recently come to us from a foreign tongue, but receives a broader meaning here than it has in its natural home. Its brevity has led to its adoption into our tongue as it comprehends many classes of persons which otherwise we must name, respectively. A half a century ago it was styled an equivocal word. Bayley, J., in *Ripley* v. *Scaife*, 5 B. & C. 167. But it is now in such general use that it is not subject to criticism, and it receives as broad a definition as its common use will warrant. *Hogan* v. *Cushing*, 49 Wisconsin, 169; *Grainger* v. *Aynsley*, 6 Q. B. D. 182; *Mining Co.* v. *Cullins*, *ubi sup.*; *Munger* v. *Lenroot*, 32 Wisconsin, 541; *Watson* v. *Manufacturing Co.*, *ubi sup.*; *Queen* v. *Freke*, 5 El. & Bl. 944; *Woodstock Iron Co.* v. *Richmond and Danville Extension Co.*, 129 U. S. 643; *Gurney* v. *Atlantic & Great Western Railway*, 58 N. Y. 358; *Astor*, *Petitioner*, 50 N. Y. 363; *Stryker* v. *Cassidy*, 76 N. Y. 50; *Water Co.* v. *Ware*, 16 Wall. 566; *Warren* v. *Sohn*, 112 Indiana, 213.

II. Vane had also a lien at the common law, or in equity.

The principle of the common law is applied to its full limit in Indiana. Rev. Stats. Indiana, 1881, § 5304; *Holderman* v. *Manier*, 104 Indiana, 118 and cases cited; *Darter* v. *Brown*, 48 Indiana, 395; *East* v. *Ferguson*, 59 Indiana, 169; *Hanna* v. *Phelps*, 7 Indiana, 21; *S. C.* 63 Am. Dec. 410. That Vane had help does not destroy the lien. *Shaw* v. *Bradley*, 59 Michigan, 199, 204; *Hall* v. *Tittabawassee Boom Co.*, 51 Michigan, 377.

The title of the New York Company appears to have been a lease or license, which, under the act of incorporation (Rev. Stats. Ind. 1881, § 4166), could not continue for a term exceeding fifty years. Such leaseholds are personal property in that

State. *McCarty* v. *Burnet*, 84 Indiana, 23; *Schee* v. *Wiseman*, 79 Indiana, 389; *Meni* v. *Rathbone*, 21 Indiana, 454, 466; *Cade* v. *Brownlee*, 15 Indiana, 369; *S. C.* 77 Am. Dec. 595; *Duchane* v. *Goodtitle*, 1 Blackford, 117. In *Boston Safe Deposit & Trust Co.* v. *Bankers' and Merchants' Telegraph Co.*, 36 Fed. Rep. 288, it was held that this very property did not become realty, but remained personalty.

That liens are favored in law, see *Holderman* v. *Manier*, 104 Indiana, 118; *Green* v. *Farmer*, 4 Burrow, 2214; *Jacobs* v. *Latour*, 5 Bing. 130; *Arians* v. *Brickley*, 65 Wisconsin, 26; *Hall* v. *Tittabawassee Boom Co.*, 51 Michigan, 377; *Webber* v. *Cogswell*, 2 Canada Sup. Ct. 15; *Williams* v. *Allsup*, 10 C. B. (N. S.) 417; *Hammond* v. *Danielson*, 126 Mass. 294; *Townsend* v. *Newell*, 14 Pick. 332.

The Roman law and the laws of nations drawing their jurisprudence from that source award such liens graciously. And the harsher rules of the English law are being liberalized until now courts and legislatures lend a willing hand to assist the laborer to obtain the price of his hire.

This wholesome equity has been adopted in the operation of railways in this country. *Fosdick* v. *Schall*, 99 U. S. 235; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286; *Barton* v. *Barbour*, 104 U. S. 126; *Hale* v. *Frost*, 99 U. S. 389; *Gilbert* v. *Washington City &c. Railroad*, 33 Gratt. 586; *Turner* v. *Indianapolis &c. Railway*, 8 Bissell, 315; *Union Trust Co.* v. *Walker*, 107 U. S. 596; *Farmers' Loan and Trust Co.* v. *Railroad*, 33 Fed. Rep. 778; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434; *Blair* v. *Railroad Co.*, 22 Fed. Rep. 471.

It is equally applicable to a telegraph line.

III. Lastly, we insist that the arrangement of November 19, 1884, fixed a lien on the property. Vane's accounts had been stated; his mechanic's liens had been filed, and of course known to Doolittle and the receivers. It was known to every one connected with the management of the line that Vane was holding possession of the six wires for his pay. Vane told Doolittle so, and the agreement made by the receivers recites it.

Opinion of the Court.

The receivers wanted the use of the wires. They had no money. This is shown by the insolvency of the company, and the acts of the receivers soon after in inducing the courts to issue receivers' certificates. This agreement was written by Doolittle, the Chicago counsel for the receivers. It was made to induce Vane to yield up possession. They knew he believed it recognized his claim on the wires. It was made in the presence of that assertion. The words are: "It is expressly understood that such use of said wires shall not be construed in any way or to any extent as impairing or interfering with the lien of said Vane thereon." Vane was induced to alter his position by this contract. It is too late, it is believed, in a court of conscience or elsewhere, to interpolate into the contract words so as to make it read: "By surrendering possession, Vane's lien shall not be destroyed, if he has any." *Norris* v. *Williams*, 1 Cr. & Mees. 842; *Perry* v. *Board of Missions*, 102 N. Y. 99; *Payne* v. *Wilson*, 74 N. Y. 348; *Unity &c. Banking Association* v. *King*, 25 Beavan, 72; *Clarke* v. *Southwick*, 1 Curtis, 297; *Gregory* v. *Morris*, 96 U. S. 619; *Pinch* v. *Anthony*, 8 Allen, 536; *Pavy's Case*, 1 Ch. Div. 631.

Mr. Robert J. Ingersoll, for appellees, submitted on his brief.

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

It is contended for Vane that he has a lien under section 1 of the act of 1877. (Section 5286 of the Revised Statutes.) That section gives a first and prior lien upon the corporate property of any corporation doing business in Indiana, whether organized under the laws of that State or otherwise, and upon the earnings of such corporation, to its employés, for all work and labor done and performed by them for the corporation, from the date of their employment by it.

It seems clear to us that Vane was a contractor with the company, and not an employé within the meaning of the statute. We think the distinction pointed out by the Circuit

Court is a sound one, namely, that to be an employé within the meaning of the statute Vane "must have been a servant, bound in some degree at least to the duties of a servant, and not," as he was, "a mere contractor, bound only to produce or cause to be produced a certain result, — a result of labor, to be sure, — but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

It is to be noted that the statute gives a lien to employés of the corporation only for work and labor done and performed by them for the corporation. It does not give a lien for the value of materials furnished, nor for advances of money made. It is confined to work and labor done and performed, and to work and labor done and performed by employés of the corporation, and to work and labor done and performed by employés of the corporation for the corporation.

In this respect there is a marked difference between the provisions of section 5286 and the provisions of section 15 of the act of March 8, 1879, (Laws of 1879, 22; § 5471 of the Revised Statutes of 1881,) which gives a lien, in coal mines, on the mine "and all machinery and fixtures connected therewith, including scales, coal-bank cars, and everything used in and about the mine" to "the miners and other persons employed and working in and about the mines, and the owners of the land or other persons interested in the rental or royalty on the coal mined therein," "for work and labor performed within two months, and the owner of the land, for royalty on coal taken out from under his land, for any length of time not exceeding two months." This miners' statute gives a lien to all persons "employed and working in and about the mines," for work and labor performed by them, without stating that they must be employés of the owners of the mine, or of the persons working it, or of the persons owning the machinery and fixtures, and without stating that they may not be persons working in and about the mine employed by contractors doing work under contract for the owners of the mine or for the owners of the machinery and fixtures.

The general mechanics' lien law of Indiana (§ 5293 of the

Revised Statutes of 1881), subsequently re-enacted by the act of March 6, 1883, Laws of 1883, 140, provided that "mechanics, and all persons performing labor or furnishing materials for the construction or repair, or who may have furnished any engine or other machinery for any mill, distillery, or other manufactory, may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery, or other manufactory for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both." This mechanics' lien statute gives a lien upon a building to all persons who perform labor or furnish materials for the construction or repair of the building, even though they do it under a contract, and is not confined to employés of the owner of the building; and it also gives a lien upon a manufactory to persons who may have furnished machinery or materials for the manufactory, even though they may have done so under contract with the owner of the manufactory or under contract with the contractor with such owner.

The Supreme Court of Indiana, in *Colter* v. *Frese*, 45 Indiana, 96, in 1873, in construing that statute, which was section 647 of the then existing Revised Statutes, held that a person who furnished materials, not to the owner, but to the contractor, for the erection of a new building, could acquire and enforce a lien on the building, and on the interest of the owner of the land on which the building stood, to the extent of the value of the materials furnished.

In view of these provisions of other lien statutes of Indiana, the limited language of section 5286 is very marked, and justifies the interpretation that the provisions of that section are to be confined to a special class of persons. It is a rule of interpretation recognized by the Supreme Court of Indiana, in *Stout* v. *Board of Commissioners*, 107 Indiana, 343, 348, that "in cases of doubt or uncertainty, acts *in pari materia*, passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the legislature in the use of particular terms, or in the enactment of

particular provisions, and, within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose."

The view above taken of the statute under consideration is supported by adjudged cases. In *Aikin* v. *Wasson*, 24 N. Y. 482, in 1862, it was held that a contractor for the construction of part of a railroad was not a laborer or servant, within the provision of the general railroad act of New York, making stockholders of a railroad corporation personally liable "for all the debts due or owing to any of its laborers and servants, for services performed for such corporation."

In *Munger* v. *Lenroot*, 32 Wisconsin, 541, in 1873, under a statute which gave a lien on logs or timber, for the amount due for his labor or services, to any person who did or performed any work or services in cutting, felling, hauling, driving, running, rafting, booming, cribbing, or towing such logs or timber, it was held that such person was entitled to such lien, not only when employed by the owner of the logs or of the land from which they were cut, but also when employed by a contractor under such owner. The court was of the opinion that the legislature intended to give the lien absolutely to the laborer, regardless of the question whether he had rendered the services under a contract with the general owner or not. This decision was based upon the special language of the statute, in not excluding a person employed by a contractor.

In *Wakefield* v. *Fargo*, 90 N. Y. 213, in 1882, it was held that a person employed by a corporation, at a yearly salary, as a bookkeeper and general manager, was not a laborer, servant, or apprentice, within the provisions of a statute of New York making the stockholders of the corporation "liable for all debts that may be due and owing to their laborers, servants and apprentices for services performed for such corporation." The view taken by the court was that the services referred to were menial or manual services; that he who performed them must be of a class who usually looked to the reward of a day's labor or service for immediate or present support, from whom the company did not expect credit, and to whom its future ability to pay was of no consequence, one who was responsible for

no independent action, but who did a day's work or a stated job under the direction of a superior; that the word "servant" must be limited by the more specific words "laborer" and "apprentice," with which it was associated, and be held to comprehend only persons performing the same kind of service that was due from laborers and apprentices; and that a general manager was not *ejusdem generis* with an apprentice or laborer.

In *Gurney* v. *Atlantic & Great Western Railway*, 58 N. Y. 358, in 1874, a case relied on by the appellant, a receiver of a railroad company was directed by an order of court to pay out of moneys in his hands "arrearages owing to the laborers and employés" of the company "for labor and services actually done in connection with" the company's road. Claim was made by a counsellor-at-law for professional services as counsel for the railroad company, rendered prior to the appointment of the receiver. The question raised was whether the language of the order covered employés who had not been in the stated and regular employment of the company. The court held that, in view of the special language of the order, it included the claim for the professional services. It appeared that the order was made as the result of negotiations in regard to which the counsel under whose advice the order was obtained testified that the word "employés" was used in the negotiations "not in any particular or strict sense, but according to its ordinary and general meaning, as including attorney's compensation as well as that of other persons employed by the corporation." The decision appears to have gone upon the ground that the person who made the claim had rendered "services" in connection with the railroad, and was consequently an employé within the meaning of the order.

We are, therefore, of opinion that Vane had no lien under the act of March, 1877, § 5286 of the Revised Statutes.

It is further contended that Vane had a lien by virtue of the general mechanics' lien law, before referred to, which was re-enacted by the act of March 6, 1883, Laws of 1883, 140; Elliott's Supplement of 1889, §§ 1688 and 1690, in the following language:

"Section 1. *Be it enacted by the General Assembly of the*

State of Indiana, That mechanics, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure, may have a lien, separately or jointly, upon the house, mill, manufactory, or other building, bridge, reservoir, system of water-works or other structure, which they may have erected, altered, repaired, or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done or materials or machinery furnished, or both."

"SEC. 3. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after the performing of such labor or furnishing such materials or machinery, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth therein the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure may stand or be connected with, or to which it may be removed. Any description of the lot or land in a notice of lien will be sufficient, if from such description or any reference therein, the lot of land can be identified."

In regard to this it is sufficient to say that the notice of lien filed by Vane in September, 1884, did not comply with section 3 of the statute, in regard to a description of the "lot or land" on which the structure stood upon which he claimed a lien.

A common law lien and an equitable lien are also claimed. As to the common law lien the master reported "that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right he had, if any, to assert his common law lien." We concur in this view, as to the personal property and earnings of the corporation. As to the poles and wires they were real estate, on which there could be no lien, at common law.

In addition to this, Vane gave up any right he had to a common law lien as to the wires, by giving up possession of them on November 19, 1884. The lien referred to in the paper of that date, signed by the receivers, as a lien claimed by Vane, was the statutory lien which he had attempted to secure by his notice dated September 15, 1884. Nor do we see any ground for saying that he had or retained an equitable lien.

It is also claimed that the instrument of November 19, 1884, fixed a lien upon the property. We do not so understand it. It conferred no new right upon Vane. It only refers to such lien, if any, as existed, — to a lien claimed by him. Where it speaks of "the lien of the said Vane," it refers to what it had before spoken of as the lien claimed by him. The purport of the paper is simply that the use of the wires by the receivers shall not be construed as impairing or interfering with the lien claimed by Vane, that is, with any lien which existed under the statute under which he had given and filed his notices, dated September 15, 1884.

Decree affirmed.

REDFIELD *v.* PARKS.

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

No. 27. Submitted November 5, 1889. — Decided November 18, 1889.

In the courts of the United States an action of ejectment is an action at law, and the plaintiff must recover on the legal title.

While the title to public land is still in the United States, no adverse possession of it can, under a state statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States, against the legal title under a patent from the United States.

A deed of land sold for non-payment of taxes, which recites that the sale was made on a day which was not the day authorized by law, is void on its face, and is not admissible in evidence to support an adverse possession under a statute of limitations.

This cause was submitted April 15, 1889, at the last term, the briefs of counsel for both parties having been filed in due course with the clerk of this court. The court there-

upon refused to consider the case on its merits for the reason that the record did not contain copies of the pleadings, and leave was granted to the plaintiff in error to sue out a writ of certiorari to bring into this court the papers omitted from the transcript. *Redfield* v. *Parks*, 130 U. S. 623. Such certiorari was then sued out, and return thereto duly made. The case made by the original record and the papers brought up on return to the certiorari is stated in the opinion of the court.

On the 15th of October of the present term the counsel for the plaintiff in error moved for leave to file an additional brief, and for leave to have an oral argument when the cause should be reached on the docket. The court on October 16th granted the counsel on both sides leave to file additional briefs, but denied the motion as to oral arguments.

Mr. John F. Dillon thereupon, on the 16th of October, filed an additional brief on behalf of the plaintiff in error, citing: *Sutton* v. *Stone*, 4 Nebraska, 319; *Trustees of Kentucky Seminary* v. *Payne*, 3 T. B. Mon. 161; *Toll* v. *Wright*, 37 Michigan, 93, 100; *Moore* v. *Brown*, 11 How. 414; *Walker* v. *Turner*, 9 Wheat. 541; *Waterson* v. *Devoe*, 18 Kansas, 223; *Skyles* v. *King*, 2 A. K. Marsh. (Ky.) 385; *Cutler* v. *Hurlbut*, 29 Wisconsin, 152; *Mason* v. *Crowder*, 85 Missouri, 526; *Sheehy* v. *Hinds*, 27 Minnesota, 259; *Gomer* v. *Chaffee*, 6 Colorado, 314; *Wofford* v. *McKinna*, 23 Texas, 36; *S. C.* 76 Am. Dec. 53; *Lindsey* v. *Miller*, 6 Pet. 666; *Bagnell* v. *Broderick*, 13 Pet. 436; *Gibson* v. *Chouteau*, 13 Wall. 92; *Wilcox* v. *Jackson*, 13 Pet. 498; *Oaksmith* v. *Johnston*, 92 U. S. 343; *Thompson* v. *Prince*, 67 Illinois, 281; *Wood* v. *Ferguson's Lessee*, 7 Ohio St. 288; *Clark* v. *Southard*, 16 Ohio St. 408; *Miller* v. *Dunn*, 62 Missouri, 216; *Dunn* v. *Miller*, 75 Missouri, 260, 272; *Cline's Heirs* v. *Catron*, 22 Gratt. 378, 392; *Iverson* v. *Dubose*, 27 Alabama, 418; *Chiles* v. *Calk*, 4 Bibb (Ky.) 554; *Clements* v. *Anderson*, 46 Mississippi, 581; *Gardiner* v. *Miller*, 47 California, 570; *De Miranda* v. *Toomey*, 51 California, 165.

Mr. A. H. Garland, *Mr. A. G. Safford* and *Mr. D. W. Jones* on the 4th November, 1889, on behalf of the defend-

ants in error, filed an additional brief, in reply to *Mr. Dillon's* additional brief, reviewing the cases cited in it, and further citing: *Daniel* v. *Lefevre*, 19 Arkansas, 201; *Fleming* v. *Johnson*, 26 Arkansas, 421; *Percifull* v. *Platt*, 36 Arkansas, 456; *McCool* v. *Smith*, 1 Black, 459; *Litchfield* v. *Railroad Co.*, 7 Wall. 270; *Sicard* v. *Davis*, 6 Pet. 124; *Wilkes* v. *Elliot*, 5 Cranch C. Ct. 611; *Lagow* v. *Neilson*, 10 Indiana, 183; *Cutter* v. *Hurlbut*, 29 Wisconsin, 152; *Lindsay* v. *Fay*, 25 Wisconsin, 460; *Mason* v. *Crowder*, 85 Missouri, 526; *Pillow* v. *Roberts*, 13 How. 472.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Arkansas. The action in that court was in the nature of ejectment to recover possession of real estate, brought by Jared E. Redfield, the present plaintiff in error, against William P. Parks, Charles Harper and others. The case was submitted to the court without a jury, which made a finding of facts on which was rendered a judgment for the defendants.

The principal issue in the case before that court was on the defence under the statute of limitations. The plaintiff relied upon, and introduced in evidence, a patent from the United States, dated April 15, 1875, conveying the property to the Mississippi, Ouachita and Red River Railroad Company, reciting the purchase by that company of the land in controversy and the payment of $594.48 for it.

The plaintiff Redfield purchased this land at a judicial sale, on a judgment against that company, for the sum of five hundred dollars, and received a deed under that purchase. It further appears from the findings of the court that the railroad company made payment in full for the land September 10, 1856, and received at that time the certificate of the register of the land office. The approval of this entry for the issue of a patent was made at the General Land Office in Washington, June 1, 1874. The circumstances under which the delay in the issue of a patent was had are not stated.

The defendants relied upon a deed made by the county clerk of Lafayette County, Arkansas, to W. P. Parks and James M. Montgomery, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the statute of Arkansas of two years in regard to claims under tax sales, and the general statute of limitation of seven years.

This action was commenced by the plaintiff on the 11th day of April, 1882. The court announced the following conclusions of law:

"1st. That said tax deed to Parks and Montgomery for said land is void, because the land was sold for the taxes of 1868 on a day not authorized by law.

"2d. That under the laws of this State, notwithstanding said tax deed is void upon its face, for the reason stated, it constitutes a claim and color of title sufficient to put in motion the statute of limitations in favor of any person in possession under it.

"3d. That the possession taken by Parks and Montgomery of said land under said tax deed, in the manner set out in the finding of facts, constitutes in law actual, peaceable, open, notorious and adverse possession of the whole of said land; and said possession of said land having been taken by Parks and Montgomery as early as the month of February, 1874, and maintained continuously by them and their grantees down to the trial of this cause, the plaintiff's right of action to recover said land is barred by the two years' statute of limitation contained in section 4475 of Mansfield's Digest, and also by the seven years' statute of limitation contained in section 4471 of the same digest."

Among the requests asked by the plaintiff and refused by the court were the following declarations of law:

"6th. The plaintiff's title to the lands in this case, and that of those under whom he claims, dates from the issuance of the patent of the United States to the Mississippi, Ouachita and Red River Railroad Company, on the 15th day of April, 1875, and the statute did not commence running in behalf of the defendants, or any of them, until such patent was issued.

"8th. That no adverse possession of land can be acquired

while the title is still in the United States government, and that the patent issued on the 15th day of April, 1875, did not relate back, so as to make the possession of the defendants adverse prior to the date of the patent.

"9th. That neither the plaintiff, nor the railroad company under which he claims, could have maintained a suit of ejectment in the courts of the United States for the possession of the land described in his complaint on an equitable title, nor until the legal title had passed out of the government on the 15th April, 1875, and this action did not accrue to them until the date of the patent.

"10th. That this suit, having been commenced on the 11th day of April, 1882, within seven years from the date of the patent, the plaintiff's cause of action was not barred by the statute of limitations.

"11th. That the deed of V. V. Smith, clerk, not being a sheriff's deed or an auditor's deed, or a deed commonly called a donation deed, is not within the terms of the two years' statute pleaded by defendants, (§ 4117, Gantt's Digest,) and this action is not barred by that statute."

These rulings upon the law of the case by the court present two distinct propositions, on which error is assigned here. One of these is that which holds the seven-year statute of limitations, which is the general period of limitation, prescribed for the benefit of adverse possession, to be a good defence in this case. The other is the same holding in regard to the two years' limitation law.

It is apparent from the finding of the facts that the action, which was commenced on the 11th day of April, 1882, was within the seven years allowed by the statute from the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government, that no statute of limitation affects the rights of the government, unless there is an express provision to that effect in the statute, and even

then it cannot be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United States until the issuing of the patent to the railroad company.

In the courts of the United States, where the distinction between actions at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action or at its trial is in some other party, the plaintiff cannot recover. The facts in the present case show that this title to the land in controversy was in the United States until the 15th day of April, 1875. Up to that time the statute of limitations could not begin to run in bar of any action dependent on this title. The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land office. His title, therefore, being derived from the United States, the right of action at law to oust the defendant did not commence until the making of that patent.

In the case of *Lindsey* v. *Miller's Lessee*, 6 Pet. 666, the defendants relied upon a patent issued by the Commonwealth of Virginia, dated March, 1789, under the survey and entry made in January, 1783, and duly recorded in that year. They then proved possession for upwards of thirty years. The plaintiff introduced a patent from the United States, in which was the legal title, dated December 1, 1824, thirty-five years after the patent issued by the Commonwealth of Virginia. The action was brought in 1832.

This court, in regard to the issue thus made, expressed itself in the following terms (p. 673):

"That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well-settled principle that the statute of

limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the government. The title under which the plaintiff in the ejectment claimed emanated from the government in 1824. Until this time there was no title adverse to the claim of the defendants; there can, therefore, be no bar to the plaintiff's action."

The case of *Bagnell* v. *Broderick*, 13 Pet. 436, which has been a leading case in this court for many years, was an action of ejectment in which a patent from the United States to John Robertson, Jr., was relied on by the plaintiff as being the origin of his title. The defendants relied upon certain proceedings in the United States land office in Missouri by which the property was deemed to have been appropriated under the act of Congress concerning New Madrid lands which had been lost by the earthquake, and had been certified to Robertson, and a deed from Robertson to the parties under whom defendants claimed. But this court held that the patent of the United States, issued long afterwards to Robertson, was the strictly legal title on which plaintiff was bound to recover, and in making the decision the following language is used:

"But suppose the plat and certificate of location had been made and returned to the recorder in the name of Morgan Byrne; and that it had been set up as the better title in opposition to the patent adduced on behalf of the plaintiff in ejectment; still, we are of opinion the patent would have been the better legal title. We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robertson, Jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the

claim set up by Byrne; and having obtained the patent, Robertson had the best title (to wit, the fee) known to a court of law. Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

Perhaps the case which presents the whole of this question in the strongest light is that of *Gibson* v. *Chouteau*, 13 Wall. 92. That was a writ of error from this court to the Supreme Court of Missouri, and that court had held that, under the statutes of that State by which an action of ejectment could be sustained upon an equitable right only, the bar of the statute of limitations began to run when the right of action under such equitable title accrued. The case was several times before the Supreme Court of that State, which finally decided in favor of the defendants on the plea of the statute of limitations, although the patent under which plaintiff claimed to recover had been issued within the ten years which that statute allowed. In delivering its opinion that court used the following language:

"But there is another principle upon which we think the statute may be made to operate here as a bar to the plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act of inception of the conveyance, to vest the title in the owner of the equity as of that date, and make it pass from him to the patentee named through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus by relation merged in one, and the statute may be held to have operated on both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the statute on its way and cut off with that which existed before." 39 Missouri, 588.

This is precisely the principle asserted in the case before us. The Mississippi, Ouachita and Red River Railroad Company, under whose patent the plaintiff claims, had made the entry and received the certificate of that entry and of the payment of the money for this land, September 10, 1856. The patent on this certificate was not issued until April 15, 1875, which was nineteen years after the entire equitable interest in the land in controversy had been vested in the railroad company by virtue of the payment of the money and the register's certificate. As the title of Redfield had its inception in this proceeding, it is now argued, and the Circuit Court must have so decided, that the statute of limitations, instead of leaving it to commence with the issue of the patent, did run through the whole course of the possession of the defendant after the date of the issue of the register's certificate in 1856. Whether the statutes of Arkansas would have authorized an action to recover the possession by virtue of the register's certificate or not, it is precisely the same principle as that asserted by the Supreme Court of Missouri in the case of *Gibson* v. *Chouteau*. The opinion of this court, delivered by Mr. Justice Field in that case, states with great clearness the principle that a statute of limitation does not run against the State unless it is so expressly declared, and adds that: "As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes." With regard to the relation back to the inception of the title the court says (p. 100): "The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal of Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In regard to the principle asserted by the Supreme Court of Missouri, the opinion says (p. 101): "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely

for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected.

"In the Federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or cancelling the patent. But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. . . .

"But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of

the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted." 13 Wall. 101, 104.

These principles are illustrated by other cases in this court, such as *Rector* v. *Ashley*, 6 Wall. 142; *United States* v. *Thompson*, 98 U. S. 486.

The question of the two years' statute of limitation of Arkansas presents other considerations. That statute is in the following language:

"No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof, at a sale by the collector, or commissioner of state lands, for the non-payment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

There can be no question but that more than two years had elapsed after the issue of the patent of the United States, under which plaintiff asserts title, and after his cause of action had accrued during which the defendants were in possession of a part, if not the whole, of the land in controversy. Therefore, if the circumstances of that possession are such as to bring it within the purview of this statute, the possession was a bar to recovery. On this subject the court declared as conclusions of law: 1st. That the tax deed, under which defendants claimed, is void, because the land was sold for taxes of 1868 on a day not authorized by law; 2d. That under the laws of this State, notwithstanding the said tax deed is void upon its face, for the reason stated, it constitutes a claim and color of title sufficient to put in motion the statute of limitations in favor of any person in possession under it; 3d. That the possession taken by Parks and Montgomery of said land under said tax deed, in the manner set out in the finding of facts, constitutes in law

actual, peaceable, open, notorious and adverse possession of the whole of said land; and said possession of said land having been taken by Parks and Montgomery, as early as the month of February, 1874, and maintained continuously by them and their grantees down to the trial of this cause, the plaintiff's right of action to recover said land is barred by the two years' statute of limitation contained in section 4475 of Mansfield's Digest, and also by the seven years' statute of limitation, contained in section 4471 of the same digest.

We think it very clear that the judge was correct in holding this tax deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. But we think that the court erred in holding that such an instrument could create color of title which would bring the case within the foregoing statute of limitations.

The case of *Moore* v. *Brown*, 11 How. 414, brought the question before this court. The court says, p. 425:

"It is disclosed upon the face of the deed that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor."

After a somewhat elaborate opinion it was certified to the Circuit Court, from which the case had come by division of opinion, "that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered," — which was to support the possession under the statute of limitations.

A similar decision was made in the case of *Walker* v. *Turner*, 9 Wheat. 541.

Many of the States of the Union have enacted what are called short statutes of limitation, the object of which is to protect rights acquired under sales of real estate for taxes. The general purpose of these statutes is to fix a period of time running in favor of the holder under such tax titles, after which the validity of that title shall not be questioned for any irregularity in the proceedings under which the land was sold. This object was generally attained by the enactment of

short statutes of limitations, by means of which the party in possession under such defective titles can, by pleading this statute, make his title good.

The brief of counsel in this case produces many instances of cases decided in the courts under statutes of this class; and the general principles pervading them is well expressed by the Court of Appeals of Kentucky in the case of *Trustees of Kentucky Seminary* v. *Payne*, 3 T. B. Mon. 161, 164, in which the court says:

"Instead of twenty years mentioned in the general act, but seven years are required by this act of 1809; but, to form a bar to an action, something more is required by the latter act than an adverse possession for seven years."

In *Waterson* v. *Devoe*, 18 Kansas, 223, 232, the court held that the tax deed, which upon its face showed that it was void, did not support the possession as a bar under the short statute of limitations in that State which applied to actions for the recovery of lands sold for taxes. The court, in that case, said, quoting from the previous case of *Shoat* v. *Walker*, 6 Kansas, 65:

"A tax deed to be sufficient, when recorded, to set the statute of limitation in operation must of itself be *prima facie* evidence of title. . . . It is not necessary that it be sufficient to withstand all evidence brought against it to show that it is bad; but it must appear to be good upon its face. . . . When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No statute of limitations can then be brought in to aid its validity."

Similar decisions have been made in the cases of *Mason* v. *Crowder*, 85 Missouri, 526; *Sheehy* v. *Hinds*, 27 Minnesota, 259; *Cutler* v. *Hurlbut*, 29 Wisconsin, 152; *Gomer* v. *Chaffee*, 6 Colorado, 314; *Wofford* v. *McKinna*, 23 Texas, 36.

We do not discover in the statute of Arkansas, nor in the decisions of its courts, cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced

in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void. We are satisfied, therefore, that in regard to the defence under both statutes of limitation, the declarations of law by the court were erroneous, and for that reason its judgment is

Reversed: and as the finding of facts by the court is before us, and these are the only matters worth attention, it is ordered that the Circuit Court enter judgment for the plaintiff.

PICKHARDT *v.* MERRITT.

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

No. 97. Argued November 12, 13, 1889. — Decided December 2, 1889.

Dyes or colors called naphthylamine red, orange II, orange IV, and resorcine red J, imported in 1879, were liable to a duty of fifty cents per pound and thirty-five per cent ad valorem under the provision of schedule M of § 2504 of the Revised Statutes, 2d ed. p. 479, imposing that rate of duty on "Paints and dyes — aniline dyes and colors, by whatever name known," although none of them were known in commerce before 1875, if, according to the understanding of commercial men, dealers in and importers of them, they would, when imported, be included in the class of articles known as aniline dyes, by whatever name they had come to be known; or if, under § 2499 of the Revised Statutes, they bore a similitude, either in material, quality, or the use to which they might be applied, to what were known as aniline dyes at the time the Revised Statutes were enacted, in 1874.

THE case is stated in the opinion.

Mr. Benjamin F. Thurston and *Mr. Livingston Gifford* for plaintiffs in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by

Wilhelm Pickhardt and Adolf Kuttroff against Edwin A. Merritt, collector of the port of New York, to recover duties paid under protest on importations into that port from Hamburg, the entries having been made at the custom-house in January and February, 1879. There were proper protests and appeals to the Secretary of the Treasury, and decisions by that officer. The goods were dyes or colors called naphthylamine red, orange II, orange IV and resorcine red J. At the trial, before Judge Wheeler and a jury, there was a verdict for the defendant, and a judgment in his favor for costs, to review which the plaintiffs have brought a writ of error.

The collector assessed a duty upon the articles in question of fifty cents per pound and thirty-five per cent ad valorem, under that provision of schedule M of section 2504 of the Revised Statutes, 2d ed. p. 479, which reads as follows: "Paints and dyes — aniline dyes and colors, by whatever name known: fifty cents per pound, and thirty-five per centum ad valorem." The plaintiffs claimed, in their protest, that the articles were not aniline dyes, and were liable to a duty of only twenty per cent ad valorem, under section 2516 of the Revised Statutes, which provides that "there shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem."

The course of legislation on the subject of duties on aniline dyes has been as follows: By section 11 of the act of June 30, 1864, c. 171, 13 Stat. 212, the following duty was imposed: "On aniline dyes, one dollar per pound and thirty-five per centum ad valorem." By section 21 of the act of July 14, 1870, c. 255, 16 Stat. 264, the following duty was imposed: "On aniline dyes and colors, by whatever name known, fifty cents per pound, and thirty-five per centum ad valorem;" and by section 22 of the same act, p. 266, picric acid, which appears to be not chemically an aniline dye, but a phenol dye, though obtained from coal-tar, was made free of duty. The provision of the act of 1870, in regard to aniline dyes and colors, was

carried into the Revised Statutes, enacted in 1874, as was also the provision in regard to picric acid.

The question sought to be raised by the plaintiffs in the present case could not arise under the Revised Statutes as amended by the act of March 3, 1883, c. 121, because, under title 33, § 2502, schedule A, as enacted by the act of March 3, 1883, 22 Stat. 493, the following duty is imposed: "All coal-tar colors or dyes, by whatever name known, and not specially enumerated or provided for in this act, thirty-five per centum ad valorem;" and picric acid was not included by name in the list of articles made free of duty by section 2503 as enacted by the act of March 3, 1883. The articles in question, which, it is claimed, were not aniline dyes or colors, are admitted to be "coal-tar colors or dyes."

The plaintiffs claimed on the trial, and claim here, that the words "aniline dyes and colors, by whatever name known," are words of description, and not words used in a general commercial sense. They therefore introduced a good deal of evidence for the purpose of showing that the articles in question were, physically and chemically, not aniline dyes or colors, though derived from coal-tar. It was shown that none of those articles were known in commerce at the time the Revised Statutes were enacted, resorcine red J having been known first in 1875, orange II and IV in 1877, and naphthylamine red in 1878. On the other hand, the defendant introduced testimony for the purpose of showing that the articles in question were known in trade, when imported, as "aniline dyes," and that in 1874 the term "aniline dyes" had been applied in trade to all dyes derived from coal-tar, or artificial dyes.

The testimony on the part of the plaintiffs tended to show that the articles in question were not chemically aniline colors; that naphthylamine red and orange II and IV were azo colors; that resorcine red J was an eosine color; that picric acid was a phenol color; that aniline colors had high tinctorial power, as compared with natural colors, while the tinctorial power of azo colors was no higher than that of natural colors; that aniline colors attached themselves to fabrics without manipulation, easily and directly, while azo colors attached

themselves with more difficulty, being assisted by mordants; that aniline colors were wanting in fastness, while azo colors were relatively fast; that aniline colors were generally on the blue shades, either blues or violets, or reds which contained blue or green, while azo colors had exactly the shades that aniline colors lacked, — yellows, orange and yellowish reds; that aniline colors were not fast to acids or alkalies, while azo colors were relatively fast to both acids and alkalies, and were sometimes even brightened or cleared by acids and alkalies; that aniline colors combined readily with albumen, which was largely used as a mordant and in photography, while azo colors did not combine with albumen; and that aniline colors were not acid, unless sulphonated, while azo colors were always acid. In regard to resorcine red J, the plaintiffs gave evidence tending to show that an aniline color could be used as a dye, while resorcine red could not be used generally as a dye; that an aniline color could not be used generally or efficiently for paints, while resorcine red was generally used as a pigment for paints; and that the color of an aniline dye was a crimson, running up to violet or bluish red, while the color of resorcine red was scarlet or yellowish red.

The plaintiffs insist that the court erred at the trial in admitting evidence to show what the importations in question were called in trade at the time of the trial in 1884, which was ten years after the Revised Statutes were enacted, and five years after the entries took place; that it also erred in admitting evidence to show the signification of the words "aniline dyes and colors," as a commercial term in contradistinction to a descriptive term; and that it erred in refusing to charge the jury, as requested by the plaintiffs, as follows: "That the term aniline dyes and colors, by whatever name known, is not used in a general commercial sense, but as a descriptive term, and primarily includes only such dyes as are in fact aniline by their constitution;" and also: "That, in determining the question at issue, to instruct the jury to disregard all the testimony of the defendant as to the general name under which the articles in question were bought and sold."

They complain that the court erred in charging the jury that, if any of the articles in question would be, according to the understanding of commercial men, dealers in the articles and importers of them, included in the class of articles known as aniline dyes, by whatever name they had come to be known at the time in question, they were subject to the duty imposed on aniline dyes; that Congress used the term "aniline dyes" as applied to a class of articles which, in June, 1874, had acquired that name by reputation and use among dealers in and importers of such articles; and that the statute was made for the future.

They also complain that the court refused to charge the jury, as requested by the plaintiffs, as follows: "That it is immaterial how the articles in question were regarded in trade, and that the plaintiffs are entitled to a verdict if they are satisfied, upon a fair preponderance of testimony, that the dyes in question are a new and different dye from the aniline dyes known in 1874, and are not in fact aniline dyes, unless the jury should find similitude under the statute." They also complain that the court refused to charge the jury, as requested by the plaintiffs, as follows: "If the jury find that the plaintiffs' goods were not known in commerce until since June, 1874, the plaintiffs are entitled to recover, unless the jury find they bear the statutory similitude to the aniline dyes and colors known in 1874." In regard to each of these last two requests, the court declined to charge otherwise than as it had already charged.

They further complain that the court erred in refusing to charge, as requested by the plaintiffs, that, if the jury should find, upon a fair preponderance of testimony, that the articles in question "were used as a substitute and in place of cochineal, and not as a substitute for any aniline dye known at the time of their introduction, the plaintiffs, on that branch of the case, are entitled to a verdict." In regard to that request, the court said that the general instruction to the jury on the subject was sufficient.

We think that the objections to evidence before recited, and the objections before mentioned to particular parts of the

charge of the court, and to the refusals of the court to charge, and to its refusal to charge otherwise than as it had charged, are untenable.

The court instructed the jury that if the four articles in question, according to the understanding of commercial men, dealers in and importers of them, would, when imported, "be included in the class of articles known as aniline dyes, by whatever name they had come to be known," they were subject to duty as aniline dyes, and the defendant was entitled to a verdict. We see no objection to this instruction. It was in accordance with the established rule that, in interpreting customs statutes, commercial terms are to be construed according to the commercial understanding in regard to them. Nor is this rule inapplicable to this case because the articles in question were unknown in 1874, when the statute was enacted. As the court said to the jury, the law was made for the future; and the term "aniline dyes and colors, by whatever name known," included articles which should be commercially known, whenever afterwards imported, as "aniline dyes and colors." In *Newman* v. *Arthur*, 109 U. S. 132, it was held that the fact that, at the date of an act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the statute clearly and fairly includes them. But it is sufficient if it so includes them according to commercial understanding.

The bill of exceptions states as follows: "In the course of the trial a large amount of testimony was introduced, on behalf of both parties, as to the similitude or resemblance, under Revised Statutes, section 2499, of the dyes and colors of the plaintiffs' importations and various dyes and colors known in trade of this country, and by chemists from 1869 to time of trial, as aniline dyes and colors, it being contended upon the part of the defendant that the importations of the plaintiffs, if not specified under and covered by the term aniline dyes, yet that they were chargeable as aniline dyes by similitude."

Section 2499, thus referred to, reads as follows: "There shall be levied, collected, and paid, on each and every non-

enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

On the question of similitude the court instructed the jury that if the articles in question did not fall within the class of articles known as "aniline dyes," or either of them did not, the jury were then to proceed to the consideration of the question arising under section 2499 of the Revised Statutes, as to similitude; that, if the four articles did not fall within the class of "aniline dyes," then the question would be whether any one of them bore a similitude, either in "material, quality, texture, or the use to which it may be applied," to what were known as aniline dyes at the time the Revised Statutes were enacted; that, if it did, it was dutiable at the same rate as aniline dyes were; that the word "texture" did not apply to the subject; that, if any one of the articles bore a similitude or resemblance, in material or quality, to what were known as aniline dyes in 1874, it was dutiable at the same rate as an aniline dye; that if either of them bore a similitude in the use to which it might be applied, to aniline dyes known and in use in 1874, it was dutiable at the same rate as an aniline dye; that the mere application to the dyeing of fabrics would not create the similitude, but that if there was a similitude in the mode of use, a similitude in the same kind of dyeing, producing the same colors in substantially the same way, so as to take the place of aniline dyes in use, there would be a similitude in use; that if all the articles were neither aniline dyes nor bore

such similitude the plaintiffs were entitled to a verdict for the full amount they claim; that, if any less than all of them were neither aniline dyes nor bore such similitude, the plaintiffs were entitled to a verdict as to those, for the amount of duties charged which ought not to have been charged; that the question was whether the articles fell within the description of "aniline dyes or colors, by whatever name known," as commercially known, or bore a similitude to articles which fell within that description, as they were known in 1874; that the jury were not to consider "aniline dyes" as a term synonymous with "coal-tar dyes;" and that they were to look at the term "aniline dyes" according to its commercial usage in 1874.

The plaintiffs excepted to that part of the charge in regard to similitude which had reference to the expression "similitude in material," and to that part which related to "similitude in the same kind of dyeing," and also requested the court to charge the jury, "in respect to similitude of quality," that the mere quality of producing color, or dyeing, was not a sufficient similitude to warrant the jury in finding a verdict for the defendant by reason of similitude. In response to this request, the court said that it had already instructed the jury that the mere fact that the article would color was not a similitude. The plaintiffs also excepted to the charge of the court as to similitude in use.

We are of opinion that the charge on the subject of similitude submitted the question properly to the jury; and that it was not error to refuse the request to charge, that, if the jury should find that any one of the articles was used as a substitute and in place of cochineal, and not as a substitute for any aniline dye known at the time of its introduction, the plaintiffs, as to that branch of the case, were entitled to a verdict.

Other questions are raised in the bill of exceptions which we do not deem it necessary to notice particularly. We see no error in the record.

Judgment affirmed.

DAHL *v.* RAUNHEIM.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 85. Submitted November 7, 1889.— Decided November 25, 1889.

An applicant for a placer patent, who has complied with all the proceedings essential for the issue of a patent for his location, but whose patent has not issued, may maintain an action to quiet title against a person asserting title to a portion of the placer location under a subsequent location of a lode claim.

If on the trial of such an action the court instruct the jury that if they believe that the premises were located by the grantors and predecessors in interest of the plaintiff as a placer mining claim in accordance with law and they continued to hold the premises until conveyed to the plaintiff, and the plaintiff continued to hold them up to the time of the application of a patent therefor, and at the time of the application there was no known lode or vein within the boundaries of the premises claimed, and there is a general verdict for the plaintiff, the jury must be deemed to have found that the lode claimed by the defendant did not exist when the plaintiff's application for a patent was filed.

When a person applies for a placer patent in the manner prescribed by law, and all the proceedings in regard to publication and otherwise are had thereunder which are required by the statutes of the United States, and no adverse claims are filed or set up, and it appears that the ground has been surveyed and returned by the Surveyor General to the local land office as mineral land, the question whether it is placer ground is conclusively established and is not open to litigation by private parties seeking to avoid the effect of the proceedings.

The rulings upon a motion for a new trial are not open to consideration in this court.

AT LAW, to quiet title. Verdict for the plaintiff and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. William H. De Witt, for plaintiff in error, submitted on his brief.

No appearance for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to quiet the title of the plaintiff below to certain placer mining ground, forty acres in extent, situated

in Silver Bow County, Montana, of which he claims to be the owner, and in a portion of which the defendant claims to have some right and interest, and for which portion he has applied for a patent. The plaintiff asserts title under a location of the ground as a placer claim on the 22d of February, 1880, by parties from whom he purchased.

The defendant asserts title to a portion of that ground, being three acres and a fraction of an acre in extent, as a lode claim under a location by the name of the Betsey Dahl Lode, made subsequently to the location of the premises as placer mining ground, and subsequently to the application by the plaintiff for a patent therefor. That application was made on the 16th of July, 1881, and the register of the local land office caused notice of it to be published as required for the period of sixty days. All the other provisions of the law on the subject were also complied with. See *Smelting Company* v. *Kemp*, 104 U. S. 636, 653. To this application no adverse claim to any portion of the ground was filed by the defendant or any other person, and the statute provides that in such case it shall be assumed that the applicant is entitled to a patent upon certain prescribed payments, and that no adverse claim exists. The statute also declares that thereafter no objection of third parties to the issue of a patent shall be heard, except it be shown that the applicant has failed to comply with the requirements of the law. No such failure was shown by the defendant. He is, therefore, precluded from calling in question the location of the claim, or its character as placer ground.

The only position on which the defendant can resist the pretensions of the plaintiff is that the placer ground, for a patent of which he applied, does not embrace the lode claim. The effect to be given to that position depends upon the answer to the question whether at the time of his application any vein or lode was known to exist within the boundaries of the placer claim, which was not included in his application. Section 2333 of the Revised Statutes provides that when one applies for a placer patent who is at the time in the possession of a vein or lode included within its boundaries, he must state that fact, and then on payment of the sum required for a vein or lode

and twenty-five feet on each side of it at five dollars an acre, and two dollars and a half an acre for the placer claim, a patent will issue to him covering both the placer claim and the lode. But it also provides that, where a vein or lode is known to exist at the time within the boundaries of a placer claim, the application for a patent, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode; and also that where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

It does not appear in the present case that a patent of the United States has been issued to the plaintiff; but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified. We accordingly treat him, in so far as the questions involved in this case are concerned, as though the patent had been delivered to him. Being entitled to it, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title.

When it can be said that a lode or vein is known to exist in a placer mining claim within the meaning of section 2333 of the Revised Statutes, was considered to some extent in *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, and *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374, and, also, in *Noyes* v. *Mantle*, 127 U. S. 348, 353, and some of the difficulties in giving an answer that would be applicable to all cases were there stated. In the present case no difficulty arises, for the question was left to the jury and decided by them. The court instructed them to the effect that if they believed that the premises were located by the grantors and predecessors in interest of the plaintiff as a placer mining claim in accordance with law, and they continued to hold the premises until conveyed to the plaintiff, and the plaintiff continued to hold them

up to the time of his application for a patent therefor, and at the time of such application there was no known lode or vein within the boundaries of the premises claimed, their verdict should be for the plaintiff.

The jury having found a general verdict for the plaintiff, must be deemed to have found that no such lode as claimed by the defendant existed when the application of the plaintiff for a patent was filed. We may also add, to what is thus concluded by the verdict, that there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

It is earnestly objected to the title of the plaintiff that he did not present any proof that the mining ground claimed by him was placer ground. It appeared that the ground had been surveyed and returned by the Surveyor General of Montana to the local land office as mineral land, and the defendant, in asserting the possession of a lode upon it admits its mineral character. That it was placer ground is conclusively established in this controversy, against the defendant, by the fact that no adverse claim was asserted by him to the plaintiff's application for a patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of the plaintiff's proceedings.

Several questions presented by the plaintiff in error in his brief we do not notice, because they arise only upon the motion made by him for a new trial. The rulings upon such a motion are not open to consideration in this court.

Judgment affirmed.

DAHL *v.* MONTANA COPPER COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 86. Submitted November 7, 1889. — Decided November 25, 1889.

Dahl v. *Raunheim*, *ante*, 260, affirmed and applied.

The objection that a corporation cannot sue in a Territorial Court, on the ground that it does not appear that the corporation has complied with the conditions imposed by a statute of the Territory upon its transacting business there, cannot be urged for the first time in this court.

This case was argued with *Dahl* v. *Raunheim*, *ante*, 260. The case is stated in the opinion.

Mr. William H. De Witt, for plaintiff in error, submitted on his brief.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action to quiet the title to certain placer mining ground, twenty acres in extent, in Silver Bow County, Montana, claimed by the plaintiff below, the Montana Copper Company, under a location made in March, 1879, against the assertion of ownership by the defendant to a portion of the premises as a lode claim under a location made in March, 1881.

The plaintiff applied for a patent for its placer ground in November, 1880, and notice of the application was published by the register of the local land office, and all the other provisions of the statute required in such cases were complied with. No adverse claim was filed by the defendant or any one else during the period of publication. The Dahl lode claim was not located until after that period had expired. The defendant is therefore precluded from questioning the right of the plaintiff to a patent for the premises, and, of course, from objecting either to the location or its character

as placer ground. The only question open to him in this controversy is whether the lode or vein claimed by him was known to exist at the date of the plaintiff's application, none having been included in such application, and upon that question a jury have passed, and found specially that no lode or vein was then known to exist within the boundaries of the placer claim.

The case is similar in this respect to the one just decided, *Dahl* v. *Raunheim*, *ante*, 260. But the plaintiff in error endeavors to raise another question in this court, namely, as to the competency of the Montana Copper Company, the plaintiff below, to do business in the Territory, and, consequently, to maintain any suit respecting its property, because it does not appear that it has complied with the conditions imposed by the statute of the Territory to its transacting business there. That statute, which was passed in July, 1879, provided that all foreign corporations organized under the laws of any State or Territory of the United States, or by virtue of any special acts of the legislative assembly of such State or Territory, or of any foreign government, should, before doing business within the Territory, file in the office of its secretary and in the office of the county recorder of the county wherein they intend to carry on business, an authenticated copy of their charter or certificate of incorporation, and also a statement verified by their president and secretary, and attested by a majority of the board of directors, showing:

First. The name of such incorporation, and the location of its principal office or place of business, without this Territory; and, if it is to have any place of business or principal office within this Territory, the location thereof.

Second. The amount of its capital stock.

Third. The amount of its capital stock actually paid in money.

Fourth. The amount of its capital stock paid in any other way, and in what.

Fifth. The amount of the assets of the incorporation, and of what the assets consist, with the actual cash value thereof.

Sixth. The liabilities of such incorporation, and, if any of its indebtedness is secured, how secured, and upon what property.

The statute also provided that such corporation or joint stock company should file at the same time and in the same offices a certificate under the signature of its president, or other acting head, and its secretary, stating that the corporation had consented to be sued in the courts of the Territory in all causes of action arising within it, and that service of process might be made upon some person, a citizen of the Territory, whose name and place of residence should be designated, and that such service should be taken and held to be as valid to all intents and purposes as if made upon the company in the State or Territory under the laws of which it was organized.

The statute also provided a forfeiture of ten dollars a day for every day in which such foreign corporation should, after four months from the publication of the act, neglect to file the statements and certificates mentioned, and declared that all acts and contracts made by such incorporation or any agent or agents, during the time it should fail and neglect to file the statements and certificates, should be void and invalid as to such corporation. In the present action the plaintiff alleges in its complaint that it is a corporation created under the laws of New York, doing business in Silver Bow County, in the Territory of Montana, and is the owner of the property in controversy. The answer of the defendant does not deny its incorporation, or its right to do business in that county, but only its ownership of the property. No question is therefore raised on the pleadings as to its competency to do business within the Territory for want of compliance with the provisions of the territorial law. The question at issue on the pleadings and on the trial in the court below was confined to the ownership of the mining ground. Without, therefore, considering the validity and force of the provisions of that law, (Congress having permitted corporations, whether formed within or without that Territory, to explore for and hold mining claims on the public domain, *McKinley* v. *Wheeler*, 130 U. S. 630,) or whether if they are valid, any parties except the government of the Territory can allege a disregard of them, to defeat the title of the corporation to its property,

(*Fritts* v. *Palmer*, *post* 282,) it is sufficient in this case to say that such incompetency cannot be considered unless set up in the pleadings in the court below. A failure to comply with the provisions of the law will not be presumed in the absence of any allegation on the subject. The objection cannot be urged for the first time in this court.

Judgment affirmed.

YOUNG *v.* PARKER'S ADMINISTRATOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 75. Submitted November 6, 1889. — Decided December 2, 1889.

On the facts stated in the opinion it is *Held*, that there is no separable controversy in this case; but that if there were, the provision as to the removal of such a controversy has no application to a removal on the ground of local prejudice.

In order to the removal of a cause from a state court on the ground of local prejudice, under Rev. Stat. § 639, it is essential, where there are several plaintiffs or several defendants, that all the necessary parties on one side be citizens of the State where the suit is brought, and all on the other side be citizens of another State or other States; and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed.

THE case is stated in the opinion.

Mr. T. B. Swann for appellants.

Mr. S. A. Miller and *Mr. J. F. Brown* for appellees.

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

In December, 1865, Milton Parker filed his bill in the Circuit Court of Kanawha County, West Virginia, against John N. Clarkson and some seventy other defendants, seeking the marshalling of assets and the subjection of Clarkson's property

to the satisfaction of certain judgments held by the complainant against him, which appears to have been treated, and may be considered, as having been intended to bring all Clarkson's creditors into concourse, and after the adjustment of the liens of those having security, to devote any remaining property, or any surplus arising upon the securities, to the discharge of his liabilities. The cause was referred to a commissioner to take, state and report an account of the property owned by Clarkson and the liens thereon and their priorities, and various reports were made in the premises.

On the 8th day of July, 1871, C. G. Hussey & Company and John Johns, assignee of John N. Clarkson in bankruptcy, described in an order of the Circuit Court of that date as defendants, filed their petition and affidavit, sworn to by "J. N. Clarkson, a party to the above-mentioned suit," for the removal of the cause into the United States Court for the District of West Virginia, in these words:

"Your petitioners, John Johns, assignee of J. N. Clarkson in bankruptcy, and a citizen and inhabitant of the State of Virginia, and C. G. Hussey and Charles Avery, partners in business, using the name of C. G. Hussey & Company, and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your honor that they are parties defendants and also plaintiffs on a bill of review and petition in a suit pending in chancery in your honor's court, in Kanawha County, in which Milton Parker is complainant and John N. Clarkson and others are defendants.

"That among the defendants are E. Hemmings, S. Thornburg, A. H. Beach, Henry Chappell, J. H. Brown, Ann Thomas, J. M. Laidley and J. D. Lewis and J. C. Ruby, all of whom are citizens and inhabitants of the State of West Virginia; that said suit is now pending in said Circuit Court of Kanawha County, and in said suit there is a controversy between your petitioners in different rights, and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which said suit is pending; that the matter in dispute exceeds the sum of $500, exclusive of costs. Your petitioners have reason to and do believe, that from prejudice or local influence they,

nor either of them, will not be able to obtain justice in such state court; they file this petition for the removal of said cause of *Parker* v. *Clarkson and others*, now pending in the Circuit Court for Kanawha County, West Virginia, unto the District Court of the United States, held at Charleston, West Virginia, the same being in the district where this suit is pending, etc."

The cause was thereupon ordered to be removed as prayed.

On the 10th day of April, 1872, another order was entered in the case by the State Circuit Court, reciting that a mistake had been made in respect to the filing of a bond upon removal, and the bond being now filed, the court directs such removal on the petition of July 8, 1871, and "on the affidavit of the said C. G. Hussey, this day filed, the sufficiency of which affidavit and bond is hereby approved by this court."

The affidavit referred to is as follows:

"Your petitioners, C. G. Hussey and Charles Avery, partners in trade, using the name, firm and style of C. G. Hussey & Co., and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your honor that they are parties defendants, and also parties plaintiffs on petition and bill of review in a cause pending, on the chancery side of your honor's court, in Kanawha County, West Virginia, in which Milton Parker is complainant, and John N. Clarkson et als. are defendants.

"That among the defendants are E. Hemmings, A. H. Beach, H. Chappell, J. A. Brown, J. D. Lewis, J. M. Laidley, all of whom are citizens and inhabitants of the State of West Virginia; that said suit and bill of review therein are now pending in said court for Kanawha County, W. Va.

"That in said suit and bill of review there is a controversy between your petitioners in different rights and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which State said suit is pending; that the matter so in controversy and dispute exceeds the sum of $500, exclusive of costs.

"Your petitioners have reason to and do believe that from prejudice or local influences they will not be able to obtain justice in said state court.

"They file this petition for the removal of said cause of *Parker* v. *Clarkson et als.*, now pending in the Circuit Court for Kanawha County, West Virginia, unto the District Court of the United States for the District of West Virginia, (having Circuit Court powers,) held at Charleston, West Virginia, same being in the district where this suit is now pending."

January 21, 1873, the record was filed and the cause docketed in the United States Court. Various proceedings were afterwards taken therein, and a decree was rendered on the 12th day of December, 1885, determining the amounts due to, and priorities of, some of the creditors, and directing the sale of certain real estate. From this decree the pending appeal was prosecuted.

The record is in a confused and imperfect condition, but it shows, among other things, that C. G. Hussey & Company were judgment creditors of Clarkson, and Hussey and his partner are described in both petitions as citizens and inhabitants of the State of Pennsylvania. In the first petition, nine persons, and, in the second, six, are designated from among the defendants as citizens and inhabitants of the State of West Virginia. It is stated in the first petition that Clarkson's assignee in bankruptcy was, at the time of filing it, a citizen and inhabitant of the State of Virginia. The assignee did not join in the second, although his name is signed, by attorney, to the bond given on removal.

There was no separable controversy here, *Fidelity Insurance Company* v. *Huntington*, 117 U. S. 280; *Ayers* v. *Chicago*, 101 U. S. 184, 187, but if there were, the provision as to the removal of such a controversy has no application to a removal on the ground of local prejudice, under the act of March 2, 1867, c. 196, 14 Stat. 558, upon which these petitions were based. *Jefferson* v. *Driver*, 117 U. S. 272.

The provisions of that act are reproduced in the third subdivision of section 639 of the Revised Statutes, and it was and is essential, in order to such removal, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another

State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed. *Sewing Machine Cases*, 18 Wall. 553; *Vannevar* v. *Bryant*, 21 Wall. 41; *Bible Society* v. *Grove*, 101 U. S. 610; *Cambria Iron Company* v. *Ashburn*, 118 U. S. 54; *Hancock* v. *Holbrook*, 119 U. S. 586; *Fletcher* v. *Hamlet*, 116 U. S. 408. It does not appear from either of these petitions and affidavits, or elsewhere in the record, that diverse citizenship as to the parties therein named existed at the time of the commencement of the suit, nor that diverse citizenship existed between the complainant and all the necessary defendants at the time the petitions and affidavits were severally filed. The cause was not properly removed, and the state court has never lost jurisdiction. *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio & Mississippi Railway Co.*, 131 U. S. 240, and cases cited.

The decree is reversed and the record remitted to the District Court with a direction to remand the cause to the state court.

UNITED STATES *v.* BARLOW.

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

No. 31. Argued October 29, 30, 1889. — Decided December 2, 1889.

When a part of an established post-route is found to be impracticable by reason of being almost impassable, that portion of it may be changed by the Post-Office Department without thereby creating a new route, requiring a new advertisement and bid.

In order to maintain an action brought to recover moneys alleged to have been fraudulently obtained from the Post-Office Department for expediting mail service, it is not necessary to show that a subordinate officer of the department participated in the fraud.

Money paid by the Post-Office Department to a contractor for carrying the mails under a clear mistake of fact, and not through error in judgment, may be recovered back.

The Postmaster General, in the exercise of the judgment and discretion reposed in him in regard to matters appertaining to the postal service, is not at liberty to act upon mere guesses and surmises, without information or knowledge on the subject.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury, for plaintiff in error, cited: *The Floyd Acceptances*, 7 Wall. 666; *Moffat* v. *United States*, 112 U. S. 24; *Cooke* v. *United States*, 91 U. S. 389; *Lockwood* v. *Kelsea*, 41 N. H. 185; *Wiseman* v. *Lyman*, 7 Mass. 286; *Moore* v. *Mandlebaum*, 8 Michigan, 433; *United States* v. *Cosgrove*, 26 Fed. Rep. 908.

Mr. Nathaniel Wilson, (with whom were *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* on the brief,) for defendants in error, cited: *Martin* v. *Mott*, 12 Wheat. 19; *Belcher* v. *Linn*, 24 How. 508; *United States* v. *Wright*, 11 Wall. 648; *Schurz* v. *United States*, 102 U. S. 378; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Johnson* v. *Towsley*, 13 Wall. 72; *Warren* v. *Van Brunt*, 19 Wall. 646; *French* v. *Fyan*, 93 U. S. 169; *Marquez* v. *Frisbie*, 101 U. S. 473; *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Baldwin* v. *Stark*, 107 U. S. 463; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67; *Page* v. *Bent*, 2 Met. (Mass.) 371; *Marshall* v. *Hubbard*, 117 U. S. 415; *Smith* v. *Richards*, 13 Pet. 26; *Cary* v. *Curtis*, 3 How. 236; *Curtis* v. *Fiedler*, 2 Black, 461; *Liverpool Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33.

MR. JUSTICE FIELD delivered the opinion of the court.

This action is brought by the United States to recover from the defendants, subcontractors for carrying the mail, moneys paid to them under a mistake of fact caused by their false representations as to the services. It appears that on the 15th of March, 1878, one Luke Voorhees entered into a contract with the United States, represented by the Postmaster General, to carry the mail over a route designated as No. 38,146, from Garland to Ouray, in the State of Colorado, passing by Lake City and several other places mentioned, and back, seven times a week, for $19,000 a year, for a term beginning July 1, 1878, and ending June 30, 1882.

On the 28th of September, 1878, Voorhees made a subcontract with the defendants, Barlow and Sanderson, by which they agreed to transport the mails over the route mentioned, for the period designated, and to perform the service required by his contract with the United States, in consideration whereof they were to receive the pay which was or might become due to him. They were recognized and accepted by the Post-Office Department as subcontractors for the service.

The distance between Garland and Lake City was one hundred and fifty miles, and the time prescribed for the service over it was twenty-seven hours, or five miles and fifty-five hundredths of a mile per hour. The distance between Lake City and Ouray by the route designated was forty-six miles, and the time prescribed by the contract for the transportation of the mails over it was thirty hours, that is, one mile and fifty-three hundredths of a mile per hour. The portion of this latter line, which lay between a place known as Mineral Point and Ouray, a distance of only ten miles, passed over mountains upon which the mails could be carried only a part of the year —in the winter only by men on snowshoes, and at other times only by pack horses. There was, in consequence, great irregularity in the delivery of the mails upon this portion of the route, and much complaint followed, leading, in October, 1878, to its abandonment and the substitution in its place of a line making a detour around the mountains of one hundred and ten miles, passing by way of Barnum, which afforded a good practicable road easily travelled with wagons.

The present action has grown out of the orders of the Post-Office Department in making this change of line, and expediting the service over it, and providing increased compensation for the additional service. The compensation allowed by the original contract, as mentioned above, was $19,000 a year, which, the distance being one hundred and ninety-six miles, was at the rate of about $96.93 a mile. At that rate the compensation for the additional service was allowed, amounting to $10,663.26 a year.

The time prescribed by the original contract for the service between Lake City and Ouray by way of Mineral Point across

the mountains — thirty hours, that is, at the rate of one mile and fifty-three hundredths of a mile an hour — was owing to the great difficulties attending the crossing of the mountains, as already mentioned. When the line was changed to one making a detour of the mountains by way of Barnum, over a road easily traversable by wagons, it was an obvious duty to the public that the service at the rate of one mile and fifty-three hundredths of a mile per hour should be expedited.

Petitions for a change of that portion of the route which led over the mountains came from officers of the counties of Ouray and Hillsdale, in which the proposed new line was to run, and they represented that over its whole distance there was a wagon road by which the mail could be carried the year round. On the 30th of September, 1878, whilst the Post-Office Department had before it the question of opening a new line between Lake City and Ouray, the defendant Sanderson addressed a letter to the Second Assistant Postmaster General, suggesting that, in lieu of the temporary service ordered between Barnum and Ouray, such service should be made by embracing Barnum in the route No. 38,146 between Garland and Ouray, increasing the distance one hundred and ten miles, "and expediting the schedule from the present, at the *pro rata* rate of seventy-two hours, to thirty-six hours between Lake City and Ouray." On the same day Sanderson was consulted by the Post-Office Department, or at least was requested to give an estimate, as to the additional number of horses and men which would be required for the increased expedition proposed, and in response to the request he wrote to the department the following letter verified by his oath:

"WASHINGTON, *Sept.* 30, 1878.

"Hon. THOS. J. BRADY,

"*Second Ass't Postmaster General:*

"SIR: To perform the service on route No. 38,146, between Lake City and Ouray, on the present schedule of seventy-two hours, requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require (66) sixty-six horses and twenty-two men.

"(Signed) J. L. SANDERSON.

"Subscribed and sworn to before me this 30th day of September, 1878.

"(Signed) J. H. HERRON,
"*Notary Public.*"

There was no existing schedule prescribing seventy-two hours for carrying the mail between Lake City and Ouray, as assumed by Sanderson. As the schedule of time prescribed in the original contract between those places over the mountains was at the rate of one mile and fifty-three hundredths of a mile an hour, he assumed that rate as the existing schedule for the new and easily traversable line of one hundred and ten miles, which would require at the same slow pace seventy-two hours. Notwithstanding the obvious error of this assumption, the evidence tended to show that the Post-Office Department acted upon his representations and estimates. Having extended the route one hundred and ten miles, and allowed the additional compensation provided by the statute upon such extension, it also allowed compensation for expediting the service on the new line, upon this extravagant estimate, at the rate of $15,994.77 a year. That sum for the increased expedition was regularly paid during the term of the original contract.

It is admitted that no additional horses and men for which this allowance was made were ever employed. Neither the horses nor the men exceeded the number originally employed to perform the service, and the defendant Sanderson testified that no greater number was necessary to perform it within the thirty-six hours mentioned, and that he never afterwards corrected his estimate, but continued to draw pay from the government as though the additional horses and men were employed.

It appears that the sums thus allowed and paid to the subcontractors for stock and carriers, which were never required and never employed, aggregated $59,592.98, constituting the principal item in the amount claimed in this action.

On the trial, the plaintiffs requested the court to instruct the jury, among other things, to the effect, 1st, that if they believed that service on a portion of the route between Lake

City and Ouray by way of Barnum was expedited and extra compensation allowed for such expedition, upon the supposition that sixty-six horses and twenty-two men would be necessary to carry the mail on that portion upon a schedule of thirty-six hours, and there was in fact no increase in the number of horses and men required above the number which the defendants swore were necessary to perform the service upon a schedule of seventy-two hours, then the plaintiffs were entitled to recover the sums paid upon such allowance, for, in that event they were paid in violation of law; and, 2d, that in determining the questions in issue the jury could only consider the number of horses and men actually necessary to carry the mail, irrespective of the number of men and horses required by the defendants as carriers of passengers and freight.

The court refused to give these instructions, and charged the jury substantially as follows: That if the agreement for compensation for the additional service was made without authority of law and in excess of all provisions of the statute, the government could not recover any part of the consideration paid the defendants for carrying the mail, unless in the making of the contract there was fraud, participated in and countenanced by the officers of the department who acted in the matter; that if they were of opinion that the parties combined and agreed to raise the compensation to an extraordinary figure, with a view to benefit the defendants, knowing that the compensation was excessive, the government could recover it back; but if they were of opinion that those parties acted honestly and fairly, and in the belief that they were dealing fairly with each other, and that the compensation for the services to be performed was reasonable, there could be no recovery, without reference to what the service actually cost, and without reference to what turned out afterwards with respect to the force required. To the refusal of the court to give the instructions requested, and to the instructions given, the plaintiffs excepted. The jury found a verdict for the defendants, upon which judgment was rendered in their favor, to review which the case is brought to this court.

The statutes upon which the government relies to recover in this case upon the facts presented, are contained in sections 3960, 3961 and 4057 of the Revised Statutes. Those sections are as follows:

"SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order.

"SEC. 3961. No extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

"SEC. 4057. In all cases where money has been paid out of the funds of the Post-Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

In their amended complaint the plaintiffs claim not only the amount allowed and paid each year for the expedited service, but also the amount allowed and paid each year, namely, $10,663.26, for the additional service by the new line from Lake City to Ouray. It would seem from what took place on

the trial that the latter amount was claimed on the ground that that route was a distinct one from that prescribed in No. 38,146, and that the contract for its service could only be made after advertisement for bids. The judge who tried the case below was of that opinion, and so instructed the jury; but we are unable to agree in that view. The new line became necessary to avoid an almost impassable portion of the original route, and changes of that kind can be authorized by the Postmaster General within the established regulations of the Post-Office Department. Those of 1873 provide in terms, that "the Postmaster General may order an increase or extension of service on a route by allowing therefor a *pro rata* increase on the contract pay." Such increase of service may be made by enlarging the distance to be travelled when that will better accomplish the object of the original contract, as well as by requiring a greater number of trips between specified points. That object was accomplished in this case by the increase of distance from the detour around the mountains. The carrying of the mails between the original terminal points was thereby greatly facilitated. The compensation allowed for this additional service over the hundred and ten miles of increased route was in accordance with section 3960 of the Revised Statutes in the exact proportion which the original compensation bore to the original service. There was no excess in the allowance.

But the amount allowed for the expedited service over the new line stands upon a different footing. The evidence produced on the trial tended to show that the allowance of $15,994.77 each year for that service was made upon a false estimate of the additional expenses which would be required; that a slight consideration of the subject would have exposed its error; and that officers of the department and the subcontractors were well acquainted with the fact that the new line was one that could be more easily travelled. It appeared by the petitions presented to the department that the change of route was asked because such was the condition of the new line desired, while the line of the original route between Mineral Point and Ouray was impassable for the greater part

of the year, and then only by pack-horses or on snowshoes. To apply the same schedule time to both lines between the same points — the original and the new one — was to ignore the known differences in the character of the roads over them, as disclosed by the evidence on file in the department. It is true the head of the department and those who stand immediately under him as assistants or deputies are unable in person to supervise all the estimates made in so extensive a department as that of the Post-Office, and, therefore, great reliance is placed upon the judgment in those matters of clerks and subordinate officers. Irregularities and favoritism and corrupt practices are therefore sometimes found to exist which escape observation and detection. It was to avoid fraud and mistakes from this as well as from other causes that sections 3961 and 4057 were adopted.

Section 3961 declares that "no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary." And section 4057, after providing that "in all cases where money has been paid out of the Post-Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor," declares that "in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

These sections would seem to cover the present case. It cannot be pretended that the allowance for expediting the service over the new route was not made upon erroneous representations. It is admitted that such was their character. Whether they were fraudulent as well as erroneous was a matter to be left to the jury, and if fraudulent, their influence in vitiating the payment and authorizing the recovery of the

moneys cannot be affected by knowledge of their character and participation in the results sought to be obtained, by any subordinate officers of the department. Whether they participated in the fraud or were simply imposed upon by the defendants, cannot change the legal liability of the latter. The court, therefore, erred in instructing the jury that in such cases there could be no recovery of the money unless the fraud was participated in and countenanced by such officers.

But, aside from any consideration of the question of fraud, the evidence produced at the trial tended to show that the allowance was made to the subcontractors, for the expedited service, upon a clear mistake as to what additional number of men and of animals were required for such service, and that the money was paid in ignorance of the fact that no additional number had been employed in the performance of that service. Such being the evidence, the plaintiffs were entitled to the instructions asked which are mentioned above. It is no answer to say that the amount of compensation for the expedited service was a matter for the determination of the Post-Office Department. Its determination cannot operate to defeat the express declaration of the statute prescribing the conditions upon which contracts with the department shall be made. If an allowance is founded upon a clear mistake of fact, not a mere error of judgment, and payments are in consequence made, the statute provides that "the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment of excess with interest," which means that if such mistake be established in the action of the department a recovery must follow.

We admit that where matters appertaining to the postal service are left to the discretion and judgment of the Postmaster General, the exercise of that judgment and discretion cannot in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty, any more than a private agent, to act upon mere

guesses and surmises, without information or knowledge on the subject. If the defendant Sanderson intended no fraud by his letter of September 30, 1878, to the Assistant Postmaster General, which he verified by his oath; if, in contradiction to his positive assertions, his testimony can be taken, that he did not know at the time anything about the matter in relation to which he was writing, and that the officers of the department were well aware that he had no knowledge or information on the subject; then they acted upon his guesses only, and not upon evidence upon the subject, and their decision cannot be received as conclusive. It would be, indeed, a mischievous doctrine in its consequences if a decision thus made could conclude the government from recovering its money, paid for additional stock and carriers, which were never required and never employed in its service.

It is also true that where the subjects in relation to which the contract of parties is made, are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the moneys paid upon the erroneous estimate. If this were a case of that description no recovery could be had. But whether it was so or not was the very issue in the cause to be determined by the jury upon the evidence.

It is familiar law that an action may be maintained to recover back money paid as the price of articles sold, or of work done, when the articles are not delivered or the work not done. The reason is that the consideration for the payment has failed. It is not perceived that the principle of law sought to be applied in this case is in any essential particular different. If the contract for extra allowance was void by reason of fraud or clear mistake, the action becomes simply one for the return of moneys paid for services of stock and carriers never rendered, but which when payment was made were believed to have been rendered. As in the case of goods not delivered, or work ordered not done, the consideration to the party paying has failed. As said by Baron Parke in *Kelly* v. *Solari*, 9 M. & W. 54, 58, "Where money is paid to

another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." See also *Townsend* v. *Crowdy*, 8 C. B. N. S. 477; *Strickland* v. *Turner*, 7 Exch. 208. Reasons for the application of the rule are much more potent in the case of contracts of the government than of contracts of individuals; for the government must necessarily rely upon the acts of agents, whose ignorance, carelessness, or unfaithfulness would otherwise often bind it, to the serious injury of its operations.

The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered; and it is further ordered that this judgment be entered as of the 30th day of October, A.D. 1889, *the day upon which the said cause was submitted to the court for decision, the said defendant in error Barlow having since died.*

FRITTS *v.* PALMER.

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

No. 72. Submitted November 6, 1889. — Decided November 25, 1889.

The constitution of Colorado provided that no foreign corporation should do business in the State without having a known place of business and an agent upon whom process might be served. A statute of the State made provision for the filing by such corporation with the Secretary of State of a certificate showing its place of business and designating such agent or agents, and also a copy of its charter of incorporation, or of its certificate of incorporation under a general incorporation law; and, in case of failure to do so, that each and every officer, agent and stockholder of the corporation should be jointly and severally personally liable on its contracts made while in default. Said act further provided that no corporation, foreign or domestic, should purchase or hold real estate except as provided in the act. The act did not indicate a mode by which a foreign corporation might acquire real estate in Colorado. G.,

Opinion of the Court.

being the owner in fee of a tract of realty in that State, conveyed it by deed of warranty to a corporation organized under the laws of Missouri, which had not then attempted, and did not afterwards attempt to comply with those provisions of the constitution or laws of Colorado. F., the defendant below, claimed through this corporation. Some months after his deed to the corporation, G. executed, acknowledged and delivered a quit-claim deed of the premises to the grantor of P., the plaintiff below: *Held*,

(1) That perhaps the reasonable interpretation of the statute was that a foreign corporation should not purchase or hold real estate in Colorado until it should acquire, in the mode prescribed by the local law, the right to do business in that State;

(2) That these constitutional and statutory provisions were valid so far as they did not directly affect foreign or interstate commerce;

(3) That the company violated the laws of the State when it purchased the property without having previously designated its place of business and an agent;

(4) But that the deed was not thereby necessarily made absolutely void as to all persons and for every purpose, inasmuch as the constitution and laws of Colorado did not prohibit foreign corporations from purchasing and holding real estate within its limits;

(5) That the penalty of personal liability of officers, agents and stockholders in case of non-compliance with the provisions of the statute, having apparently been deemed by the state legislature sufficient to effect its object, it was not for the judiciary to enlarge that penalty, by forfeiting the estate for the benefit of parties claiming under a subsequent deed from the same grantor;

(6) That the grantee under the subsequent quit-claim deed could occupy no better position than the grantor, common to both parties, would have occupied if he had himself brought the action; and that, in that case, it could not have been maintained.

This was an action in the nature of an action of ejectment. Judgment for the plaintiff, to which this writ of error was sued out. The case is stated in the opinion.

Mr. L. C. Rockwell, *Mr. E. A. Reynolds* and *Mr. Bertram Ellis* for plaintiffs in error.

Mr. Joseph Shippen for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action in the nature of ejectment to recover the possession of certain real property in Gilpin County, Colorado, namely, the North Comstock, Grand View, Clipper and Com-

stock lodes, and a building lot in Central City, in the same county, together with the dwelling-house thereon, the fee and possession of all which property were claimed by the plaintiff, the present defendant in error. The defendants admitted their possession of the premises described in the complaint, except the Clipper lode, and alleged their ownership and right of possession of the other property. They distinctly disclaimed all interest in the Clipper lode, and denied that they were or had ever been in possession of it. A trial by jury was waived in writing by the parties, and the case was heard on an agreed statement of facts, upon which the court was asked to declare the law and enter judgment accordingly. Judgment was rendered in favor of the plaintiff for the possession of all the property described in the complaint, including the Clipper lode. The question to be determined is whether the judgment is supported by the agreed facts.

These facts are in substance as follows: The common source of title is William Groshon, who, on the 16th of June, 1877, at Central City, in the State of Colorado, conveyed, with warranty, all the property described in the complaint, to the Comstock Mining Company, a corporation organized under the laws of Missouri for the purpose of carrying on mining business, and with the object expressed in its articles of incorporation, of purchasing, owning and controlling mining property, both real and personal, in the State of Colorado, and of conducting a mining business therewith. This deed was duly recorded in the proper local office on the 25th of June, 1877. Before the purchase from Groshon the company was engaged in the prosecution of its mining business at and near Central City, where it established an office.

On the day of the execution of Groshon's deed, the company made to Ezra D. Fritts its three promissory notes, aggregating thirty thousand dollars, which were intended to be used and were used in part payment of the price of the property conveyed to it; and, in order to secure the payment of the notes, it executed to Thatcher, as trustee, a deed of trust upon the property, except the Clipper lode, conditioned that on default in the payment of either of the notes or the

interest thereon, the trustee might sell and dispose of the said mining property. That deed of trust was duly recorded on the 26th of June, 1877.

On the 5th of January, 1878, default having occurred in the payment of the notes, the deed of trust was foreclosed under the power of sale contained in it, and on that day Thatcher executed, acknowledged and delivered his deed for all said real estate and mining property (except the Clipper lode) to Fritts. That deed was duly recorded January 7, 1878.

The defendants claimed title and possession by virtue of divers mesne conveyances, in due form, from the company and its assigns under the above deed of trust, for all of the property, excepting the Clipper lode, which has never been conveyed by it.

On the 13th of April, 1878, Groshon executed, acknowledged, and delivered his deed of quit-claim of all the real estate and mining property in the complaint described to Samuel S. Porter. That deed was delivered to Porter on the 20th of May, 1878, but has never been recorded. The latter by his deed of quit-claim, executed May 20, 1878, conveyed to defendant Palmer. The latter deed was delivered to the grantee on the 25th of May, 1878, but it remains unrecorded. Afterwards, June 28, 1879, Palmer filed in the office of the clerk and recorder of the county where the property is situated notice, according to law, of the bringing of this suit, and the object thereof.

The Comstock Mining Company at the time of its purchase from Groshon had not, nor has it since that time, complied or attempted to comply with section ten of article fifteen of the constitution of Colorado, nor with sections twenty-three and twenty-four of chapter nineteen of the General Laws of that State, otherwise known as sections 260 and 261 of chapter 19 of the General Statutes of Colorado, 1883, prescribing the terms and conditions upon which foreign corporations may do business in that State.

A copy of the incorporation laws of Missouri, under which this company was organized, was, at the time of its organization, on file in the office of the Secretary of State of Colorado,

but was not filed by it. Its articles of incorporation were filed in the office of the clerk and recorder for Gilpin County, where its business interests were located, on August 10, 1877, and a copy of the incorporation laws of Missouri, under which the company was organized, was also on file in the same office at and after the time the company was organized.

The defendants, during the time of their possession of the property, have held the same in good faith under the above deeds, and have paid taxes legally assessed and levied upon it, to the amount of $400; and plaintiff has paid no taxes thereon. They have put improvements upon the property, in the way of building and repairing the dwelling-house described in the complaint, of the value of $350.

It is clear, from the facts agreed, that the object of Groshon's conveyance to the Comstock Mining Company was to pass to that corporation whatever interest he had in the property. It is equally clear that under the trust deed to Thatcher, the sale and conveyance to Fritts, and the subsequent mesne conveyances to the defendants, the latter acquired whatever interest the Comstock Mining Company got by Groshon's deed to it.

But it is contended that no title or interest whatever passed from Groshon, by his deed of June 16, 1877, even as between him and the company, and, consequently, it was competent for him, at his pleasure, and notwithstanding he received the consideration for which he stipulated, and even after the sale and conveyance of the property under the deed of trust, to make to other parties a quit-claim deed that would override, not only his conveyance to the Comstock Mining Company, but all subsequent conveyances based upon it.

This proposition is based upon certain provisions of the constitution and laws of Colorado relating to foreign corporations.

The constitution of that State declares that "no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Art. XV. § 10.

The statutory provisions, for failing to comply with which

the Comstock Mining Company is alleged to have taken nothing by Groshon's conveyance to it, are these:

"SEC. 260. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided for in this act; and no corporation doing business in the State, incorporated under the laws of any other State, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this State, to the injury or exclusion of any citizen, citizens or corporations of this State who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State until all its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished.

"SEC. 261. Every company incorporated under the laws of any foreign State or kingdom, or of any State or Territory of the United States beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the Secretary of State a copy of their charter of incorporation, or, in case such company is incorporated by certificate under any general incorporation law, a copy of such

certificate and of such general incorporation law, duly certified and authenticated by the proper authority of such foreign State, Kingdom, or Territory." Gen. Stat. Col. 1883, c. 19.

Precisely what was meant by the words, in section 260, "except as provided for in this act," is difficult to tell, since the act does not indicate any particular mode in which a foreign corporation may acquire real estate in Colorado. But, perhaps the reasonable interpretation of the statute is that a foreign corporation shall not purchase or hold real estate in Colorado, for purposes of its business, until it first acquires, in the mode prescribed by the local law, the right to do business in that State.

No question is made in this case — indeed, there can be no doubt — as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 732, this court said that "the right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this court." It may be assumed, therefore, that the Comstock Mining Company, being a corporation of another State, had no right to do business in the State of Colorado until after it had one or more known places of business within its limits, and an authorized agent designated upon whom process could be served, nor until it had made and filed in the proper office the certificate prescribed by section 260 of the statute relating to foreign corporations. It may also be assumed, for the purposes of this case, that this company violated the law of that State when it purchased the premises here in controversy without having, in the mode prescribed by the statutes of Colorado, previously designated its principal place of business in that State, and an agent upon whom process might be served.

But it does not follow that the title to the property conveyed to the Comstock Mining Company remained in Groshon, notwithstanding his conveyance of it to that company, in due form, and for a valuable consideration.

The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in section 262 of the same chapter, which provides: "A failure to comply with the provisions of sections 23 and 24 [sections 260 and 261] of this act shall render each and every officer, agent and stockholder of any such corporation, so failing therein, jointly and severally personally liable on any and all contracts of such company made within this State during the time that such corporation is so in default." The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. If Groshon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded. But the present plaintiff, who asserts title under a quit-claim deed from Groshon made after the property had passed, by the sale under the deed of trust, from the mining company, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the

right to engage in business in the State, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. If the construction placed by the plaintiff upon the constitution and statutes of Colorado be sound, there would be some ground to say that a foreign corporation, taking a conveyance of real estate for purposes of its business in Colorado, before it had acquired the right to do business there, would have no standing in the courts of that State for the purpose of having the estate so acquired protected against trespasses upon it. And yet the contrary has been held by the Supreme Court of Colorado in *Utley &c.* v. *Clark-Gardner Mining Company*, 4 Colorado, 369. That was an action of trespass brought by a New York corporation. The declaration in one count charged the defendants with breaking and entering upon certain claims of the Gardner lode and breaking ore, etc. The other count was *de bonis asportatis*. The defendants filed a special plea in abatement, alleging that the plaintiff was a foreign corporation, and had never complied with the above statutory provisions as to filing a certificate designating its principal place of business in the State and an authorized agent upon whom process could be served. The court, waiving any expression of opinion as to what would be its decision, if the plea had been one in bar of the action, held that the prohibition in respect to foreign corporations, while they extended to the carrying on of business before complying with the laws of the State, did not abridge the right of a foreign corporation to sue in the courts of Colorado.

The views we have expressed are supported by several adjudications in this court in cases somewhat analogous to the present one, among which are those arising under sections 5136 and 5137 of the Revised Statutes of the United States. The first of those sections authorizes national banking associations to loan money on personal security. The other section provides: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: First, such as shall be necessary for its immediate ac-

commodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

In *National Bank* v. *Matthews*, 98 U. S. 621, 627, the question was directly presented whether a national bank was entitled to the benefit of a deed of trust upon real estate, which, with the note described in it, was taken — not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but — for a loan made by the bank at the time the deed of trust was assigned to it. The Supreme Court of Missouri held the deed of trust to be void, in the hands of the bank, because its loan was made upon real estate security in violation of the statute. But this court, after observing that the result insisted upon did not necessarily follow, said: "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." Again: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding, instituted for that purpose."

In *National Bank* v. *Whitney*, 103 U. S. 99, 103, which involved the validity of a mortgage to a national bank, to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principles announced in *National Bank* v. *Matthews*. The court said:

"Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government.' To the same effect are *Swope* v. *Leffingwell*, 105 U. S. 3, and *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 412.

In *Smith* v. *Shelley*, 12 Wall. 358, 361, which was an action of ejectment, the question was collaterally raised as to the validity of the title acquired by a banking institution, under a deed of the premises, in consideration of a certain sum paid by it to the grantor. The bank was created by an act of the territorial legislature of Nebraska, with power "to issue bills, deal in exchange, and to buy and possess property of every kind." But when that act passed, there was in force an act of Congress, which provided that "no act of the territorial legislature of any of the Territories of the United States, incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever, until approved and confirmed by Congress." The act of the territorial legislature incorporating the bank, above referred to, never was approved or confirmed by Congress. It was urged, as an objection to the deed made to the bank — upon which deed one of the parties relied — that it was not a competent grantee to receive title. This court said: "It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the Territory of Nebraska; but it is said, it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained; but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it; and, in such a case, the party who makes a sale of real estate to it is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase. If, prior to the execution of

the deed, there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different." See also *Myers* v. *Croft*, 13 Wall. 291, 295; *Jones* v. *Guaranty and Indemnity Co.*, 101 U. S. 622, 628; *Fortier* v. *New Orleans Bank*, 112 U. S. 439, 451.

To the above cases may be added those holding that an alien may take by deed or devise and hold against any one but the sovereign until office found. *Cross* v. *De Valle*, 1 Wall. 1, 13; *Governeur* v. *Robertson*, 11 Wheat. 332; *National Bank* v. *Matthews*, 98 U. S. 621, 628; *Phillips* v. *Moore*, 100 U. S. 208. Also, those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so. *Cowell* v. *Springs Company*, 100 U. S. 55, 60; *Jones* v. *Habersham*, 107 U. S. 174, 188.

It results from what has been said that the court erred in rendering judgment for the plaintiff for any part of the premises described in the complaint.

The judgment is reversed, with directions to enter judgment upon the agreed statement of facts for the defendants.

Mr. Justice Miller dissenting.

I earnestly dissent from the opinion of the majority of the court. I do not enter into the question of the circumstances under which a foreign corporation can do business within the limits of the State of Colorado under section 23 of the General Statutes of 1883 of that State, nor do I here consider or attach importance to the question of how far a party dealing with a foreign corporation which has not complied with the rules prescribed by the State to enable it to do business in the State is estopped by the presumption that, in making contracts with

it, it has recognized its official existence and its right to contract. I base my dissent in the present case upon the following emphatic language in the laws of that State:

"No foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State except as provided for in this act."

It is very clear that the words "as provided for in this act" have relation to the acts, prescribed for all corporations, of filing with the Secretary of State, and the recorder of deeds of the county in which that business is carried on, the necessary statement of their corporate existence, properly certified, and the appointment of agents in the State residing in its principal place of business. The language I have just cited from this statute is unambiguous, and is not a declaration of powers and rights conferred upon these corporations; but it is prohibitory, and declares that no corporation shall purchase or hold real estate that has not complied with this requirement. It has been a recognized doctrine of this court for a great many years, perhaps a century, that the transfer of title to real estate, whether by inheritance, by purchase and sale, or by any other mode by which title to property is acquired, is rightfully governed by the laws of the State in which the land is situated. The policy of permitting corporations to hold real estate has always been a restricted one. Corporate bodies, whether for public use or for private purposes, have always been subjects of limitation on their right to hold real estate. It may be prohibited altogether. It may be allowed with distinct limitations as to amount either in quantity or in value. In this respect it is wholly within the control of legislative action. I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, or to take property for specific uses, in which the question as to whether they have exceeded that amount or perverted the use may be one for the State alone, and not of any private citizen. But the positive declaration that a corporation shall not purchase or hold real

estate, which is not a grant of power, but an express denial of its power to hold any real estate under the circumstances mentioned, is in my opinion destructive of the right to hold any real estate at all under those circumstances. Whenever it is shown that any of these corporations have not complied with the requirements of the statute, they are forbidden to purchase or *hold* real estate. Any such purchase is therefore void. It is the positive declaration of the law of the land. The title does not pass, and it needs no inquest of the State to establish that fact. The title which would have passed if the corporation had a right to purchase does not pass. It remains in the party who attempted to grant or convey it. The grantee can neither purchase nor hold real estate. The assumption of the opinion of the court is that it may purchase and it may hold real estate. I have not time to give the authorities on this subject. They are numerous; but they are generally applicable to cases in which the granting power of the corporation is wanting in sufficient language to enable it to purchase and hold, and not to statutes which are in their terms prohibitory, forbidding and peremptory.

CLEVELAND *v.* KING.

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

No. 89. Argued and submitted November 8, 1889. — Decided November 25, 1889.

In Ohio it is the duty of a municipal corporation to keep the streets of the municipality in order; and a person receiving injuries in consequence of its neglect so to do, has a right of action at the common law for the damage caused thereby.

A building permit by municipal authorities authorizing the occupation of part of a public street as a depository for building materials, and requiring proper lights at night to indicate their locality, does not relieve the municipality from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the street in such a way as to endanger passers-by in their proper use of it.

Statement of the Case.

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

This is an action to recover damages for personal injuries which the defendant in error, who was the plaintiff below, alleges were sustained by him in consequence of the failure of the city of Cleveland, by its officers and servants, to exercise due care in keeping one of its streets in proper and safe condition for use by the public. At the trial, the city objected to the introduction of any evidence in behalf of the plaintiff, on the ground that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled and the defendant excepted. When the evidence for the plaintiff was concluded, the defendant asked a peremptory instruction in its behalf. This motion was denied, and to that ruling of the court an exception was taken. After the whole evidence was closed, and the court had charged the jury, the defendant asked an instruction to the effect that there was not sufficient legal proof of negligence on the part of the city, its officers or agents, to entitle the plaintiff to recover. This request having been denied, an exception was taken to the ruling of the court. The case having been submitted to the jury, a verdict was returned for ten thousand dollars against the city. Upon that verdict a judgment was rendered for the plaintiff.

The petition, after referring to Bank Street as a common public street and highway in the city of Cleveland for the free passage and travel, at all times, of persons on foot and with horses and vehicles, and averring that, under the statutes of Ohio, the duty rested upon the city to cause the street to be kept open, in repair, and free from nuisances, alleged that the defendant, on the 12th day of November, 1879, wrongfully placed, and permitted to be placed, large quantities of dirt, sand, rubbish, stones, boxes and other materials for building purposes in and across said street at or near and before a building owned by one Rosenfeld, and negligently and wrongfully suffered and permitted the same to extend across and occupy more of the street than was reasonable or

necessary, namely, more than one-half of its width, and to remain and continue on the above day and during the night-time of that day, unprotected and unguarded, without a sufficient number of lights, or in such a manner as to be distinctly seen by those using the street. It was further alleged that, in consequence of such carelessness, negligence and improper conduct on the part of the city, the plaintiff, while lawfully passing in a buggy along Bank Street in the night-time, was, by reason of said dirt, sand, rubbish, stones, boxes and other materials in the street, overturned with great force and violently thrown upon the street, whereby, and without fault or negligence upon his part, one of his legs was broken, and he was otherwise permanently injured and disabled.

The answer of the city put in issue all the material averments of the petition, and, in addition, alleged that if the plaintiff was injured, it was due to his own negligence, and not because of any want of care on the part of the defendant.

At the trial the plaintiff was permitted, against the defendant's objection, to read in evidence two sections of certain ordinances of the city relating to the placing in the streets of material for building purposes. They are as follows:

"SEC. 4. No person shall place or cause to be placed on any street, lane, alley or public ground any material for building purposes without the written permission of the board of city improvements. Such permission shall specify the portion of the sidewalk and street to be used and the period of said use, which shall not exceed two months, and in no case shall any person use more than one-half of the sidewalk and half of the street. The council may at any time revoke such license. At the expiration of the permission or on the revocation of it said persons shall remove said material from the street."

"SEC. 14. Whenever any person or persons, whether contractor or proprietor, shall be engaged in the erection or repairing of any building or other structure whatever within the city, and shall cause or permit any building materials, rubbish or other thing to be placed on any public street, lane, alley or sidewalk, or other place in the city where persons pass and repass; and whenever any person or persons who shall be en-

gaged in constructing any sewer or laying any gas, water or other pipes or conductors in or through any of the streets, lanes, alleys, highways, sidewalks or other places in the city where persons pass and repass, whether by appointment of the city or its agents, or as contractor, it shall be the duty of all such persons to protect, with a sufficient number of lights, the materials, rubbish, goods, wares and merchandise, heaps, piles, excavation or other things so caused or permitted by them to be or remain in or at any of the places above mentioned, and in such manner as to be distinctly seen by all passers-by, and to continue all such lights from dusk until daylight during every night while any obstructions of the above-mentioned description are allowed to remain in or at such places; and every person who shall neglect the duty imposed by this section shall, in addition to the penalty imposed by this chapter, be liable for all damages to persons and property growing out of such neglect."

He was also permitted against the defendant's objection, to read in evidence two permits given by the city, through its board of improvements, one to E. Rosenfeld, dated July 16, 1879, and the other to Frank Kostering, dated September 19, 1879; each permit authorizing the person named therein to occupy one-half of the sidewalk and one-third in width of the street in front of the premises owned by Rosenfeld, during a period of sixty days from the date of the permit, for the purpose of placing building materials thereon, subject, however, to the provisions of the ordinance requiring that such materials be protected "with a sufficient number of lights, from dusk until daylight, during every day that the same shall remain," and to the condition that the person neglecting that duty should be liable to the penalty imposed by the ordinance, and for all damages to person or property growing out of such neglect.

There was evidence before the jury tending to show that when the plaintiff was passing on Bank Street about seven o'clock in the evening of November 12, 1879, the buggy in which he was riding ran against a mortar-box placed by Kostering in the street, and used by him for purposes of building on Rosenfeld's premises, and was overturned, whereby he was

thrown violently to the street, and seriously and permanently injured in his body. There was also evidence tending to show that the obstructions placed in the street by Kostering were not indicated by lights or signals, so as to give warning to persons passing in vehicles; that a greater width of street was occupied by these building materials than was justified by the permits granted by the board of improvements; and that the failure of the plaintiff and of the person driving the buggy in which he was riding, to see the mortar-box in time to avoid running against it, was not due to any want of care upon the part of either, but to the absence of signals or lights upon the box.

There was evidence on behalf of the city tending to show that the plaintiff and the person with whom he was riding might, with reasonable diligence, have seen the mortar-box before the buggy came in contact with it; also that a proper light was placed on the mortar-box about dark of the evening when the accident in question occurred.

The charge to the jury was very full, covering every possible aspect of the evidence, and sufficiently indicating the legal propositions which, in the judgment of the court below, were applicable to the case.

Among other things, the court said: "The plaintiff had the right to the use of the street, in going from the hotel to the depot, unobstructed and free from danger, but subject, however, to such incidental, temporary or partial obstructions as are necessarily occasioned in the building or repair of houses fronting upon the streets over which he passed; but in using the street he must exercise reasonable and ordinary care to avoid obstructions, if any be found thereon. In the nighttime he had the right to suppose, in the absence of signals of danger, that the street was not dangerously obstructed or dangerous to pass over; but in passing over it he must exercise ordinary care and prudence to avoid any dangerous obstructions, both in the observation of obstructions, their locality and character, and the speed used in passing along the street. If any obstructions attracted his attention, he should be more careful to avoid any others that might be in the street and

near the same, or if he knew that there were building materials located in the street in front of a new building, in driving along he must exercise reasonable care to avoid running upon any such obstructions. The city had a right to allow Rosenfeld to use a reasonable part of the street for the purpose of depositing therein building materials with which to erect his building, and the same could rightfully be used by Mr. Kostering, the builder or contractor, for that purpose."

Again: "The principal negligence complained of by the plaintiff is that, being in the night-time, no lights were placed at or near the materials, sufficient to warn him of danger as he passed along the street. Having provided in the permits to Rosenfeld and Kostering, the contractor, that in the night-time sufficient lights should be placed by them at or near materials placed and remaining in the street to warn persons passing along there of dangerous obstructions, the city had a right to suppose such lights were so placed in the night-time. Whilst it was the general duty of the city to keep its streets in safe condition for the use of persons passing over the same, and liable for injuries caused by its neglect or omission to keep them in repair and reasonably safe, yet, in such a case, the basis of the action being negligence, it is not liable for an injury resulting from such negligence unless it had notice or knowledge of the defect that caused the injury before it was sustained: or, in the absence of express or direct notice, such notice or knowledge may be inferred from facts and circumstances showing that such want of proper lights to denote dangerous obstructions existed for a sufficient period of time and in such a public and notorious manner as that the officers representing the city, or those in the employment of the city for the purpose of removing obstructions in the city, in the exercise of ordinary care and diligence, ought to have known of such want of proper guards in the night-time.

"The city is not an insurer of the absolute safety of persons passing along its streets in the night-time. It is only required to exercise ordinary care for such safety, and in judging of what would be ordinary care you are to take into account the great number of streets and their mileage contained in the city. If

the city, or the officers or employés representing it, had such notice or knowledge, direct or implied, as I have stated, then it was its duty to see that proper lights in the night-time were placed at or near the obstructions, such as would be sufficient to warn persons of reasonable and ordinary prudence of the presence of such obstructions, and, failing to do so, it would be liable for injuries resulting from such failure."

Mr. Allan T. Brinsmade, for plaintiff in error, submitted on his brief, citing: *Frazer* v. *Lewiston*, 76 Maine, 531; *Hewison* v. *New Haven*, 34 Conn. 136; *Hewison* v. *New Haven*, 37 Conn. 475; *Hill* v. *Boston*, 122 Mass. 344; *Chase* v. *Cleveland*, 44 Ohio St. 505; *Robinson* v. *Greenville*, 42 Ohio St. 625; *Medical College* v. *Cleveland*, 12 Ohio St. 375; *Clark* v. *Fry*, 8 Ohio St. 358; *Allegheny* v. *Zimmerman*, 95 Penn. St. 287; *Everett* v. *Marquette*, 53 Michigan, 450; *St. Paul* v. *Gilfillan*, 36 Minnesota, 298; *Norristown* v. *Fitzpatrick*, 94 Penn. St. 121; *Campbell* v. *Montgomery*, 53 Alabama, 527; *Lafayette* v. *Timberlake*, 88 Indiana, 330; *Altvater* v. *Baltimore*, 31 Maryland, 462; *Sinclair* v. *Baltimore*, 59 Maryland, 592; *Bartlett* v. *Kittery*, 68 Maine, 358; *Farrall* v. *Oldtown*, 69 Maine, 72; *Smyth* v. *Bangor*, 72 Maine, 249; *Joliet* v. *Seward*, 86 Illinois, 402; *Hume* v. *New York City*, 47 N. Y. 639; *Warsaw* v. *Dunlap*, 112 Indiana, 576.

Mr. E. K. Wilcox, (with whom was *Mr. Richard Bacon*,) for defendant in error cited: *Campbell* v. *Montgomery*, 53 Alabama, 527; *Barnes* v. *District of Columbia*, 91 U. S. 540; *Medical College* v. *Cleveland*, 12 Ohio St. 375; *Robinson* v. *Greenville*, 42 Ohio St. 625; *Cardington* v. *Fredericks*, 46 Ohio St. (not yet reported); *Boucher* v. *New Haven*, 40 Connecticut, 456; *Reed* v. *Northfield*, 13 Pick. 94; *Manchester* v. *Hartford*, 30 Connecticut, 118; *Storrs* v. *Utica*, 17 N. Y. 104; *Buffalo* v. *Holloway*, 3 Selden (7 N. Y.) 493; *Baltimore* v. *O'Donnell*, 53 Maryland, 110; *Detroit* v. *Corey*, 9 Michigan, 164; *Child* v. *Boston*, 4 Allen, 41.

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

By section 2640 of the Revised Statutes of Ohio, Title, Municipal Corporations, it is provided that "the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance." 1 Rev. Stats. Ohio, Title XII, Div. 8, c. 13, Giauque's ed. 600.

The city concedes that, if there was any liability at all on its part, the charge of the court correctly announced the principles of law applicable to the case. If the obstruction in question was on Bank Street unnecessarily, or for an unreasonable length of time, or was there without proper lights or other guards to indicate its locality, and such condition of the street at the time the plaintiff was injured existed with the knowledge of the city, either actual or constructive, for a sufficient length of time to remedy it by the exercise of proper diligence, the liability of the city cannot be doubted, in view of the decisions of the Supreme Court of Ohio and of this court; unless, as contended by the defendant, the plaintiff, notwithstanding the negligence of the city in not keeping the street open and free from nuisance, could, by due care, have avoided the injuries he received.

In the case of *Cardington* v. *Fredericks*, which will appear in 46 Ohio St., the Supreme Court of Ohio construed the above section in connection with section 5144, which, among other things, provides that an action for a nuisance shall abate by the death of either party. That was an action against an incorporated village founded upon a petition alleging that a street used by the public was so unskilfully and negligently constructed and left by the defendant as to be in an unsafe condition, and allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that it was highly dangerous; and that the plaintiff, while lawfully passing along the street, accidentally, and without fault on her part, was precipitated down an embankment, whereby she was greatly bruised and injured.

The court held the action to be one for a nuisance, and, in harmony with the principles announced upon this general

subject in *Barnes* v. *District of Columbia*, 91 U. S. 540, 547, said: "The statute (§ 2640, Rev. Stats.) gives to municipal corporations the care, supervision and control of all public highways, etc., and requires that the same shall be kept open, and in repair, and free from nuisance. In effect it is a requirement that the corporation shall prevent all nuisances therein; and by allowing a street to become so out of repair as to be dangerous, the corporation itself maintains a nuisance, and a suit to recover for injuries thereby occasioned is for damage arising from a nuisance or 'for a nuisance.' The statute does not give a remedy, it but enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law."

This language leaves no room to doubt the liability of the city of Cleveland for the damages sustained by the plaintiff if it was guilty of the negligence charged in the petition, and if the plaintiff was not himself guilty of negligence that materially contributed to his injury. The fact that the permits to Rosenfeld and Kostering only authorized them to occupy one-half of the street for the purpose of depositing building materials thereon, and required them to indicate the locality of such materials by proper lights, during the whole of every night that they were left in the street, did not relieve the city of the duty of exercising such reasonable diligence as the circumstances required, to prevent the street from being occupied by those parties in such a way as to endanger passers-by in their use of it in all proper ways. Whether that degree of diligence was exercised by the city, through its agents; whether its officers had such notice or knowledge of the use of Bank Street, in the locality mentioned, by the parties to whom the above permits were granted, as was inconsistent with the safety of passers-by using it with due diligence; whether, in fact, the materials and obstructions placed by Kostering on the

street were sufficiently indicated by signal lights or otherwise, during the night-time; and whether the plaintiff was himself guilty of such negligence as contributed to his injury, were questions fairly submitted to the jury, and are not open for consideration in this court.

The objection that the petition did not state facts constituting a good cause of action, is not well taken. The allegations were broad enough to admit proof of such knowledge or notice upon the part of the city of the condition of Bank Street as would fix its liability to the plaintiff. If the defendant desired a fuller statement of the cause of action, the proper course was to indicate its wishes by a motion to require the plaintiff to make more specific his allegations as to negligence.

The motion to exclude all evidence upon the part of the plaintiff and the motion for a verdict in behalf of the defendant were properly denied. The question of negligence, in all of its aspects, was peculiarly for the jury.

As no error of law was committed at the trial, the judgment is affirmed.

CONTINENTAL LIFE INSURANCE COMPANY *v.* CHAMBERLAIN.

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

No. 100. Submitted November 13, 1889.— Decided November 25, 1889.

In Iowa it is provided by statute that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." *Held*,

(1) That a person procuring an application for life insurance in that State became by the force of the statute the agent of the company in that act, and could not be converted into the agent of the assured by any provision in the application;

(2) That, if he filled up the application (which he was not bound to do) or made representations or gave advice as to the character of the answers to be given by the applicant, his acts in these respects were the acts of the insurer;

Opinion of the Court.

(3) That a "provision and requirement" (printed on the back of the policy issued on the application), that none of its terms could be modified or forfeitures waived except by an agreement in writing signed by the president or secretary, "whose authority for this purpose will not be delegated" did not change the relation established by the statute of Iowa between the solicitor and the insured.

THE case is stated in the opinion.

Mr. J. L. Carney, for plaintiff in error, cited: *Jeffries* v. *Life Ins. Co.*, 22 Wall. 47; *Aetna Life Ins. Co.* v. *France*, 91 U. S. 510; *Price* v. *Insurance Co.*, 17 Minnesota, 497; *Kelsey* v. *Universal Life Ins. Co.*, 35 Connecticut, 225; *Miles* v. *Conn. Mut. Life Ins. Co.*, 3 Gray, 580; *Campbell* v. *N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Miller* v. *Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Insurance Co.* v. *Mahone*, 21 Wall. 152; *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Chase* v. *Hamilton Ins. Co.*, 20 N. Y. 53; *Shawmut Ins. Co.* v. *Stevens*, 9 Allen, 332; *American Ins. Co.* v. *Neiberger*, 74 Missouri, 167; *Insurance Co.* v. *Mowry*, 96 U. S. 544; *Waynesboro Mutual Fire Ins. Co.* v. *Conover*, 98 Penn. St. 384; *Guernsey* v. *American Ins. Co.*, 17 Minnesota, 104; *Catoir* v. *Am. Life Ins. & Trust Co.*, 4 Vroom (33 N. J. L.) 487; *Walsh* v. *Hartford Ins. Co.*, 73 N. Y. 5; *Van Allen* v. *Farmers' Joint Stock Ins. Co.*, 64 N. Y. 469.

Mr. D. D. Chase, for defendant in error, cited: *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Boetcher* v. *Hawkeye Ins. Co.*, 47 Iowa, 253; *Miller* v. *Mutual Benefit Ins. Co.*, 31 Iowa, 216; *Williams* v. *Insurance Co.*, 50 Iowa, 568; *Walsh* v. *Aetna Life Ins. Co.*, 30 Iowa, 133; *Insurance Co.* v. *Norton*, 96 U. S. 234, 240.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action is upon a policy of insurance on the life of Richard Stevens, the intestate of the defendant in error. There was a verdict and judgment against the insurance company.

The policy recites that "it is issued and accepted upon the

condition that the provisions and requirements printed or written by the company upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed." The signatures here referred to are those of the president and secretary of the company.

The application for insurance was taken in Iowa by one Boak, a district agent of the company in certain named counties of the State, fourteen in number, having written authority "to prosecute the business of soliciting and procuring applications for life insurance policies within and throughout said territory."

Among the numerous questions propounded in the application was the following: "Has the said party [the applicant] any other insurance on his life; if so, where and for what amounts?" The answer, as it appears in the application, is: "No other." That answer, as were all the answers to questions propounded to the applicant, was written by the company's agent, Boak. In reference to the above question and answer, the latter testified: "I asked him [Stevens] the question if he had any other insurance, as printed in the application and as we ask every applicant, and he told me he had certain certificates of membership with certain coöperative societies, and he enumerated different ones, and said he did not know whether I would consider that insurance or not. I told him emphatically that I did not consider them insurance and we had considerable conversation about it. He wanted to know my authority for saying I did not consider them insurance. I gave him my authority — gave him my reasons — and he agreed with me that these coöperative societies were in no sense insurance companies, and in that light I answered the question 'No.' Q. Did you tell him at the time that the proper answer was 'No' after he had stated the facts? A. I did. Q. Who wrote the answer in there? A. I did."

The application also contained these clauses: "And it is hereby covenanted and agreed that the statements and representations contained in this application and declaration shall be the basis of and form part of the contract or policy of in-

surance between the said party or parties signing this application and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true, and any policy which may be issued upon this application by the Continental Life Insurance Company and accepted by the applicant shall be so issued and accepted upon the express condition that if any of the statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition, or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all moneys which may have been paid on account of said policy shall be forfeited to the said company.

"And it is hereby further covenanted and agreed that the officers of the said company at the home office of the said company, in Hartford, Conn., alone shall have authority to determine whether or not the policy of insurance shall be issued on this or any application, or whether or not any insurance shall take effect under this or any application

"And it is hereby further covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance or to any other person shall be binding on the said company, unless such statements or representations be in writing in this application when the said application is received by the officers of the said company at the home office of the said company, in Hartford, Conn."

Among the "Provisions and Requirements" printed on the back of the policy are the following:

"11. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated.

"12. If any statement made in the application for this policy be in any respect untrue this policy shall be void, and all payments which shall have been made to the company on account of this contract shall belong to and be retained by the company:

Provided, however, That discovery of the same must be made by the company and notice thereof given to the assured within three years from the date hereof."

It was admitted on the trial that at the date of Stevens's application he had insurance in coöperative companies to the amount of $12,000.

The company contended in the court below that by the terms of the policy it was discharged from liability by reason of the answer, "No other," to the question as to other insurance on the life of the applicant; its contention being that the certificates of membership in coöperative societies constituted insurance, which should have been disclosed in the written answer to that question.

The court below charged the jury, in substance, that if at the time the application was being prepared, Stevens fully stated the facts to the agent, Boak, and the latter came to the conclusion that certificates in coöperative companies did not mean insurance within the view the defendant took of insurance, and in that view wrote the answer that there was no other insurance, then it was the company, by its agent, that made the mistake, and for such mistake the responsibility cannot be placed upon the assured. Again: "If, therefore, you find under the evidence that Stevens did state fully and fairly the facts in regard to those different insurances in coöperative companies to the agent, and the agent, knowing all these facts, wrote the answer in the application as it is contained therein, the defendant is now estopped from making defence by reason of the fact that Stevens did have insurance in these coöperative companies."

It must be assumed upon the record before us that Boak had authority from the defendant to prosecute the business of soliciting and prosecuting applications for policies; that Stevens acted in good faith, and made to the company's agent a full disclosure of every fact involved in the question as to whether he had other insurance upon his life; that he was informed by the agent that insurance in coöperative societies was not deemed such insurance as the company required to be stated; and that Boak, upon his own responsibility, as agent of the de-

fendant, though with the knowledge and assent of Stevens, wrote the answer "No other," assuring the applicant at the time that such was the proper answer to be made.

Is the insurance company estopped, under these circumstances, to dispute its liability upon the policy? This question, the plaintiff insists, must receive an affirmative answer upon the authority of *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Insurance Co.* v. *Mahone*, 21 Wall. 152, and *New Jersey Mutual Life Insurance Co.* v. *Baker*, 94 U. S. 610; while the defendant contends that the case of *New York Life Insurance Co.* v. *Fletcher*, 117 U. S. 519, requires it to be answered in the negative. An extended statement of those cases is not necessary, and therefore will not serve any useful purpose; for the present case can be determined upon its special facts and upon grounds that did not exist in any of the others.

By the first section of an act of the legislature of Iowa, approved March 31, 1880, entitled "An act relating to Insurance and Fire Insurance Companies," (Laws of Iowa, 1880, c. 211, p. 209,) it is provided that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

The second section, among other things, requires all insurance companies or associations, upon the issue or renewal of any policy, to attach to the policy, or endorse thereon, a true copy of any application or representations of the assured, which, by the terms of the policy, are made a part thereof, or of the contract of insurance, or are referred to therein, or which may in any manner affect the validity of the policy. The third section relates only to policies of fire insurance. The last clause in the act is in these words: "All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

In *Cook* v. *Federal Life Association*, 74 Iowa, 746, 748,

where the question arose as to the scope of the above statute, the Supreme Court of Iowa said: "Considering the title of the act and all of its provisions, it seems to us to be very clear that it applies in its first and second sections to all kinds of insurance. There can be no doubt that section one applies to any and all classes of insurance, whether life, fire, marine, insurance of live stock, or any other kind of insurance; and the same may be said of the second section. To hold otherwise would, it seems to us, be inconsistent with and repugnant to the title of the act. If all insurance was not contemplated, the title would have been, simply, 'An act relating to fire insurance companies.'" The object of this legislation is manifest. But if any doubt on the subject existed, it is removed by the case of *St. Paul Fire & Marine Ins. Co.* v. *Shaver*, 76 Iowa, 282, 286, in which it was said: "The purpose of the statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the assured. Under that provision they were able to avail themselves, in many cases of loss, of defences which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the statute, and it ought to be so interpreted as to accomplish that result."

This statute was in force at the time the application for the policy in suit was taken, and, therefore, governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be

defeated. In his capacity as agent of the insurance company he filled up the application — something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, to the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer "No other," telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in coöperative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the State where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant.

It is true that among the "Provisions and Requirements," printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and in the application, and "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated." But this condition permits — indeed, requires — the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word "insurance" in the question, "Has the said party any other

insurance on his life?" is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in coöperative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in coöperative associations. The answer of "No other" having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance.

The judgment is affirmed.

ROEMER *v.* PEDDIE.

ROEMER *v.* HEADLEY.

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

ROEMER *v.* KUPPER.

ROEMER *v.* JENKINSON.

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

Nos. 120, 121, 132, 133. Argued November 18, 19, 1889. — Decided December 9, 1889.

The claim of letters patent No. 195,233, granted to William Roemer, September 18, 1877, for an improvement in a combined lock and handle for travelling-bags, namely, "The lock-case made with the notched sides *a a*, near its ends to receive and hold the handle-rings B, substantially as herein shown and described," having been inserted by amendment, after his application for a broader claim was rejected, and after he had amended his specification by stating that he dispensed with an extended bottom plate, cannot be so construed as to cover a construction which has an extended bottom plate.

When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it.

IN EQUITY for the infringement of letters patent. The case is stated in the opinion.

Mr. Arthur v. Briesen for appellant.

Mr. Frederic H. Betts, (with whom was *Mr. J. E. Hindon Hyde* on the brief,) for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

These are two suits in equity, brought by William Roemer in the Circuit Court of the United States for the Southern District of New York, one against Thomas B. Peddie and

George B. Jenkinson, and the other against Albert O. Headley; and two suits in equity brought by the same plaintiff in the Circuit Court of the United States for the District of New Jersey, one against Charles Kupper, and the other against Richard C. Jenkinson. All four of the suits are brought for the infringement of letters patent No. 195,233, granted to the plaintiff September 18, 1877, for an improvement in a combined lock and handle for travelling-bags.

The specification says: "Be it known that I, William Roemer, of Newark, in the county of Essex and State of New Jersey, have invented a combined lock and handle holder for travelling-bags, etc., of which the following is a specification: Figure 1 is a top view of my improved combined lock and handle holder. Fig. 2 is a vertical longitudinal section of the same; Fig. 3 is a cross-section on the line *c c*, Fig. 2. Similar letters of reference indicate corresponding parts in all the figures. This invention relates to a new construction of lock-case for travelling-bags, satchels, and the like, whereby the same is made to retain the rings which connect with the handle, [to dispense with an extended bottom plate,] and yet to leave said rings movable in their bearings. The invention consists in forming notches in the sides, near the ends of the lock-case, which notches engage over the lower parts of the handle-rings, all as hereinafter more fully described. In the accompanying drawing, the letter A represents the lock-case, the same being of suitable construction, shape and size, and adapted to be fastened to the frame of the satchel or bag by rivets or other suitable means. The ends of the lock-case are, by notches *a*, which are cut into or formed in its sides, made hook-shaped, as clearly shown in Fig. 2, and these hooks *b*, thus produced, serve to retain the handle-rings B B in place. These handle-rings are, as indicated in Fig. 3, preferably flattened at their lower parts, and are, with these flattened portions, placed under the hooks *b* of the lock-case, and thereby secured to the satchel-frame, to which the lock-case is riveted, as already described. In these hooks, however, the rings are free to vibrate, and free, therefore, to move with the handles, and the rings constitute, in consequence, a flexible connection

between the handle and the bag or satchel. [By making the notches in the sides, the top of the lock-case remains smooth and offers no obstruction to the free movement of handle and rings.]" The claim of the patent is as follows: "The lock-case made with the notched sides *a a* near its ends to receive and hold the handle-rings B, substantially as herein shown and described."

In the application for the patent as filed, the parts above put in brackets were not contained in the specification, and the proposed claim was as follows: "The combination of the lock-case, A, having the hooks, *b*, at its ends, with the rings, B B, which are held in place by said hooks, substantially as herein shown and described." The application as thus made was rejected, by a reference to patent No. 177,020, granted May 2, 1876, to William Simon, for improvements in a travelling-bag. The proposed claim was then stricken out, and the following claim was substituted: "The lock-case, A, having the notches, *a a*, at its under side, and combined with the rings, B B, which are held in said notches, substantially as and for the purpose specified." The application was again rejected, by a reference to the patent to Simon, the Patent Office saying: "The difference between the two devices appears to be, that in applicant's device the notches are cut in the vertical sides of the lock-case, and in the reference they are struck up from the bottom plate." The application was then amended by inserting in the specification the words above put in brackets, and by altering the claim so as to read as it does in the patent as issued.

After an answer and a replication in the suit against Peddie and Jenkinson, proofs were taken on both sides and the court, held by Judge Wheeler, made a decree dismissing the bill, with costs. In the opinion of the court (27 Fed. Rep. 702) it was said: "The improvement patented consists essentially in extending the sides of the lock-case to hold the handle-rings of travelling-bags. The bottom plate of the lock had before been extended for that purpose. By the improvement the bottom plate could be dispensed with, and the side walls of the lock-case made both to enclose the lock and hold the handle-rings.

The defendants use the same thing to hold the handle-rings, but place the lock above it, and do not use it for the side walls of the lock-case. It becomes, by the use which they make of it, an extended bottom plate to the lock, of an improved form. If this piece was patented and the patent is valid to cover it, the defendants do infringe. The file-wrapper and contents are made a part of the case. From them it appears that the orator, in his application for this patent, at first applied for a patent covering the combination of the lock-case with the handle-rings. His claim was rejected on a reference to patent No. 177,020, granted to William Simon, which covered an extended bottom plate to the lock, to hold the handles. The claim was amended, and again rejected on the same reference, and was not granted until the specification was amended to dispense with an extended bottom plate to the lock, and the claim was confined to a lock-case with notched sides near its ends, to receive and hold the handle-rings. This piece, which the defendants use, was the same before as after these amendments. The Patent Office would not grant a patent for it generally in combination with the handle-rings, but only specifically when used for the sides of the lock-case and for the handle-rings. The orator accepted the patent narrowed in that manner, and cannot now be heard to claim that it is any more broad than that in its scope. He invented this particular form of lock-case, and his patent is for that only, and it cannot be construed to cover anything else. *Railway Co.* v. *Sayles*, 97 U. S. 554. The defendants do not use his lock-case, but use an extended bottom plate like his lock-case. It has been argued ingeniously and with plausibility that the same thing is used under a merely different name, but this argument is not in reality well founded. The patent was for a lock-case not only in name but in substance. The defendants do not use this lock-case. They evade the patent not by a mere colorable, but by a substantial evasion."

As the patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock-case, whereby it was made "to dispense with an extended bottom plate," he cannot now

contend that his specification and claims are to be interpreted so as to cover a construction which has an extended bottom plate. By his patent, as issued, he dispenses with the extended bottom plate, and confines his claim to a lock-case with sides notched near its ends to receive and hold the handle-rings — an arrangement not found in the defendants' structure. In that, the lock and the handle-fastenings are combined with the extended bottom plate, as in the Simon patent of May 2, 1876. The lock-case of the defendants does not have notches in its sides, but the notches are in the sides of an extended struck-up bottom plate, such extended bottom plate being expressly excluded from the construction by the specification of the plaintiff's patent.

This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. *Leggett* v. *Avery*, 101 U. S. 256; *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222, 228; *Fay* v. *Cordesman*, 109 U. S. 408; *Mahn* v. *Harwood*, 112 U. S. 354, 359; *Cartridge Co.* v. *Cartridge Co.*, 112 U. S. 624, 644; *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63; *Shepard* v. *Carrigan*, 116 U. S. 593, 597; *White* v. *Dunbar*, 119 U. S. 47; *Sutter* v. *Robinson*, 119 U. S. 530; *Bragg* v. *Fitch*, 121 U. S. 478; *Snow* v. *Lake Shore Railway Co.*, 121 U. S. 617; *Crawford* v. *Heysinger*, 123 U. S. 589, 606, 607.

It is contended by the defendants, that, in view of the prior state of the art, the patent is invalid. We do not consider it necessary to examine that question, because, for the reasons before assigned, we are of opinion that the decree must be affirmed; and as, in each of the other three cases, there is a stipulation that the suit may be argued here, on appeal, on the record in the Peddie suit, and abide the result of that suit, and as the decree in each of those other three cases was a decree dismissing the bill with costs, each of such decrees is

Affirmed.

CLEAVELAND *v.* RICHARDSON.

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

No. 125. Argued November 21, 1889. — Decided December 9, 1889.

A creditor made a compromise with his debtor for sixty cents on the dollar, and subsequently sued him to recover the balance of the claim, on the ground of fraudulent action by the debtor in obtaining the compromise, and that the debtor had violated his agreement not to voluntarily pay any other creditor more than sixty per cent: *Held*, that he could not recover because —

(1) There was no breach of good faith on the part of the debtor, and no misrepresentation as to his assets, and no false answer made by him to any question;

(2) The payment of more than sixty per cent to another creditor having been made when the latter had an attachment suit against the debtor, which was about to be tried, was not a voluntary payment within the meaning of the agreement.

This was an action of assumpsit, brought in the Circuit Court of the United States for the Northern District of Illinois, in September, 1884, by George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter and Harrison Gardner, partners composing the firm of George C. Richardson & Co., against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, partners composing the firm of Cleaveland, Cummings & Woodruff.

The declaration contained the money counts, and annexed to it is a copy of an account showing various items of merchandise sold by the plaintiffs to the defendants, in August, September and October, 1883, amounting in debit items to $12,125.25, with a credit item of cash, December 31, 1883, amounting to $7275.15, leaving a balance due to the plaintiffs, on the last-named day, of $4850.10.

The defendants were served with process and put in various pleas, and there were replications and rejoinders, raising issues covered by the findings of the court on the trial. The defendant Woodruff having died, it was ordered that the suit proceed

against the surviving defendants. A trial before a jury was commenced, but a juror was withdrawn, and the parties duly waived a trial by jury and consented that the case be tried by the court.

The court filed special findings as follows:

"1. James O. Cleaveland, Cornelius B. Cummings and Washington Libbey, three of the defendants, with one William F. Shelley, on the 31st of December, 1881, formed a limited copartnership under the statute of the State of Illinois in that behalf, under the name of 'Cleaveland, Cummings & Shelley,' to do a wholesale business in merchandise in Chicago, in which the said Washington Libbey was a limited partner, having put in $50,000 of capital.

"2. About the 1st of May, 1883, the said Shelley went out of the firm, and Charles W. Woodruff, the other defendant in this cause, came into the firm, which assumed the name of 'Cleaveland, Cummings & Woodruff,' and continued to do business until as hereinafter stated.

"3. Said firm of 'Cleaveland, Cummings & Woodruff' intended, as between themselves, to do business as a limited partnership, but they did not take the steps required by law to make said firm a limited partnership under the statute of Illinois in that behalf.

"4. The plaintiffs sold to the firm of Cleaveland, Cummings & Woodruff, upon the 28th, 29th and 30th of August, 1883, and upon the 14th and 15th of September, 1883, merchandise to the amount of $8064.03, payable by the said firm in sixty days from September 15th; and on the 24th of October sold to Cleaveland, Cummings & Woodruff merchandise to the amount of $1291.83, payable in sixty days from November 1st; and the plaintiffs were also the holders of two notes of said Cleaveland, Cummings & Woodruff, dated Chicago, September 15, 1883, due in four months from the date thereof, payable to the order of the defendants and endorsed by them, one for $1347.99 and one for $1421.40, which two notes matured January 18, 1884; said several amounts aggregating $12,125.25.

"5. On the 30th of October, 1883, Washington Libbey paid

to James O. Cleaveland $1000 for his interest in the firm of Cleaveland, Cummings & Woodruff, and said James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey signed and delivered to James O. Cleaveland an instrument in writing as follows, viz.:

"'The copartnership heretofore existing between James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, under the firm name of Cleaveland, Cummings & Woodruff, has this day been dissolved by mutual consent, and such dissolution to take effect Nov. 1, 1883. All accounts and indebtedness due the late firm of Cleaveland, Cummings & Woodruff must be paid to Cummings, Woodruff & Brown, successors to Cleaveland, Cummings & Woodruff, by whom all liabilities of the late firm must be paid and said Cleaveland held harmless therefrom.

"'Dated Chicago, Illinois, Oct. 30, A.D. 1883.

"'JAMES O. CLEAVELAND.
"'C. B. CUMMINGS.
"'CHARLES W. WOODRUFF.
"'WASHINGTON LIBBEY.'

"6. It was contemplated, October 30, 1883, that a new firm would be formed, composed of Cornelius B. Cummings, Charles W. Woodruff and Swan Brown, as general partners, and Washington Libbey, as special partner, but said firm was never formed, but the said Cleaveland supposed it was so formed when he sold out his interest to the said Libbey.

"7. The firm of Cleaveland, Cummings & Woodruff stopped business on or before November 14, 1883. Said firm owed for borrowed money about $179,000 which was unsecured, and for merchandise about $461,000; and the assets of said firm were sufficient to pay the borrowed money in full and not quite sixty per cent on the dollar upon the mercantile debts. The said Washington Libbey was reputed to be a man of large wealth.

"8. On the 14th of November, 1883, all the bills receivable, notes and accounts of Cleaveland, Cummings and Woodruff

were sold to Columbus R. Cummings for his two notes for $201,110.43, one for $110,000, which was delivered to the Union National Bank in full payment of borrowed money due by said firm to said bank. The other, for $91,110.43, was delivered to a member of said firm of Cleaveland, Cummings & Woodruff. Columbus R. Cummings was a brother of Cornelius B. Cummings, and a director in the Union National Bank, to which he had introduced said firm, and felt in honor bound to see that the bank suffered no loss.

"9. Immediately thereafter, Cleaveland, Cummings & Woodruff sent J. J. Knickerbocker, as their attorney, to New York, and proposed to the mercantile creditors of that firm to pay them sixty cents on the dollar of their respective claims. When application to the plaintiffs was made to accept sixty cents on the dollar of their claims, some had settled at that rate and some had not. The attorney of Cleaveland, Cummings & Woodruff explained the situation of the assets of Cleaveland, Cummings & Woodruff, saying that the borrowed money was to be paid in full, which would not leave enough to pay quite sixty per cent of the remaining indebtedness. Libbey's liability as a member of the firm was spoken of, when said attorney stated to the plaintiffs that he had not had opportunity to examine into the question and was not in possession of information to know whether Libbey could make a successful defence or not, but that it was a question they could investigate for themselves. One of said plaintiffs said to said attorney they had sold no goods to the defendants on the strength that Libbey was more than a special partner; that no credit had been given to the firm on the faith that Libbey sustained any other relation to it; that Libbey had lost his special capital; and that they had no desire to make him pay more. It does not appear, however, from the evidence, that the defendants, or their attorney, communicated to the plaintiffs the fact that Libbey had signed the instrument in writing referred to in the fifth finding, or that he made any statement as to Libbey's financial ability to pay the debts of said firm. The plaintiffs at first refused, but about the 29th of December, 1883, upon the receipt of the sum of

$7275.15, which was sixty per cent of their entire claim, they, by their agent, Walter M. Smith, executed and delivered to the said John J. Knickerbocker, the attorney for the defendants, at Chicago, an instrument in writing, as follows:

"'For and in consideration of the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$ ($7275.15) dollars, to us in hand paid by John J. Knickerbocker, of Chicago, Ill., the receipt whereof is hereby acknowledged and confessed, we have sold, assigned, transferred and delivered, and do hereby sell, assign, transfer, set over and deliver to said Knickerbocker, his heirs, executors, administrators and assigns the above and foregoing claim in our favor and against the late firm of Cleaveland, Cummings & Woodruff, and all other claims and demands which we now have or might or could have against the said Cleaveland, Cummings & Woodruff, by reason of the happening of any matter or thing from the beginning of the world to the day of the date hereof, without recourse to us, and authorize and empower said Knickerbocker to sue for, collect, settle, compound and give acquittance therefor as fully as we could do in person.

"'In witness whereof we have hereunto set our hand and seal this 29th day of December, 1883.

"'George C. Richardson & Co., [seal.]
"'Per Walter M. Smith, [seal.]

"Attached to said instrument are the following:

"'Chicago, *Sept.* 15, 1883.

"'Four months after date we promise to pay to the order of ourselves one thousand three hundred and forty-seven $\frac{99}{100}$ dollars at the Mechanics' National Bank, N.Y., value received.

"'Due Jan'y 18, 1884.

"'$1347.99. Cleaveland, Cummings & Woodruff.'

"(Endorsed:) 'Cleaveland, Cummings & Woodruff.'

"'Chicago, *Sept.* 15, 1883.

"'Four months after date we promise to pay to the order of ourselves one thousand four hundred and twenty-one dol-

lars and $\frac{41}{100}$ at the Mechanics' National Bank, N.Y., value received.

"'Due Jan'y 18, 1884.

"'$1421.41. CLEAVELAND, CUMMINGS & WOODRUFF.'

"(Endorsed:) 'Cleaveland, Cummings & Woodruff.'

"'Mess. Cleaveland, Cummings and Woodruff to George C. Richardson & Co., debtors.

"'1883.

"'Aug.	28.	To mdse.,	60 days,	Sept. 15	. . . .	333 94
"'	29.	"	"	"	. . . .	853 79
"'	"	"	"	"	. . . .	156 06
"'	30.	"	"	"	. . . .	859 35
"'	"	"	"	"	. . . .	4783 65
"'Sept.	14.	"	"	"	. . . .	324 74
"'	15.	"	"	"	. . . .	227 17
"'	"	"	"	"	. . . .	525 33
"'Oct.	24.	"	"	Nov. 1.	. . . .	1291 83
						9355 86'

"And Charles W. Woodruff, one of the said defendants, at the same time, and as part of the same arrangement, delivered to the said agent of the plaintiffs an instrument in writing as follows, viz.:

"'John J. Knickerbocker. Jesse Holdom.

"'Knickerbocker & Holdom, attorneys-at-law, 164 La Salle St.

"'Chicago, ———, 188–.

"'In consideration of a compromise this day made by Messrs. Geo. C. Richardson & Co. and Messrs. Jay, Langdon & Co., of New York City, of their respective claims against the late firm of Cleaveland, Cummings & Woodruff, of Chicago, Ill., the said Cleaveland, Cummings & Woodruff stipulate and agree not to pay voluntarily to any of their creditors holding claims in excess of one thousand dollars, to exceed sixty per cent on the dollar in settlement: Providing, however, that the payment of attorneys' fees and court costs in all cases

where suits have been heretofore or may hereafter be commenced shall not be considered as an evasion or violation of this agreement.

"'CLEAVELAND, CUMMINGS & WOODRUFF.

"'Dec. 29th, 1883.'

"10. In April, 1884, all the mercantile debts of Cleaveland, Cummings & Woodruff had been settled at sixty cents and released except about $88,000. The firm of Vietor & Achelis had not released their claim, but had brought a suit by attachment thereon against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, which was about to be tried. The attorney of Cleaveland, Cummings & Woodruff paid to Vietor & Achelis sixty cents on the dollar of their claim, who thereupon released their said claim; but at the same time said attorney of Cleaveland, Cummings & Woodruff gave his check (which was afterwards paid) to the attorneys of Vietor & Achelis, for twenty-five per cent on the dollar of said claim, and said attorneys remitted twenty of said twenty-five per cent to Vietor & Achelis. This payment to the attorneys of Vietor & Achelis was a cover under which Vietor & Achelis were to and did receive on their claim more than sixty per cent, and such payment was made, after Vietor & Achelis had refused to take sixty per cent, by agreement between the attorneys of Cleaveland, Cummings & Woodruff and Vietor & Achelis that Vietor & Achelis should receive eighty per cent.

"11. The amount due on the original claim is $4850.10, and the interest thereon from December 29th, 1883, to April 14th, 1886, is $679.35, making $5529.45 in all."

Thereupon a judgment was entered, which stated that the court found the issues for the plaintiffs, and assessed their damages at $5529.45, and overruled a motion by the defendants for a new trial, and ordered that the plaintiffs recover from the defendants Cleaveland, Cummings and Libbey, survivors of Woodruff, $5529.45 damages and $147.80 costs. To review this judgment, the defendants brought a writ of error.

There was a bill of exceptions, which stated that both par-

Citations for Plaintiffs in Error.

ties adduced evidence tending to prove the issues on their respective sides; that, when the written paper dated October 30, 1883, set forth in the fifth special finding, was offered in evidence, the defendants objected to its introduction, on the ground that it was incompetent and irrelevant, but the court overruled the objection and admitted the paper in evidence, and the defendants excepted; that the plaintiffs also offered in evidence the paper dated December 29, 1883, signed "Cleaveland, Cummings & Woodruff," set forth at the close of the ninth special finding; that the defendants objected to its introduction, on the grounds of variance and incompetency, but the court overruled the objection and admitted the paper in evidence, and the defendants excepted; that evidence was introduced touching the matters named in the tenth special finding, and the defendants adduced evidence tending to show that no payment was made to either of the mercantile creditors by preference, or with a view to discriminate between one of the said creditors and another; that the defendants objected to the evidence tending to show that Vietor & Achelis were paid more than sixty per cent, on the ground that such payment, if made as claimed by the plaintiffs, was not made voluntarily; that the court overruled the objection, and held that, under the contract of December 29, 1883, signed "Cleaveland, Cummings & Woodruff," any payment over sixty per cent was made voluntarily, unless such claim had gone to judgment; that the defendants excepted to such ruling; and that it appeared from the evidence that the borrowed money was paid in full during November, 1883, and each of the mercantile creditors received sixty per cent on their claims, from Cleaveland, Cummings & Woodruff.

Mr. James S. Harlan, (with whom was *Mr. S. S. Gregory* on the brief,) for plaintiffs in error, cited: *Kingsley* v. *Kingsley*, 20 Illinois, 203; *Potter* v. *Green*, 6 Allen, 442; *Brooks* v. *White*, 2 Met. (Mass.) 283; *Goodnow* v. *Smith*, 18 Pick. 414; *Sibree* v. *Tripp*, 15 M. & W. 23; *Serviss* v. *McDonnell*, 107 N. Y. 260; *Graham* v. *Meyer*, 99 N. Y. 611; *Carey* v. *Barrett*, 4 C. P. Div. 379; *Chicago & Alton Railroad* v. *Chicago*, *Ver-*

milion &c. Coal Co., 79 Illinois, 121; *Radich* v. *Hutchins*, 95 U. S. 210, 213; *In re Sturges*, 8 Bissell, 79.

Mr. J. R. Doolittle, for defendants in error, cited: 2 Parsons Contr. 6 ed. 671, 672; *Serviss* v. *McDonnell*, 107 N. Y. 260, 265; *Hefter* v. *Cahn*, 73 Illinois, 296, 300; Bump on Composition, 20, 23; *Seving* v. *Gale*, 28 Indiana, 486; *Elfelt* v. *Snow*, 2 Sawyer, 94, 106; *Hoare* v. *Dawes*, 1 Doug. 371; *Robinson* v. *Wilkinson*, 3 Price, 538; *Graham* v. *Meyer*, 99 N. Y. 611; *Dambmann* v. *Schulting*, 75 N. Y. 55; *S. C.* (2d trial) 85 N. Y. 622, 623; *Carey* v. *Barrett*, 4 C. P. Div. (1879) 379, 381, 382; *Kingsley* v. *Kingsley*, 20 Illinois, 203; *Miller* v. *Manice*, 6 Hill, 114; *Wann* v. *McNulty*, 2 Gilman (Ill.) 355; *Bradshaw* v. *Combs*, 102 Illinois, 428, 433; 1 Greenleaf Ev., 12 ed. 34, § 284; *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Lewis* v. *Seabury*, 74 N. Y. 409; *Chapin* v. *Dobson*, 78 N. Y. 74.

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

It is contended for the plaintiffs that their assignment to Knickerbocker was not binding upon them, because the defendants did not disclose to them the financial standing of Libbey, nor the fact of his liability as a general partner in the firm of Cleaveland, Cummings & Woodruff, nor the liability in regard to the debts of that firm assumed by him by the paper set forth in the fifth finding.

But the ninth finding sets forth fully what took place between Knickerbocker and the plaintiffs, on the visit of the former to the latter, at New York, to propose to them to accept from the defendants sixty cents on the dollar. That finding states that Knickerbocker explained the situation of the assets of Cleaveland, Cummings & Woodruff, saying that the borrowed money was to be paid in full, which would not leave enough to pay quite sixty per cent of the remaining indebtedness (a fact which was true, according to the seventh finding); that Libbey's liability as a member of the firm was spoken of, when Knickerbocker stated to the plaintiffs that he

had not had opportunity to examine into the question and was not in possession of information to know whether Libbey could make a successful defence or not, but that it was a question they could investigate for themselves; and that one of the plaintiffs said to Knickerbocker that they had sold no goods to the defendants "on the strength that Libbey was more than a special partner," that no credit had been given to the firm on the faith that Libbey sustained any other relation to it, that Libbey had lost his special capital, and that they had no desire to make him pay more. The ninth finding does not state that Knickerbocker was in possession of any information such as that which he stated to the plaintiffs he was not in possession of.

The ninth finding further says that it does not appear from the evidence that the defendants or Knickerbocker communicated to the plaintiffs the fact that Libbey had signed the paper set forth in the fifth finding, or that Knickerbocker made any statement as to Libbey's financial ability to pay the debts of the defendants' firm. It is not shown that Knickerbocker made a false answer to any inquiry put to him by the plaintiffs.

It thus appears that Libbey's liability as a member of the defendants' firm was spoken of between Knickerbocker and the plaintiffs; that Knickerbocker made to them no representation that Libbey was not liable, but substantially stated to them that the question of Libbey's liability was a matter to be examined into, and one which they could investigate for themselves; that the plaintiffs communicated to Knickerbocker at the time the idea that, in their dealings with the defendants, they had always acted on the view that Libbey was only a special partner; and that Knickerbocker did not state to the plaintiffs that Libbey was not financially able to pay the debts of the defendants' firm.

The exact date of this interview in New York, between Knickerbocker and the plaintiffs, does not appear, but it would seem, from the eighth and ninth findings, that an interval of between five and six weeks must have elapsed between the time of that interview and the 29th of December, 1883, when the assignment to Knickerbocker was executed.

It is not found by the court that it was known to the defendants' firm or to Libbey that the latter was not merely a special partner; nor is it found that the defendants were guilty of any fraudulent concealment. The suggestion by Knickerbocker to the plaintiffs that there was a question as to the liability of Libbey as a general partner, was full enough to put them on inquiry, and to call upon them to investigate the question for themselves, during the five or six weeks that elapsed before they made the assignment to Knickerbocker.

As to the statement in the ninth finding, that it does not appear that the defendants or Knickerbocker communicated to the plaintiffs the fact that Libbey had signed the paper set forth in the fifth finding, it is to be remarked that that paper sets forth that the liabilities of the defendants' firm were to be paid by the proposed new firm of Cummings, Woodruff & Brown; and that the sixth finding states that it was contemplated, on the day that paper bears date, that a new firm would be formed, composed of Cornelius B. Cummings, Charles W. Woodruff and Swan Brown, as general partners, and Washington Libbey as special partner, but that such new firm was never formed, although Cleaveland supposed it was so formed when he sold out to Libbey his interest in the firm of Cleaveland, Cummings & Woodruff, on the day that paper was signed. As the new firm was never formed, that paper had no effective force at the time of the interview between Knickerbocker and the plaintiffs, or at the time the assignment to Knickerbocker was made. Besides, Libbey was to be only a special partner in the new firm.

We are unable to see, in this case, any breach of good faith on the part of the defendants, or any misrepresentation as to the assets of their firm, or any false answer by Knickerbocker to any question put to him by the plaintiffs.

It is found as a fact, by the court below, that Cleaveland, Cummings and Libbey, with one Shelley, in December, 1881, formed a limited copartnership under the statute of Illinois, under the name of "Cleaveland, Cummings & Shelley," in which Libbey was a limited partner, having put in $50,000 of capital; that, about the 1st of May, 1883, Shelley went out of

the firm, and Woodruff came into it, the firm being then called "Cleaveland, Cummings & Woodruff;" and that that firm intended, as between its members, to do business as a limited partnership, but did not take the steps required by law to make itself a limited partnership under the statute of Illinois. It is not found that either Cleaveland, or Cummings, or Woodruff, or Libbey, supposed at any time that the copartnership was other than a limited one; and it distinctly appears, by the ninth finding, that the plaintiffs, in selling their goods to the defendants, all the time regarded Libbey as only a special partner.

In a case very like the one before us (*Dambmann* v. *Schulting*, 75 N. Y. 55) it was held that a party can commit a legal fraud, in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice, for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make; that where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had; that ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; and that, as to such facts, the party must rely upon his own vigilance, and, if not imposed upon or defrauded, will be held to his contract. That was an action brought to set aside a release under seal, on the ground that it was inoperative, because obtained by misrepresentation and a concealment of material facts. It was not found that there was any fraudulent misrepresentation, and there was none in fact, and there was no misrepresentation of any kind, nor was there any fraudulent concealment of any facts; nor was any statement or artifice used to throw off from his guard or to entrap or mislead the party executing the release. The court says in its opinion: "A party buying or selling property, or executing instruments, must, by inquiry or

examination, gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had." These views were reaffirmed when the case was again before the court, in 85 N. Y. 622.

In *Graham* v. *Meyer*, 99 N. Y. 611, it was held that a compromise made by a debtor with his creditor cannot be assailed on the ground that the debtor omitted to disclose his financial condition; and that where he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. It was claimed in that case that, although there was a failure to show that any fraudulent representations were made on the part of the debtor to induce the compromise, yet it ought to be set aside on account of the undue concealment by the debtor and his attorney of the true condition of the estate of the debtor, which he had assigned under a general assignment for the benefit of his creditors. The court said: "But the defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations, and did nothing to mislead Graham, or prevent him from inquiring, or to throw him off from his guard. They negotiated at arms' length. The defendant was in no trust or confidential relation with him. It is true that he had made an assignment, and had thereby created a trust for Graham's benefit. But he was not the trustee. He bore the simple relation to him of debtor, and he had the right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage which his superior skill, foresight and knowledge may give him. The business of the world can be conducted upon no other basis. If either party desires information from the other, he must ask for it; and then he must not be misled or deceived by answers given. These views are fully sustained by the case of *Dambmann* v. *Schulting*, 75 N. Y. 62, and the court below was not mistaken in holding that that case was a controlling authority for the decision it made. The principles of law laid down in that case were in no way im-

pugned or questioned when the case again came before this court, in 85 N. Y. 622, but they were reaffirmed."

As to Libbey's financial ability, the seventh finding states that he "was reputed to be a man of large wealth," not that he was a man of large wealth. The failure of Knickerbocker to make any statement as to Libbey's financial ability to pay the debts of the defendants' firm cannot give rise to any inference of concealment or fraud, because the importance of Libbey's financial ability depended entirely upon whether he was a special or a general partner; and the statement made by one of the plaintiffs to Knickerbocker, that they had acted, in their dealings with the defendants' firm on the view that Libbey was only a special partner, joined with the fact that Knickerbocker distinctly suggested to them an investigation of the question as to the character of Libbey's liability as a member of the firm, shows that there was no duty on the part of Knickerbocker, as representing the defendants, to make any statement as to Libbey's actual or reputed financial ability.

The only remaining question is as to whether the defendants violated the agreement made by them in the paper signed in their firm name, dated December 29, 1883, set forth in the ninth finding, "not to pay voluntarily to any of their creditors holding claims in excess of one thousand dollars, to exceed sixty per cent on the dollar in settlement."

It appears by the tenth finding that, in April, 1884, all the mercantile debts of the defendants' firm had been settled at 60 cents and released, except about $88,000; that the firm of Vietor & Achelis had not released their claim, but had brought a suit by attachment thereon, against Cleaveland, Cummings, Woodruff and Libbey, which was about to be tried; that the attorney of the defendants' firm paid to Vietor & Achelis 60 cents on the dollar of their claim, which they thereupon released, and that at the same time said attorney gave his check, which was afterwards paid, to the attorneys of Vietor & Achelis, for 25 per cent. on the dollar of said claim, and the latter attorneys remitted 20 of said 25 per cent to Vietor & Achelis; that this payment was a cover under which Vietor & Achelis were to and did receive on their claim

more than 60 per cent, and such payment was made, after Vietor & Achelis had refused to take 60 per cent, by agreement between the attorneys of Cleaveland, Cummings & Woodruff, and of Vietor & Achelis, that the latter should receive 80 per cent.

We are of opinion that the facts set forth in the tenth finding fail to show that the payment of the 20 per cent to Vietor & Achelis was a voluntary payment. They had brought a suit by attachment on their claim, against their debtors, and the suit was about to be tried. There was evidently no defence to it, and a judgment for the full amount of it would be recovered, and it was secured by attachment. A settlement of the entire claim for 80 per cent would be a saving of 20 per cent, and would, to that extent, increase the assets of the firm, which were not quite sufficient to pay the 60 cents on the dollar which the firm proposed to pay on the mercantile debts, and which they had paid, by April, 1884, and prior to the transaction with Vietor & Achelis, on debts amounting to $373,000. Under these circumstances, the payment of the 20 per cent to Vietor & Achelis was not voluntary.

It appears by the bill of exceptions that the defendants objected to the evidence tending to show that Vietor & Achelis were paid more than 60 per cent, on the ground that such payment was not made voluntarily, but that the court held that, under the paper of December 29, 1883, signed by Cleaveland, Cummings & Woodruff, any payment over 60 per cent was made voluntarily, unless the claim had gone to judgment. If the claim had gone to judgment, the payment over 60 per cent would have been 40 per cent; and we do not see that the payment of the 20 per cent, at the time it was made, was any the less involuntary than would have been the payment of the 40 per cent after judgment had been obtained.

In *Carey* v. *Barrett*, 4 C. P. Div. 379, certain creditors of the defendant signed an agreement, to which the plaintiff assented, setting forth that they, in consideration of ten shillings in the pound on their respective debts, agreed to accept the same in discharge of those debts, "the whole of the creditors receiving not exceeding a like sum in discharge of their

debts." At the time the agreement was entered into, it was known that the debtor was being sued by a creditor for a sum of money which was afterwards paid in full the day before the cause was ripe for trial. In consequence of this, the plaintiff sued the defendant to recover a part of his unpaid debt. The court (Lord Coleridge, C. J., and Lindley, J.) held that the agreement of compromise was limited to the creditors who signed it, and that, even if that were not so, the payment to the creditor who was paid in full, being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void. Lord Coleridge said that the payment in full "was not the less a payment under process of law, because the debtor did not wait to incur the expense of a judgment and execution."

In *Radich* v. *Hutchins*, 95 U. S. 210, 213, it is laid down that where there is an actual or threatened exercise of power possessed over the property of another by the party exacting or receiving a payment, there is coercion or duress, which will render a payment involuntary; and the case of *Mayor of Baltimore* v. *Lefferman*, 4 Gill, 425, is cited, which holds, that when a payment is made to emancipate property from an actual and existing duress imposed upon it by the party to whom the money is paid, the payment is to be regarded as compulsory.

The judgment is reversed, and the case is remanded to the Circuit Court with a direction to enter judgment for the defendants on the findings of fact.

Mr. Justice Miller dissented.

Mr. Chief Justice Fuller, having been of counsel in this case, did not sit in it or take any part in its decision.

UNITED STATES *v.* DAVIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 1033. Submitted November 4, 1889. — Decided December 9, 1889.

A regulation by the President to fix the length of service and compensation of special deputy marshals, or supervisors of elections, appointed in pursuance of the provisions in Rev. Stat. §§ 2012, 2016 and 2021, if it has any validity, cannot have a retroactive effect.

THE case is stated in the opinion.

Mr. Assistant Attorney General Cotton for appellants.

Mr. Charles C. Lancaster for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

On the 2d day of December, 1887, the appellee, Tyler Davis, brought suit against the United States in the District Court of the United States for the District of Maryland, under the act of March 3, 1887, 24 Stat. 505, giving to the District Courts of the United States concurrent jurisdiction with the Court of Claims in suits against the United States where the amount in dispute does not exceed $1000, (with a few exceptions not necessary to be considered in this case,) to recover the sum of $25, alleged to be a balance due him for services performed as a special deputy marshal at the Congressional election of 1886, in the city of Baltimore, in that State.

Issue having been joined upon a demurrer filed by the plaintiff to the answer of the United States, the court found the facts and the law in favor of the plaintiff, and rendered judgment in his favor for the amount demanded. The United States appealed.

At the last term of this court the case was before us on a motion to dismiss the appeal upon the ground that the United States were not entitled to appeal from a judgment of the District Court against them where the amount in dispute was less than $5000. The motion was denied, the court holding

that, under the act of March 3, 1887, *supra*, appeals from the District Court were governed by the same law as applied in the case of appeals from the Court of Claims in like cases. 131 U. S. 37. The case is now here on its merits.

There is no dispute as to the facts. As found by the court below, they are as follows:

"(1) The plaintiff was duly appointed and commissioned special deputy marshal of election for the 18th ward of Baltimore City, in the State of Maryland, by George H. Cairnes, Esq., United States marshal for the district of Maryland, on the 3d day of September, A.D. 1886, in pursuance of section 2021 of the United States Revised Statutes, and the supplements and amendments thereto, and he duly qualified and entered upon his duties.

"(2) The laws of Maryland governing registration for Congressional and other elections in the city of Baltimore require that the officers of registration, for the purpose of correcting the lists of qualified voters, shall sit with open doors in the several wards of the city, from 9 A.M. to 9 P.M., for fifteen successive days, commencing on the first Monday of September, and afterwards, for the purpose of revising the lists, for three (3) successive days, commencing on the —— Monday of October.

"(3) The plaintiff, in pursuance of his said appointment, and of the provisions of section 2016 of the Revised Statutes, which authorized and required the supervisors of elections to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress, and to personally inspect and scrutinize such registration, and in pursuance of section 2021, which made it his duty, when required thereto, to aid and assist the supervisors of election in the verification of any lists of persons who may have registered, did attend to said registration in the said ward for which he was appointed for the purpose of aiding and assisting the supervisors of election, for fifteen days in September, A.D. 1886, and for three days in October, 1886, being October 4th, 5th and 6th in said year.

"(4) The United States marshal for this district, on the 10th of October, 1886, received from the Attorney General of the United States a circular letter, in which he notified the marshal that 'it is not expected that supervisors and deputy marshals will receive compensation for more than five days' services, and they should be so informed. Within this time all can be done, it is thought, that ought to be done.'

"(5) The plaintiff was on duty and had performed eighteen days of proper and necessary service as special marshal before the circular letter of the Attorney General, relied upon in the answer of the United States, had been received."

Section 2031 of the Revised Statutes provides, among other things, that "there shall be allowed and paid to . . . each special deputy marshal, who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days."

The defence relied upon by the United States is, that the President had authority to regulate the length of service and compensation of a special deputy marshal or a supervisor of election; and that, having such authority, and having undertaken, through the Attorney General, to make such regulations, by the circular letter aforesaid, those regulations are binding upon inferior officers. Upon the facts in this case, it is to be observed that the question of the authority of the President to make the regulations mentioned does not arise here; for, as shown by the findings of fact, the services for which compensation is demanded were performed prior to the date when the circular letter was issued from the Attorney General's office. They were performed under the statutes mentioned, and compensation must be made accordingly. Whether the President had the power to make the regulations prescribed by the above-mentioned circular or not, they manifestly cannot have a retroactive effect, so as to invalidate a claim for services performed before they were in existence.

The judgment of the court below is

Affirmed.

Counsel for Parties.

UNITED STATES *v.* SCHOFIELD. Appeal from the District Court of the United States for the District of Maryland. No. 1034; submitted with No. 1033. MR. JUSTICE LAMAR delivered the opinion of the court. This case is similar in all its essential features to the preceding one of *United States* v. *Davis*, and the decision in it should be the same. For the reasons given in the opinion in that case the judgment of the court below in this case is

Affirmed.

Mr. Assistant Attorney General Cotton for appellants.

Mr. Charles C. Lancaster for appellee.

BACHRACK *v.* NORTON.

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

No. 116. Argued and submitted November 15, 1889. — Decided December 9, 1889.

An action on a marshal's bond, to recover damages for the wrongful taking of goods under an attachment issued out of a Circuit Court of the United States, is a case arising under the laws of the United States, and is within the jurisdiction of a Circuit Court of the United States without averment of citizenship of the parties. *Feibelman* v. *Packard*, 109 U. S. 421, affirmed and applied.

In the absence of a statute forbidding it, an assignment for the benefit of creditors may be made to an assignee who is not a citizen or resident of the State where the assignment is made or the debtor resides.

It having been held in *Cunningham* v. *Norton*, 125 U. S. 77, that the act of Texas of March 24, 1879, was intended to favor general assignments by insolvents for the benefit of their creditors, and to sustain them notwithstanding technical defects; it is now *Held*, that there is nothing in the sixth section of the act, directing the assignee's bond to be filed with the county clerk of "*his*" county, to indicate a legislative intent that an assignee under such an assignment must necessarily be a citizen or resident of the State.

Mr. H. G. Robertson and *Mr. Sawnie Robertson*, for plaintiff in error, submitted on their brief.

Mr. D. A. McKnight for defendant in error. *Mr. John Johns* was with him on the brief.

Opinion of the Court.

Mr. Justice Bradley delivered the opinion of the court.

This is an action on a marshal's bond, against him and his sureties, to recover damages for his wrongful taking of the goods of the plaintiff under an attachment issued out of the Circuit Court of the United States for the Northern District of Texas, against one Myerson. According to the decision in *Feibelman* v. *Packard*, 109 U. S. 421, it is a case arising under the laws of the United States, and is therefore within the jurisdiction of the Circuit Court without any averment of citizenship of the parties.

The plaintiff avers that Myerson had previously assigned the goods to him for the benefit of his creditors, and sets out a copy of the assignment. The defendants demurred to the petition, or, in the language of the Texas practice, filed a special exception, the principal ground of which was that it appears by the petition that the plaintiff was a resident and citizen of Missouri, and therefore could not lawfully be an assignee under the laws of Texas. The court below entertained this view and sustained the exception and, the plaintiff having declined to amend, the cause was dismissed. The question, therefore, is, whether the view taken by the court below was, or was not, erroneous.

The assignment was made on the 22d day of October, 1880, under the act of the legislature of Texas, approved March 24th, 1879, which was before this court in the case of *Cunningham* v. *Norton*, 125 U. S. 77. In that case the provisions of the act were examined *in extenso*, and we held that it was intended to favor general assignments by insolvents for the benefit of their creditors, and to sustain them, notwithstanding technical defects, provided they assigned all the property of the debtor. The assignment in the present case is substantially the same in form as in the case of *Cunningham* v. *Norton*. The only material difference (if it is material) is the fact that the assignee was a resident of the State of Missouri, and not of Texas. As to this, the allegation of the petition is, "that at the time of making of said assignment he (the plaintiff) was a resident of the city of St. Louis and State of Missouri; but that, while

holding his domicil in said State last named, his business lay in the State of Texas, and for the greater part of the year, before and since said time of the making of said assignment, he was in said State of Texas in pursuance of his calling in said State; that at, before and since the time of said assignment he was, in pursuance of his calling, frequently in said county of Grayson, in which county he had business interests. That at the time of making said assignment said Myerson was a resident of Grayson County, Texas, where he was conducting his business, and where said goods, wares and property, before and at the time of making said assignment, were situated, and where said assignment was made." Some two or three years after this assignment was made, viz., April 7th, 1883, an amending act was passed which, amongst other things, required that the assigneee of an insolvent debtor under the act should be a resident of Texas; but the act of 1879 had no such requirement. The only word in the whole act which could be construed to imply it was in the 6th section, which required the assignee to execute a bond with sureties, and directed that the bond should be filed with the county clerk of *his* county. We think that this expression was insufficient to raise the implication contended for. It probably only meant that the bond should be filed with the clerk of the county where the debtor resided and carried on business.

Independently of a statute on the subject, we do not see why, as a mere matter of law, an assignment should be held void because the assignee is not a citizen or resident of the State where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by the law. A citizen, or resident, of another State may, in a particular case, be a very proper assignee. A large part of a debtor's assets may be located in a State other than that in which he resides. If a non-resident assignee should for any reason be deemed an improper person to act as such, the court having jurisdiction of the matter could, according to the laws of Texas, remove him and appoint another in his place. It was the object of the act of 1879 to uphold, rather than to set aside, assignments; to aid defects, rather than to allow them to defeat

the purpose of the debtor and the rights of his creditors. In *Windham* v. *Patty*, 62 Texas, 490, the court held that the failure of the assignee to give a bond ought not to defeat the assignment, but that the creditors might apply for the appointment of another assignee to fulfil the trust. The 14th section of the act of 1879 declares that "if any assignee becomes unsuitable to perform the trust, refuses or neglects so to do, or mismanages the property, the county judge, or judge of the District Court, may, upon the application of the assignor, or one or more of the creditors, upon reasonable notice to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and, in case of vacancy by death or otherwise, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee."

One or two other objections to the assignment are made under the special exception, but we do not deem it necessary to discuss them. They are clearly untenable. In our judgment it was error in the court below to allow the exception and dismiss the action. The judgment must be

Reversed, and the cause remanded, with instructions to overrule the exceptions, and take such further proceedings in the case as to law and justice may appertain.

YOUNG *v.* CLARENDON TOWNSHIP.

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

No. 34. Argued October 23, 1889. — Decided December 9, 1889.

It is settled law that a municipality has no power to issue its bonds in aid of a railroad, except by legislative permission.

The legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose.

Where authority is granted to a municipality to aid a railroad and incur a debt in extending such aid, that power does not carry with it authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act.

Syllabus.

The act of the legislature of Michigan of March 22, 1869, "to enable any township, city or village to pledge its aid by loan or donation to any railroad company, etc.," provided that the bonds when "issued" should be "delivered by the person . . . having charge of the same to the treasurer of this State;" that the treasurer should "hold the same as a trustee for the municipality issuing the same and for the railroad company for which they were issued;" that whenever the railroad company should "present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this act . . . such of said bonds as said company shall be entitled to receive shall be delivered to said company;" that the treasurer should endorse upon each bond delivered the date of its delivery and to whom it was delivered; and that in case the bonds were not demanded in compliance with the terms of the act within three years from the date of delivery to the treasurer, "the same shall be cancelled by said treasurer and returned to the proper officers of the township or city issuing the same." The township of Clarendon, in Michigan, having complied with the requirements of the act on its part, delivered to the state treasurer its bonds to the amount of $10,000, dated July, 1869, for the benefit of the Michigan Air Line Railroad Company. The company completed its railroad before February, 1871, and became entitled to the governor's certificate under the act; but on May 26, 1870, the Supreme Court of the State had declared the act to be unconstitutional, and the governor in consequence thereof refused to give the certificate. On the 28th May, 1872, before the expiration of three years from their delivery, the treasurer returned the bonds to the township. November 12, 1884, the appellant obtained judgment against the railroad company and an execution was issued, which was returned *nulla bona*. On the 24th February, 1885, he filed a bill in equity against the township and the company, claiming that the township was equitably indebted to the company to the amount of the bonds and coupons with interest, and that he was entitled to recover the amount of that indebtedness, and to apply it on his judgment debt. *Held*,

(1) That the municipal authorities had no power to deliver the bonds, after their execution, except to the state treasurer, and that the word "deliver" as used in the statute with reference to this act, was used in its ordinary and popular sense, and not in its technical sense;

(2) That to the governor alone was given the power to determine whether the bonds should ever in fact issue, and, if issued, when they should issue;

(3) That the endorsement by the treasurer upon each bond of the date of its delivery and of the person to whom it was delivered, was necessary to make it a completed bond, and that this could not be done until the governor's authorization was made;

(4) That as the bonds were never endorsed and delivered by the treasurer they never became operative;

(5) That the rule in regard to escrows could be applied to these

Statement of the Case.

instruments because they were never executed in compliance with the peremptory requirements of the statute;

(6) That if the railroad company had any cause of action against the township by reason of these facts, it was barred at law by the statute of limitations of the State of Michigan;

(7) That by reason of laches in pursuing the remedy, the bar at law could be set up and maintained in equity.

The constitutionality of the act of the legislature of Michigan of March 22, 1869, which is considered in this case, was fully settled in the case of *Taylor* v. *Ypsilanti*, 105 U. S. 60, to which the court adheres.

On the 24th of February, 1885, the appellant exhibited, in the Circuit Court of the United States for the Eastern District of Michigan, his bill, in the nature of a creditor's bill, against the appellees.

The bill averred that, on the 12th of November, 1884, the appellant obtained a judgment against the railroad company for the sum of $355,865.24; that an execution upon the judgment was issued, and was returned "*nulla bona;*" that the judgment was still unpaid; and that the railroad company was a corporation, organized on the 28th of August, 1868, by a consolidation of two companies — one organized under the laws of Michigan, and the other under those of Indiana, which consolidated company was itself, on October 8, 1880, again consolidated with the St. Joseph Valley Railroad Company, retaining, however, its name of the Michigan Air Line Railroad Company.

The bill also alleged that after the first consolidation as aforesaid, and on the 22d of March, 1869, the legislature of Michigan passed "An act to enable any township, city or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized, or that may hereafter be organized, under and by virtue of the laws of the State of Michigan, in the construction of its road." Said act authorized the issue of aid bonds. In its fifth and sixth sections it provided as follows:

"Sec. 5. Whenever any such bonds as provided by provisions of this act shall have been issued as therein specified, the same shall be delivered by the person, persons or officers having charge of the same to the treasurer of this State, who

shall give a receipt therefor and hold the same as trustee for the municipality issuing the same and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust, as hereinafter provided.

"SEC. 6. . . . Such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner — that is to say, whenever any railroad company, in aid of which any of such bonds may have issued, shall present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this act, and is thereby entitled to any of such bonds, the same, or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, cancelling and returning to the municipality the past-due coupons. The treasurer shall endorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered; and the treasurer shall notify the clerk of the township or recorder or clerk of the city issuing the same of the date of the delivery of its bonds to such railroad company. . . . And in case any bonds so delivered to said treasurer by any such township or city shall not, within three years from the time when the same were received by him, be demanded in compliance with the terms of this act, the same shall be cancelled by said treasurer and returned to the proper officers of the township or city issuing the same."

The bill further averred that, in conformity with the provisions of this act, the electors of the township, on the 21st day of June, 1869, voted to pledge the aid of the township by the loan of $10,000, to be paid by its 10 per cent bonds at par, upon certain terms and conditions in said vote stated, among which were, that the road should be located and constructed through said township; that the time of payment of each of those bonds was to be postponed a year in the event of the non-completion of the road-bed and the ironing before the 1st of November, 1869; and that the company would pay yearly

to the township a sum equal *pro rata* to the dividends paid stockholders; and said sums were to be in extinguishment of the interest on the bonds, and the excess over 10 per cent, if any, to be applied on the principal. The bonds, thus voted, were issued in pursuance of said act, and were delivered to the state treasurer, to be by him held as trustee for both the township and the company on the terms and conditions of the act, as aforesaid.

The bill then averred that the railroad company, in consideration of the township's action, and relying thereon, entered upon the construction of said railroad, and, previous to the 1st of February, 1871, had fully constructed and ironed said road through the township; and, at the time of the delivery of the bonds to the state treasurer, as aforesaid, had duly executed and delivered to the township the agreement specified in the terms on which the aid was voted, and had performed every condition precedent to the earning of said bonds, and had become fully entitled to have the same delivered by the treasurer, except that it had not secured the certificate of the governor as required by said act. While the road, however, was in the process of construction, the Supreme Court of the State of Michigan, on the 26th of May, 1870, declared the act in question to be unconstitutional; but as the railroad company had already expended the sum of a million of dollars, and upwards, in construction, it could not stop, but went on and completed the road in full compliance with all the conditions of the vote. The company then applied to the governor for his certificate under the statute, exhibiting to him proofs of its title to receive the bonds; but he refused to give the same, giving as his sole reason for such refusal the judgment of the Supreme Court aforesaid.

The bill then averred that on May 28th, 1872, the township, knowing the premises, and without the knowledge or consent of the company, and in violation of the law and of the trust aforesaid, and in fraud of the company's rights, induced the state treasurer, who had full knowledge of the foregoing facts, to surrender to the township the said bonds and the coupons thereunto attached; that the township had since retained the

same, and withheld them from the company; that said bonds and coupons, by reason of all the premises, became in justice and equity the property of said railroad company and the township became bound thereon according to their tenor and effect; that the said township was therefore equitably indebted to said company, to the whole amount of said bonds and coupons, with the interest thereon to the present time; and that the appellant was entitled to the said amount, towards the satisfaction of his judgment against the company.

To this end an account was prayed to be stated between the company and the township, the appellee, and a final decree against the township for the sum shown to be due, in favor of the appellant, was asked.

The bill was dismissed by the Circuit Court on demurrer (26 Fed. Rep., 805); and the cause came here on appeal by the complainant.

Mr. John D. Conely for appellant. *Mr. Alfred Lucking* was with him on the brief.

Mr. W. K. Gibson and *Mr. Isaac Marston*, for The Township of Clarendon, appellee.

Mr. Justice Lamar, after stating the facts in the foregoing language, delivered the opinion of the court.

We consider the decisive question in this case to be that of the laches in pursuit of the railroad company's right against the township. In this view the controversy must be narrowed to a single issue. The township, which is the defendant below, and which defends separately, claims that the cause of action accrued either 13 or 14 years before this bill was filed —13 years if the conversion of the bonds by the township and the treasurer be considered the gravamen, and 14 years if it be the governor's refusal to issue his official certificate; that since the statutes of limitation in Michigan, touching these questions, vary from 6 to 10 years, the cause of action is long since barred at law as to the railroad company; that it is, therefore, barred also in equity and lost by laches in its

assertion; and that since the appellant by this bill is prosecuting a demand in the nature of a garnishment, and the railroad company's right is barred both at law and in equity, therefore that of the appellant is also barred. The appellant seeks to avoid the force of this position by claiming that the bonds had been so far perfected by the dealings between the parties that the railroad company was entitled to have them from the state treasurer; that such being the case, the tort of the township and of the treasurer in converting them could not impair the rights of the company; that, therefore, the company was and is entitled to waive the tort and sue directly on the bonds, as in the case of lost or stolen bonds; that only a few of such bonds, if delivered, would have been barred at the time of the filing of the bill, since most of them were so drawn as to mature within 10 years of that time; and, finally, that as the company was thus still in possession of an enforcible demand, the appellant could avail himself of it by this bill.

The controlling question presented, therefore, is this: Were the bonds in question so dealt with by the parties as at any time to vest in the railroad company a right to sue directly on the bonds themselves, as distinguished from a right to sue for their non-delivery or because of their cancellation? That question cannot be satisfactorily or properly answered without constant reference to the exceptional character of the circumstances by which these bonds were deprived of their value. It is not the case of a common negotiable instrument put forth by a natural person as obligor; but it is that of a railroad aid bond sought to be put forth by the municipality. In such case the nature of the bonds, their force and effect, their value and character, while in the hands of the state treasurer, the rightfulness and sufficiency of their issue, and all kindred questions, must be referred to the statute authorizing them. In this case the statute is the act of 1869. It is the touch-stone. Whatever might be the rule in ordinary cases, so far as the act goes, it controls here, being the enabling act; outside of it there was no power, whatever, to issue these bonds. By an unbroken current of decisions by this court and by all other courts, too numerous to mention, it is settled law that a municipality has

no power to make a contract of this character, except by legislative permission. It is manifest that, such being the case, the legislature in granting such permission can impose such conditions as it may choose; and even where there is authority to aid a railroad and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act. *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Kelley* v. *Milan*, 127 U. S. 139.

The analogy offered between the case at bar and a lost bond is misleading. There is, in fact, no analogy. There is no doubt about the right of the owner of a bond lost or stolen to sue on it, and in the absence of it to give secondary evidence of its contents; but the very statement of the principle assumes the existence of the instrument. A bond lost or a bond stolen is out of the personal possession and control of the owner, it is true; but it is also an instrument that has become executed — to which those things have been done that were needed to give it legal existence as an actionable obligation.

But here the very question to be determined is, whether there ever were any bonds. It is a question, in substance, of the very existence of the instruments themselves. As before remarked, the act of 1869 fixes the rights of parties in this case. All the questions concerning the execution of the bonds in controversy must be referred to that statute, tested by it, and decided in strict conformity with its terms. It is an enabling act, conferring a power not before existent, and any departure from its requirements cannot be allowed. *Harshman* v. *Bates County*, 92 U. S. 569.

In the case of *Sheboygan Co.* v. *Parker*, 3 Wall. 93, 96, this court said:

"The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose without special authority conferred upon them by the legislature. But when special authority is given to the people of a county to do these

acts, and bind themselves by the issue of such bonds, the legislature may properly direct the mode in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound."

In the case of *Anthony* v. *County of Jasper*, 101 U. S. 693, the township of Marion had, by authority, subscribed in aid of the railroad. Afterwards the legislature passed an act requiring such bonds to be registered and certified by the auditor of the State. The court said (pp. 696, 697, 698):

"There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper. The act now in question is, we think, of this character. It in effect provides that no bond issued by counties, cities or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the state auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted, which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate endorsed on the bonds. This being done the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. . . . When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind

the public for their payment. We had occasion to consider in *McGarrahan* v. *Mining Co.*, 96 U. S. 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of State. . . . In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties."

The bonds in that case were declared void. See also to the same effect *Coler* v. *Cleburne*, 131 U. S. 162.

Turning now to the statute involved in the case at bar, we find its directions, among others, to be as follows:

"Such bonds shall bear interest at the rate of not exceeding ten per cent, per annum, and shall have attached thereto the necessary and usual interest coupons, corresponding in dates and numbers with the bonds to which they are attached, which shall be signed by written signatures by the same person or persons executing such bonds. Such bonds shall, if issued by a city, be executed by the mayor and clerk or recorder

thereof, as the case may be, under the seal of the said city; and if issued by a township, they shall be executed by the supervisor and clerk thereof; and if any city or township issuing such bond shall have a seal, the same shall be impressed upon each of such bonds. The bonds and coupons attached thereto shall be payable at the office of the treasurer of the county in which such township or city may be situate. Whenever any such bonds as provided by provisions of this act shall have been issued as therein specified, the same shall be delivered by the person, persons or officers having charge of the same to the treasurer of this State, who shall give a receipt therefor and hold the same as trustee for the municipality issuing the same and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust as hereinafter provided. Upon receipt of any such bonds from any township or city in aid of any such railroad company, the treasurer of this State shall immediately register or record the same in a book or books to be kept by him for that purpose in his office, which record shall show the amount, date and number of each bond, the rate of interest which it bears, by what township or city issued, to the benefit of what railroad company the same are issued, and the time when payable, which record shall be always open for the inspection of any citizen of this State or other interested person. Such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner; that is to say, whenever any railroad company, in aid of which any of such bonds may have issued, shall present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this act, and is thereby entitled to any of such bonds, the same, or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, cancelling and returning to the municipality the past-due coupons. The treasurer shall endorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time

when so delivered; and the treasurer shall notify the clerk of the township, or recorder or clerk of the city issuing the same of the date of the delivery of its bonds to such railroad company. . . . And in case any bond so delivered to said treasurer by any such township or city shall not, within three years from the time when the same was received by him, be demanded in compliance with the terms of this act, the same shall be cancelled by said treasurer and returned to the proper officers of the township or city issuing the same."

A critical analysis of this statute indicates this to have been the plan: In the preparation and perfecting of the plan persons described by certain official titles, and probably selected because of their titles, were to participate.

(1) The bonds were to be "executed;" that is to say, written or printed, signed and sealed by the supervisor and clerk of the township. Here the powers of those persons ceased. They could not perfect the instruments by delivery. The word "executed," used in the statute in connection with the acts mentioned, manifestly does not import the *final* delivery; for that is expressly directed to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event. The delivery which they were directed to make to the treasurer in his capacity of statutory trustee was only such as amounted to a "giving up" or the "committing" of them to the treasurer for his safe-keeping. The word was used in its ordinary and popular sense, not in the technical one.

(2) To the governor, and the governor alone, was given the power to determine whether the bonds should ever in fact issue, and if issued, when they should issue. For to him was committed the decision of the important question whether the railroad had performed its part of the common undertaking. His certificate was to be the evidence of that fact, and the only admissible authentication of it to the trustee, the depositary. So far as the investigation and determination of that question were concerned and the certifying of it, the governor was to

discharge that function in the process of issuing the bonds which was imposed on the auditor in the case of *Anthony* v. *County of Jasper*, *supra*, the difference being that in that case the certificate was to be endorsed on the bonds themselves, but not so in this case.

The State treasurer was appointed to be a trustee for both the township and company; to receive the bonds; to register them; and to finish their clerical execution, using the word in its popular sense, by his endorsements on them of the date of delivery, and of the person to whom delivered. Such endorsements are clearly a part of the very form of the completed bond, as laid down in the *Jasper County case*, *supra*. He was also to cancel them, and to return them so cancelled to the township authorities if not demanded in three years; and, finally, if demanded in compliance with the terms of the act within the three years, to complete their execution (using the word in its technical sense) by delivering them. Such, as we understand it, was the intention of the legislature. If it be said that such details are useless and technical, a sufficient answer is, so the statute is written; and the courts cannot unmake or modify it.

As already shown, the legislature in this class of cases has the right to provide the processes by which the contract is to be perfected. Moreover, we do not think these details are either useless or technical. When it is remembered that the whole policy of allowing contracts of this class has been deprecated by some of the oldest publicists and jurists, and that the negotiable form of such bonds has often led to the imposing of great burdens on municipalities for which there has been no return, we are not disposed to criticise the care of a legislature to establish a system of even rather severe checks as a condition to its concession of such extraordinary powers.

The appellant claims that the bonds were perfected instruments when delivered to the state treasurer — that the ministerial duties had been performed in full. The argument proceeds largely upon the idea that, as to this transaction, the township and its agents, the supervisor and clerk, were a complete and rounded organism, distinct from the state treasurer,

and capable of dealing with the treasurer as if he were a third party — in making delivery to him, for instance. We do not so regard it. All the steps directed by the statute to be taken leading up to the final act of delivery to the railroad company constitute one progressive process. To adopt the language of the court in the *McGarrahan case*, *supra*, "each and every one of the integral parts of the execution is essential to the validity of the bond."

We hold, therefore, that, since the bonds were never endorsed and delivered by the treasurer as required by the statute, they never became operative. The act of delivery is essential to the existence of any deed, bond or note. Although drawn and signed, so long as it is undelivered it is a nullity; not only does it take effect only *by* delivery, but also only *on* delivery. *Bayley* v. *Taber*, 5 Mass. 286; *Marvin* v. *McCullom*, 20 Johns. 288; *Ward* v. *Churn*, 18 Grattan, 801; *Lovejoy* v. *Whipple*, 18 Vermont, 379.

The appellant, however, contends that these bonds were, in effect, delivered — that "by the delivery to the treasurer and by the performance of the conditions the title to the bonds vested in the company, the state treasurer holding them as trustee for the township and for the railroad company." We cannot concur in this view. The law in reference to escrows seems to be involved in some uncertainty. What the effect is of a performance of the conditions by the grantee, the instrument remaining in the hands of the depositary — whether, in such case the second delivery by the depositary is or is not necessary to give effect to the deed — are questions about which the courts yet differ. But concede the appellant's position to be correct, as a general rule, yet that general rule does not necessarily control this case. These are extraordinary instruments, and certain fundamental questions of power to contract and of details of execution underlie any action brought upon them, which render the usual rules in regard to escrows very unsafe guides. Too much stress cannot be laid on the necessity for consulting the statute.

Even in the case of an ordinary escrow, nothing passes by the deed until the condition is performed. *Calhoun County* v.

American Emigrant Co., 93 U. S. 124. Here the condition prescribed by the statute as that upon which the delivery was to be made to the railroad company, and on which the bonds were to be perfected instruments in its hands, was never performed. On this point the statute seems to be very simple and clear. Indeed, it would be difficult to make it more clear. By its very terms, the bonds received by him in their uncompleted condition were to be by the state treasurer "safely kept;" and for three years after their reception could only be parted with by him in one way — that is, to the railroad company interested, on its production of the governor's certificate. On that condition could they be delivered, not on any other. The certificate was not a mere formal act on the part of the governor, but was a condition precedent to the power of the treasurer to deliver. The statute is not only emphatic on this point, but also repetitious in its emphasis. Section 5 says, the bonds are "to be disposed of by said treasurer in discharge of his trust as hereinafter provided;" and section 6 provides that "such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner; that is to say, whenever any railroad company . . . shall present to said treasurer a certificate from the governor," etc.; also, that "in case any bond so delivered to said treasurer . . . shall not within three years . . . be demanded in compliance with the terms of this act, the same shall be cancelled by said treasurer," etc. The certificate was designed to be the treasurer's sole authority to deliver. The question whether the railroad company had "in all respects complied with the provisions of this act" was one that he could not inquire into except by consulting the governor's certificate. This was his only and conclusive evidence, by the very terms of the statute. The company's compliance with the provisions of the act gave it the right to receive the governor's certificate; but it did not confer the right to receive the bonds. That was given by the governor's certificate alone. Had the treasurer made delivery without the certificate, he would have acted without authority of law, and the bonds would have been voidable in the hands of the company. *An-*

thony v. *County of Jasper*, *supra*. These requirements are not novel. They are matters of administrative detail fixed by the statute. We cannot declare them to be merely directory, or annul them by construction. It does not matter, so far as the question of the statutory power of the treasurer is concerned, that the failure of the company to produce the certificate might not be because of any fault in the company. A failure might be due to the governor's mistaken view of the law, or to his misconception of the facts, or even to his wilful refusal to discharge his official duty — all is immaterial to this aspect of the statutory scheme. A miscarriage in this particular was one of the risks taken by the company. The company knew the statute — was held by the law to know and understand it. It contracted with the township through the statute, and could so contract with it in no other way. Availing itself of the statute, it must take it *cum onere*. If the governor failed to give the certificate when he should, and could not be reached by a mandamus, those were but features of the company's risk.

There is another provision of the statute in question which supports the foregoing views. It is the direction that when the treasurer should make the delivery to the company he should cut the over-due coupons from the bonds and cancel them; and that he should at the same time endorse the bonds with the date of that delivery, from which date the bonds should bear interest. Had the legislature inserted in the statute a declaration, in set and formal phrase, that it should be the issue of the bonds on the governor's certificate and not the completion by the railroad company of the portion of its contract that should perfect the bonds and give them effect; such declaration would not, in any degree, be clearer than this provision. *Lovejoy* v. *Whipple*, *supra*. It is to be observed that no question arises in this case of a *bona fide* purchaser of bonds improperly issued. The appellant stands exactly in the shoes of the railroad company, and his rights are no greater. *Smith* v. *Bourbon County*, 127 U. S. 105.

Holding these views, it is unnecessary to pursue this discussion further. Whether the railroad acquired a cause of action against the township by the failure to deliver the bonds, or by

their cancellation prior to the lapse of the three years fixed by the statute, on the one hand, or the whole project was a mere fiasco, on the other, and, if such cause of action arose, what was its precise nature and form — are matters rather of curious speculation than of practical consequence. If no real cause of action arose, that is the end of the matter. If it did arise, then its form and nature are immaterial, since all forms are barred alike, being actionable as of the then date. Is is not even suggested that any other method exists by which to escape the bar save the one considered and hereinbefore rejected. We consider the question of the constitutionality of the act of 1869, herein mooted again, to be fully settled by the case of *Taylor* v. *Ypsilanti*, 105 U. S. 60; but this case is decided on other grounds, and it is unnecessary to dwell on that question.

It is further claimed by the appellant that the bonds in question were invested by the statute with the character of trust property, and that, therefore, they can be followed into any hands to which they may be traceable; and that that right is not subject to the limitation prescribed for a conversion. To this view there are two answers; first, the fact that the bonds were never perfected instruments, as already decided; and, while the treasurer returned them cancelled a few weeks prior to the lapse of the three years fixed by the statute, that error became immaterial from this point of view so soon as the three years did expire; secondly, the laches of the railroad company in pressing what claim it may have had. *New Albany* v. *Burke*, 11 Wall. 96.

We apply the doctrine of laches to this case with the less reluctance, because after all we see but little of substantial merit in the bill. The scheme contemplated was a loan not a donation. A loan on rather indifferent security, perhaps; but a loan nevertheless. While therefore it is possible that a loan may be so proposed and accepted as to give to the intended borrower a cause of action for any failure to perform the agreement, and a right to recover damages at law, yet on a bill in the nature either of a bill for specific performance, or for an equitable garnishment, the court may well inquire where is the substantial equity in the case.

The decree of the Circuit Court is *Affirmed.*

HASTINGS AND DAKOTA RAILROAD COMPANY *v.* WHITNEY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 49. Argued October 31, November 1, 1889. — Decided December 9, 1889.

So long as a homestead entry, valid upon its face, remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and precludes it from a subsequent grant by Congress.

A defect in a homestead entry on public land in Minnesota made by a soldier in active service in Virginia during the war, caused by want of the requisite residence on it, was cured by the act of June 8, 1872 "to amend an Act relating to Soldiers' and Sailors' Homesteads," 17 Stat. 333, c. 338, § 1 (Rev. Stat. § 2308).

While the decisions of the Land Department on matters of law are not binding on this court, they are entitled to great respect.

THE case is stated in the opinion.

Mr. Gordon E. Cole for plaintiff in error.

No appearance for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an action, somewhat in the nature of a suit in equity, originally brought in the District Court of Ramsey County, Minnesota, by the Hastings and Dakota Railroad Company, (a corporation organized under the laws of that State,) against Julia D. and John Whitney, to recover a tract of about eighty acres of land situated in that county, for which the defendants have a United States patent.

The material facts in the case are undisputed, and are substantially as follows: By the act of July 4, 1866, Congress granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature of the

State might determine, every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. The act further provided that "in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid." 14 Stat. 87, c. 168, § 1.

On the 7th of March, 1867, the legislature of Minnesota accepted this grant, and transferred it over to the plaintiff. The railroad company complied with all the terms and conditions of the acts of Congress and of the legislature of the State of Minnesota, and, on or about the 7th of March, 1867, definitely located its line of road by filing its map in the office of the Commissioner of the General Land Office.

The land which is the subject of this controversy fell within what are known as the ten-mile limits of the aforesaid grant, when the line of road was definitely located.

The case being brought on for trial on evidence produced by the respective parties, the court made and filed its findings of fact and conclusions of law, the essential parts of which are as follows:

"Claiming to act under the provisions of section 2293 of the Revised Statutes of the United States, one Bentley S. Turner, on the 8th of May, 1865, then being a soldier in the army of the United States, and actually with his regiment in the State

of Virginia, made an affidavit and caused the same to be filed in the local land office of the district wherein said land was situate. Said affidavit was made before his commanding officer in the State of Virginia, and stated that said Turner was the head of a family, a citizen of the United States, and a resident of Franklin County, New York. Application was made through one Conwell, whom said Turner constituted his attorney for that purpose, upon said affidavit, to enter said land as a homestead. Said affidavit did not state that Turner's family or any member thereof was residing on the land, or that there was any improvement thereon; and, as a matter of fact, no member of his family was then residing, or ever did reside, on said land, and no improvement whatever had ever been made thereon by any one. Thereupon, upon being paid their fees by said Conwell, the register and receiver of said land office allowed said entry, and the same stood upon the records of said local land office and upon the records of the General Land Office uncancelled until September 30th, 1872, when said entry was cancelled by the proper officers of the United States. It does not appear that any specific reason was assigned for said cancellation, nor does the reason for said cancellation appear, save as it may be furnished by the facts aforesaid. On the 7th day of May, 1877, without notice to the plaintiff, the defendant, Julia D. Whitney, then a single woman, by name Julia D. Graham, who has since intermarried with said defendant, John Whitney, did enter said land at the local land office as a homestead, and thereafter, in the usual course of business, the officers in charge of the General Land Office of the United States caused a patent of the United States for said land to be issued in due form, and delivered to said defendant Julia, who ever since May 7th, 1877, has been and now is in the actual occupancy of said premises, holding the same under said patent. Said land is of the value of six hundred dollars ($600)."

After making these findings of fact, and holding as a conclusion of law that the alleged entry of Turner was absolutely void, that the title to the land in dispute was, under the land grant to the State, vested in the plaintiff, and that the entry

of Julia D. Whitney thereon was unauthorized and of no effect, the court entered a decree in favor of the plaintiff in error.

On an appeal by the defendant to the Supreme Court of the State that decree was reversed, without any order for a new trial. 34 Minnesota, 538. Such reversal, under the laws of Minnesota, is, in effect, the final judgment of the highest court of that State in which a decision of the cause could be had, and the case has been brought here by a writ of error.

Section 1 of the act of March 21, 1864, 13 Stat. 35, (now section 2293 of the Revised Statutes,) under which Turner's homestead entry was made, provides as follows:

"In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law."

The question presented for our consideration is, whether, upon the facts found and admitted, the homestead entry of Turner upon the land in controversy excepted it from the operation of the land grant under which plaintiff in error claims title.

The doctrine first announced in *Wilcox* v. *Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a

great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

In *Witherspoon* v. *Duncan*, 4 Wall. 210, this court decided, in accordance with the decision in *Carroll* v. *Safford*, 3 How. 441, that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained." And the court further held that this applies as well to homestead and preëmption as to cash entries. In either case, the entry being made, and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands, and takes the character of private property. The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws. The correctness of this holding has been sustained by this court in the case of *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, and the principle applied to a railroad grant act, which contained the same exceptions as those embodied in the act under which the plaintiff in error claims title to the tract in controversy. In that case a homestead claim had been made and filed in the land office by one Miller, and there recognized by a certificate of entry, before the line of the company's road was located. Subsequently to the location he abandoned his entry and took a title under the railroad company, and his homestead entry was cancelled. One G. B. Dunmeyer then entered the land under the home-

stead law, claiming that, by the cancellation for abandonment, it had passed back into the mass of public lands and was not brought within the grant; and upon that claim ousted the defendant in error, who afterwards brought his action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterwards affirmed by this court.

The court said, Mr. Justice Miller delivering its opinion:

"The record shows that, on July 25, 1866, Miller made a homestead entry on this land which was in every respect *valid*. . . . It also shows that the line of definite location of the company's road was first filed . . . September 21, 1866." p. 634.

* * * * *

"In the language of the act of Congress, this homestead claim had *attached* to the land, and it therefore did not pass by the grant. Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do." p. 644.

* * * * *

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company — that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

"We are unable to perceive the force of this proposition." p. 639, 640.

* * * * *

Opinion of the Court.

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.

"Why should a different construction apply to lands, to which a homestead or preëmption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land?" p. 641.

Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and that this entry having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding, in the proper land office, as could attach even an inchoate right to the land.

We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made — the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is

allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the Commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be cancelled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money — an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based.

As was said in the *Dunmeyer case*, *supra*:

"It is not conceivable that Congress intended to place these parties [homestead and preëmption claimants on the one hand and the railway company on the other] as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occu-

pation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations." p. 641.

A question somewhat analogous, in principle, to the one in this case, arose in *Newhall* v. *Sanger*, 92 U. S. 761. In that case, Newhall claimed under a patent issued to the Western Pacific Railroad Company for land supposed to be within the grant made by the act of July 1, 1862, 12 Stat. 489, c. 120, and that of July 2, 1864, 13 Stat. 356, c. 216, and Sanger claimed under a subsequent patent which recited, among other things, that the former patent had been erroneously issued. The land in controversy had been within the boundaries of a claim made under a Mexican grant, which was pending in the Land Department of the United States at the time the order withdrawing the railroad lands from entry was made. The Mexican claim was rejected a few days thereafter because of its fraudulent character. Under that state of facts, the contention of the railroad company was, that, the Mexican claim having been declared invalid, the land in controversy became subject to the operation of the granting acts, and, therefore, passed to the company. But this court declared otherwise, and held that the land never became subject to the grant, and that the claimant under the second patent had the better title.

In addition to this, section 2308 of the Revised Statutes provides:

"Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the Army or Navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence of the same length of time upon the tract so entered," etc.

That act is a curative act, or, rather, one putting a construction upon the prior act of 1864, under which the Turner entry was made. The effect of it is to declare service in the Army or Navy of the United States by the applicant, at the date of an entry made under the act of 1864, equivalent to actual residence upon the land by him. In that view of the case the affi-

davit in the Turner entry was sufficient; for, in contemplation of law, he was then residing upon the tract embraced in his entry.

The conclusion at which we have arrived is in harmony with the later rulings of the Land Department. See *Graham* v. *Hastings & Dakota Railroad*, (this case,) 1 Land Dec. 380; *St. Paul &c. Railway* v. *Forseth*, 3 Land Dec. 457; *So. Minn. Railway* v. *Gallipean*, 3 Land Dec. 166; *Hastings & Dakota Railway* v. *United States*, 3 Land Dec. 479; *St. Paul &c. Railway* v. *Leech*, 3 Land Dec. 506; *Hastings & Dakota Railway* v. *Whitnall*, 4 Land Dec. 249; and many others of like tenor and effect.

It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States* v. *Moore*, 95 U. S. 760, 763, this court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." See also *Brown* v. *United States*, 113 U. S. 568, 571, and cases there cited; *United States* v. *Burlington &c. Railroad*, 98 U. S. 334, 341; *Kansas Pacific Railroad* v. *Atchison Railroad*, 112 U. S. 414, 418.

Other subsidiary questions have been argued by counsel for plaintiff in error, but they are all virtually disposed of in the foregoing.

For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant, who, as the record shows, was the defendant in error, Julia D. Whitney, *née* Graham.

The decree of the Supreme Court of Minnesota is *Affirmed.*

Citations for Defendants in Error.

KLEIN *v.* HOFFHEIMER.

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

No. 112. Argued November 14, 15, 1889. — Decided December 9, 1889.

A creditor of an insolvent debtor, having full knowledge of the insolvency, secured for himself a transfer of a large part of the notes, book accounts and debts of the insolvent. Other creditors by a proceeding which was part of the same transaction secured their debts by attachments sufficient to absorb all the property of the debtor. A creditor not included in the arrangement sued the debtor and by garnishee process brought in the creditor who had obtained the notes, etc. *Held*, (1), that the garnishee was bound to establish, as against the pursuing creditor, that his claim against the debtor was just, and that he will receive from the assets no more than is reasonably necessary to pay it; and, (2), if he is found liable at all as garnishee, he is liable to account not only for the money collected on the notes, accounts, etc., but also for the value of those which remain in his hands, at least to a sufficient amount to satisfy the debt of the pursuing creditor.

THE case is stated in the opinion.

Mr. Martin F. Morris, (with whom was *Mr. Leo N. Levi* on the brief,) for plaintiffs in error, cited: *Greenleve* v. *Blum*, 59 Texas, 124; *Ellis* v. *Valentine*, 65 Texas, 532; *Lewy* v. *Fischl*, 65 Texas, 311; *Bunn* v. *Ahl*, 29 Penn. St. 387; *Rice* v. *Perry*, 61 Maine, 145; *Horwitz* v. *Ellinger*, 31 Maryland, 492, 504; *Price* v. *Brady*, 21 Texas, 614; *Taylor* v. *Gillean*, 23 Texas, 508; *Tirrell* v. *Canada*, 25 Texas, 455; *Ellison* v. *Tuttle*, 26 Texas, 283; *Van Ness* v. *Hyatt*, 13 Pet. 294.

Mr. George Hoadly, for defendants in error, cited: *Chandler* v. *Von Roeder*, 24 How. 224; *Gregg* v. *Moss*, 14 Wall. 564; *Cooper* v. *Coates*, 21 Wall. 105; *Cannon* v. *Pratt*, 99 U. S. 619; *Mining Co.* v. *Taylor*, 100 U. S. 37; *Loder* v. *Whelpley*, 111 N. Y. 239; *Callan* v. *Statham*, 23 How. 477; *Walcott* v. *Almy*, 6 McLean, 23; *Hubbard* v. *Allen*, 59 Alabama, 283; *Hamilton* v. *Blackwell*, 60 Alabama, 545; *Harrell* v. *Mitchell*, 61 Alabama, 270; *Buchanan* v. *Buchanan*, 72 Alabama, 55; *Zel-*

nicker v. *Brigham*, 74 Alabama, 598; *Owens* v. *Hobbie*, 82 Alabama, 466; *Oppenheimer* v. *Halff*, 68 Texas, 409; *Jones* v. *Simpson*, 116 U. S. 609; *Hamilton* v. *Russell*, 1 Cranch, 309, 313; *Etting* v. *United States Bank*, 11 Wheat. 59, 74, 75; *Rhett* v. *Poe*, 2 How. 456; Privil. Lond. 197 (3d ed.) 255; *McDaniel* v. *Hughes*, 3 East, 367; *Walker* v. *Gibbs*, 2 Dall. 211; *Staples* v. *Staples*, 4 Greenl. 532; *Glenn* v. *Boston & Sandwich Glass Co.*, 7 Maryland, 287; *Tirrell* v. *Canada*, 25 Texas, 455; *Ellison* v. *Tuttle*, 26 Texas, 283.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court for the Northern District of Texas.

Hoffheimer Brothers brought suit in the District Court of Dallas County, Texas, for a debt of $11,329.79, against Strauss & Levy, of that place, a firm composed of A. Strauss and J. J. Levy, in which suit they applied for and obtained a writ of garnishment against Frieberg, Klein & Co., who were residents of the same county and doing business in Dallas. This writ was served upon Frieberg, Klein & Co. through Joseph Seinsheimer, a member of the firm, in the county of Galveston, on the 15th day of August, 1885. The writ required the garnishees to answer upon oath "what, if any, they were indebted to said Strauss & Levy, and were when this writ was served upon them, and what, if any, effects of said Strauss they have in their possession, and what when the writ was served." To this they made the following answer on oath:

"Now come Frieberg, Klein & Co., garnishees herein, and, answering the writ of garnishment heretofore served upon them, say that they are not now indebted to Strauss & Levy, or either of them, and were not when this writ was served; that they have no effects of Strauss & Levy, or either of them in their possession, and had none when this writ was served; that they know of no person indebted to Strauss & Levy, or either of them, or who have in their possession effects belonging to Strauss & Levy, or either of them."

This answer was controverted by Hoffheimer Brothers, who

took issue upon it by a plea which alleged that said garnishees "combined, colluded, and confederated together with said Strauss & Levy for the purpose and with the intent to hinder, delay and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claims, pretending to be owners thereof. These plaintiffs are not informed as to the amount of such claims which had been collected by said garnishees at the time said writs of garnishment were filed herein, but they are informed and believe that at the time the writs of garnishment were served, as well as at the time the said answers were filed, said garnishees had then collected a very large amount upon said claims — it is believed more than sufficient to pay off and discharge the claims of these plaintiffs against said Strauss & Levy — and that the said garnishees then had and still have the money so collected, and that said garnishees then had in their possession said claims not so collected by them."

The case was afterwards transferred to the Circuit Court of the United States, and the plaintiffs having obtained judgment against Strauss & Levy for the sum of $11,787.15, a trial was had in that court before a jury on the issues made between Hoffheimer Brothers and Frieberg, Klein & Co., garnishees. In that trial the jury returned a verdict in favor of the plaintiffs for the sum of $11,329.79, and the court rendered judgment upon that verdict, and declared that when it should be paid or collected it should constitute a credit for that amount on the judgment in favor of plaintiffs against Strauss & Levy. It is to reverse this judgment that the garnishees, Frieberg, Klein & Co., have brought the present writ of error.

The errors assigned relate to the admission of evidence

against objections of plaintiffs in error, and to the charge of the court to the jury, and to the refusal to charge as requested by them. A bill of exceptions was taken which purports to give the proceedings on the trial, and which, while it does not expressly state that it includes all the testimony given in the case, is probably a correct statement of all that was said and done pertinent to the issues now presented.

It appears from this bill of exceptions that Strauss & Levy were engaged in Dallas as wholesale dealers in liquors and cigars on the 10th day of August, 1885, and were at that time seriously embarrassed in their business; that Frieberg, Klein & Co. were also wholesale dealers, in Galveston, Texas, with a house in Dallas; that Strauss & Levy were indebted to Frieberg, Klein & Co. by notes and accounts in the probable sum of about $15,000; and that on the 10th day of August aforesaid, just after dinner, Klein was in the office of Strauss & Levy, when Mr. Bradford, a lawyer, came in. He had a paper in his hand, and demanded payment of them of a claim not then due. They said they would pay it when due, and Bradford talked about suing them. Klein says he knew that Bradford was the attorney for the Bradstreet Commercial Agency, and he became alarmed, and demanded payment for the debt due his firm. They told him they had no money, but they had notes and accounts which they assigned to Frieberg, Klein & Co. in payment of their debt on his demand. The notes and accounts were assigned to Frieberg, Klein & Co. by a written instrument in which Strauss & Levy assigned and transferred to Frieberg, Klein & Co. in full payment and satisfaction of their indebtedness to that firm of the sum of $15,789, "all of our accounts mentioned on a sheet attached marked A, and the notes now held by Frieberg, Klein & Co. as collateral security, besides the notes this day handed Mr. Klein in person, which notes with aforementioned accounts, amount in the aggregate to the estimated value of $15,000." This instrument is dated the same day, August the 10th. Mr. Klein states that late on the night of the 10th a Mr. Rhinehart came to his house and showed him a telegram, and stated that Strauss & Levy were outside and wanted to know what to do

about their business matters. At their solicitation he went with them to the residence of Mr. L. M. Crawford, a lawyer, after one o'clock in the morning of the 11th. Mr. Crawford said that his papers were ready, and he was going to attach. It appears that during that night papers were prepared for attachment in favor of several creditors living in the town of Dallas. Among these attaching creditors were Marx & Kempner, Addie Lowenstein, Oliver & Griggs, and perhaps others. The order in which these attachments should be levied or issued so as to give priority among themselves was determined during these interviews, in all of which Mr. Klein took an active part, directing himself the displacement of this order of priority in one case to the dissatisfaction of Strauss & Levy when they found it out, who thus found some of their own friends, whom they intended to make safe by these attachments, postponed to some others; and it is obvious from the testimony, that Klein, and Strauss & Levy and Crawford, the lawyer, and some of the other parties to those suits sat down during that night and morning and arranged for the issuing of attachments sufficient in amount to absorb all the property owned by Strauss & Levy, and that Hoffheimer, and perhaps many other creditors, were left without protection and without any means of making their debts, so that between the time when Bradford, the lawyer, made his demand that evening, after dinner, and daylight next morning, all the assets of the partnership of Strauss & Levy had been divided between the parties who met that night, and that, not by any assignment, but by a contrivance by which Frieberg, Klein & Co. got the choses in action, whether notes or accounts due to Strauss & Levy, and the visible property was secured to the other persons engaged in the transaction by attachments issued with the consent and active assistance of Strauss & Levy, and apportioned among these different parties in accordance with an arrangement which met the assent of all of them. It will be observed that in the reply of Hoffheimer & Co., by which they took issue on the answers of the garnishees, they state that prior to the service of the writ of garnishment said garnishees combined, colluded and confederated together with

said Strauss & Levy for the purpose and with the intent to delay, defeat and hinder the creditors of said Strauss & Levy in the collection of their debts; and the question which came before the jury for trial turned upon the truth of this allegation. There is much other testimony in the bill of exceptions showing the interference of Klein, and occasionally of one of his partners, in the proceedings, by which this combination or conspiracy was carried out. Whether it is sufficient to establish it or not, it was for the jury to say, if they were properly instructed, and if no improper testimony was admitted. It is obvious that there is sufficient testimony to justify a jury in the inference that Mr. Klein was the presiding genius in the appropriation and distribution of the assets of Strauss & Levy.

Before we come to the matters on which the assignments of error are made, it is proper to make one or two things a little more clear than they seem at first sight. The transfer of the notes and accounts of Strauss & Levy to Frieberg, Klein & Co. was not an assignment to secure payment of the debt of the former to the latter, but it purports upon its face to be, and was treated by the parties throughout as, an absolute sale of those notes and accounts in full satisfaction of the debt due by the insolvent firm. The case is not to be treated, therefore, in its subsequent consideration, as one in which Frieberg, Klein & Co. held these notes and accounts as security for their debt, but as one in which they became the owners of them absolutely, if the transaction was fair and honest.

Another point to be considered is, how far this transfer or assignment of the notes and accounts was a part of the transaction by which the whole property of the insolvent firm of Strauss & Levy was appropriated during the twelve or fifteen hours within which the matter was completed. It is earnestly insisted by counsel for plaintiffs in error that the transaction between Klein and Strauss & Levy in the afternoon of the 10th was totally distinct from those which took place that night in regard to the attachments, and that therefore nothing said or done by Strauss or Levy, or by any of the parties, or their agents, whose attachments were levied after the execution of the paper transferring the notes and accounts to Frieberg,

Klein & Co., can be used as evidence against the validity of the transfer. If the entire proceedings of that afternoon and night are to be considered as one transaction, intended to distribute the assets of Strauss & Levy to certain creditors to the exclusion of others, then whatever was said or done by any of those parties in regard to that transaction is evidence against all of them, and the acts of Mr. Klein in futherance of this combination, though some of them may have occurred after he had obtained the transfer of a part of the assets of Strauss & Levy to himself and partners, must be considered as part of the *res gestæ*. We are of opinion that the short time consumed in the whole transaction, the active interference of Mr. Klein in all its stages and in securing priority for certain friends of his, and of Strauss & Levy in the attachments, and the fact that the whole property of the insolvent debtors was intended to go to certain individuals to the exclusion of others, by consent of the parties engaged, constituted one transaction, in which Mr. Klein's acts and doings were part of the *res gestæ*, and as such are admissible evidence.

With these principles in view we approach the assignments of error, the first of which relates to the introduction of testimony objected to by defendants below. The testimony of John W. Edmondson, who was in the employ of Marx & Kempner, one of the firms whose attachments were included in the proceedings we have mentioned, stated that the suit and attachments of Marx & Kempner were filed by the authority of Klein, and that Klein, Strauss and Levy, and Crawford, the attorney, had told him so. He also said that in September, 1885, he had a conversation with Strauss and Levy, at which Klein and Marx were present. In that conversation Strauss and Levy said they had received from Hoffheimer Brothers on the 10th of August, about nine or ten o'clock at night, a telegram which referred to their matters in such a way as to alarm them. That they then went with the telegram to Klein, about one o'clock that night, and with Klein to the house of Crawford, the lawyer, and there conferred together. It was then agreed "between all of them that confidential debts should be attached for as follows: Crawford & Crawford, Marx & Kempner,

Wertheim & Schiffer, Oliver & Griggs and Addie Lowenstein. Crawford & Crawford were to come first and Marx & Kempner next; but Sam Klein had it fixed so that next day when the attachments were levied that of Oliver & Griggs was levied ahead of Marx & Kempner." "Some statements were made by Levy that the attachment was agreed on, in which August Cohn, brother-in-law of Levy, was endorser on one of the notes. Levy said that he had taken legal advice, and would knock all the attachments out of court and give away how the whole thing was done, and let none of the confidential debts be paid a dollar rather than Cohn should suffer."

There is much more of this, showing the secret arrangements by which the property of the insolvents was to be disposed of as the parties present had determined. Edmondson said that Klein, who was present, concurred in all that Strauss and Levy said. He further testified that Klein had said in that conversation that in consideration of the agreement of Marx & Kempner to hold August Cohn harmless, they gave Marx & Kempner a note of Cohn endorsed by Strauss & Levy and by Frieberg, Klein & Co.

The objection to this testimony seems to be upon the ground that Strauss and Levy, after they had parted with their interests in the property, could not, by their own confessions, or statements of the nature of the transaction, defeat the title they had transferred to Frieberg, Klein & Co. But it will be remembered that this conversation was in the presence of Klein, one of the defendants, and that the bill of exceptions states that he concurred in all that was said. It was therefore admissible against him and his partners as a statement which he agreed to at the time of the conversation, and which he should have contradicted if it were untrue.

With regard to the letter attached to Edmondson's deposition as an exhibit, from J. J. Levy to M. Marx, of the firm of Marx & Kempner, it might possibly be admissible, though written August 31st, twenty days after the attachment proceedings, as showing that Levy understood that in those proceedings his friend Cohn was to be taken care of. Otherwise it is entirely immaterial, and could not have worked the defendants any harm.

Opinion of the Court.

After the testimony of Edmondson, the deposition of H. Kempner, of the firm of Marx & Kempner, was introduced. He testified to a conversation with Mr. Klein in Galveston on the Sunday morning after the attachment suits had been instituted, in which he said: "Now, Mr. Klein, being that you were the leader and manager for the attachment suits, why is it that you did not carry out the instructions of Strauss & Levy, and put Marx & Kempner second in the order of attachment?" He replied that he felt in honor bound to put Oliver & Griggs ahead of Marx & Kempner, because he had recommended them for accommodation. He said that he had done all that he could for Marx & Kempner; that Strauss had insisted that Addie Lowenstein should be put in as a creditor in attachment for three thousand, but he, Klein, had objected, and it was compromised on the one thousand named in her suit. She is the sister-in-law of Strauss.

As this testimony relates to what Klein himself, one of the defendants, said, and as it tends to show his own recognition of the fact that he had been a controlling spirit in the attachment proceedings, we do not see what objection can be urged to it.

Objection is made to the testimony of Chapman Bradford, offered in rebuttal, to the effect that he had seen in the store of Pascal Tucker, in Brownwood, several barrels of whiskey marked S. & L., Dallas. This testimony seems to have been offered in rebuttal of the testimony of Klein, who had declared that Tucker had been book-keeper for Strauss & Levy, and had afterwards moved to Brownwood, and was keeping a store there; that "none of Strauss & Levy's goods were shipped to Tucker; he received none of them. I shipped all of them to Frieberg, Klein & Co., at Galveston." This was his own firm. So far as the testimony of Bradford tended to contradict this statement of Klein, no objection can be seen to its admissibility; and if neither Klein's testimony nor Brown's testimony is material to the issue, it seems to be so utterly useless that defendants could not be hurt by it.

Two principal objections are made to the charge of the court. The first of these, and perhaps the more important, is

that the court placed the burden of proof upon the garnishees to establish the fairness of the transaction by which they obtained possession of the notes and accounts of the insolvent debtors. The argument is that the defendants, by virtue of the statute, answered certain interrogatories which had been propounded to them in the garnishee process; that that answer is to be taken as evidence in their favor; and that, as they positively denied having any property or credits of the insolvent debtors in their hands, or being in any way indebted to them, this answer should stand as a *prima facie* case in their favor to be overcome by proof on the part of the plaintiffs. It is also true that in the traverse of this answer made by plaintiffs they set out the affirmative allegation that "prior to the service of the writ of attachment and writ of garnishment the garnishees combined, colluded and confederated together with said Strauss & Levy for the purpose and with the intent to hinder, delay and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action, and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claims, pretending to be owners thereof." If this allegation is not true in substance, the plaintiffs had no case against Frieberg, Klein & Co., and the burden of the issue was, therefore, primarily upon them. But Klein and another member of that partnership were sworn as witnesses, and what they said as witnesses, being minutely descriptive of what was done, is much more important in ascertaining the truth than their general denial that they held the property of the insolvent debtors or owed them anything. In the testimony of Klein himself it was made very clear that he was aware, at the time of the transaction by which he obtained their choses in action, that Strauss & Levy were insolvent, or at least were in failing

circumstances and unable to pay their debts; and that he received from them all or nearly all of the notes and accounts due them, and professed to take them in payment of the debt of his firm. It was not unreasonable, therefore, that the court should charge that, under these circumstances, Klein and his partners should establish the fairness of the proceeding by which they came into the possession of these notes and accounts.

The substance of the charge of the court, of which complaint is made, is, that "if the jury believe from proof in the case that plaintiffs had a valid, existing, unsatisfied claim against Strauss & Levy for something over eleven thousand dollars, and that Strauss & Levy were insolvent on the 10th day of August, 1885, and that Klein knew, or might have known, that fact, and that under the circumstances he on behalf of garnishees took the bills receivable, and that garnishees had received and collected the sum of nearly ten thousand dollars, and have still uncollected bills of value, you will find the garnishees liable, *unless* you believe also from the proof that the garnishees were, in fact and in good faith, creditors of Strauss & Levy in the full sum claimed by said garnishees, and that the dealings of Klein on behalf of the garnishees, with Strauss & Levy, on the 10th day of August, were, in fact, fair and honest and had with a single purpose of obtaining satisfaction of their debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt." We think that this was a fair statement of the law on the subject. The whole case was before the jury. The insolvency of Strauss & Levy was known, or might have been known to Klein, and, therefore, when he undertook to deal with the assets of this insolvent firm by taking a very large part of it in payment of his own debt, a circumstance which he knew must leave many other creditors either wholly or partly unprotected and without means for payment, it was proper that all his dealings in that matter should be fair and honest; that his claim should be a just one; that he should receive no more than what was reasonably necessary to pay his debt; and that if the transaction was tainted with any

fraud or unjust interference with the rights of creditors it should not stand. In other words, the preliminary statement of those facts made a case which required of the garnishees a fair and satisfactory explanation of the remarkable proceedings of Mr. Klein and his partners in the whole transaction.

The language we have cited also shows that there is no ground for the argument of counsel that the jury were instructed that if the garnishees received anything more, even a dollar, than was due to them of the assets of the insolvent debtors, the transaction was therefore void. Fair play and honest dealing did require that while they had the right, as is admitted by the court, to secure their debt or to take payment for it provided it was done fairly and honestly, and that Strauss & Levy had a right to pay them out of their assets in preference to other creditors, yet it was right and proper that they should take no more of these assets in which other creditors were interested than was, in the language of the court, "reasonably worth the amount of the garnishees' debt." Of course this reasonable amount did not mean that it should be measured to a dollar or to a cent. It did not mean if what they took turned out to be worth a little more than their debt, if the notes and accounts yielded a little more than the debt in the end, that thereby the whole transaction was to be void, but it meant, and that we think was sound law, that in presence of the circumstances under which the transfer was made, if defendants took more than what appeared to be reasonably worth the amount of their debt, it was a fraud upon the other creditors; and the court, in giving the converse of this proposition, said that if the garnishees on that day received no more from the insolvent debtors than was reasonably sufficient to satisfy their claim, the jury were to find for the garnishees.

The court also instructed the jury that if they found for the plaintiffs, they were to return a verdict for the amount of money shown by proof to have been received by the garnishees and the value of the uncollected bills, if the sum of these did not exceed plaintiffs' debt. It is said that the garnishees could only be liable for the sum which they had actually collected

out of these notes and accounts, and that, as to any of them remaining in their hands, they could not be held accountable in this proceeding. If the transfer of these choses in action to the garnishees had been a fair assignment by way of security out of which they were to pay their debt, if so much of it could be collected, then the remainder of the choses in action, whether valuable or not, could be returned by them, without liability; but, as we have seen, the case goes upon the idea of a fraudulent conversion by Frieberg, Klein & Co. of assets of the insolvent debtors. By this fraud the control of the assets passed to them, and we are of opinion that, if liable at all, they were liable not only for the money collected on such notes and accounts, but for the value of those which remained in their hands to at least, as the court instructed, an amount sufficient to pay the debt of Hoffheimer Brothers against Strauss & Levy. Whether there was, or not, such amount was a question left to the jury, and the jury found that there was. They must have found, under the instructions of the court, that enough of the assets collected remained in their hands, either in the shape of money collected or of notes and accounts yet uncollected but valuable, to pay the debt of Hoffheimer Brothers against Strauss & Levy. In this we see no error to the prejudice of the plaintiffs in error, and the judgment is therefore

Affirmed.

BRADLEY *v.* CLAFLIN.

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

No. 110. Argued November 14, 1889. — Decided December 9, 1889.

In Louisiana, as in the States in which the English system of equitable jurisprudence prevails, a creditor who has received from his debtor the legal title to real estate, may institute other proceedings against the debtor in relation to the same property, in order to strengthen his title or establish his lien, if he deems it his interest to do so.

In Louisiana a married woman, who has received from her husband a con-

veyance of real estate as a *dation en paiement* of a debt against him arising out of her paraphernal property which came into his control, may cause a mortgage of the same property to secure the same debt to be recorded in the manner provided by law, and the mortgage may become valid if the title under the conveyance fails.

In Louisiana a mortgage or lien on real estate of the husband in favor of the wife is created by Art. 3319 [3287] of the code when the husband receives her dotal or paraphernal property, which mortgage though not registered, is not merged in a simulated and fraudulent title conveyed to her by her husband as a *dation en paiement,* and its registry by the wife makes it valid against creditors of the husband asserting title under liens subsequent thereto.

The case is stated in the opinion.

Mr. B. R. Forman for appellants.

Mr. W. W. Howe for appellees.

Mr. Justice Miller delivered the opinion of the court.

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

Julius Lisso and John H. Scheen constituted a mercantile partnership engaged in business in the town of Coushatta, Louisiana. Horace B. Claflin, Edward E. Eames and others, constituting the firm of H. B. Claflin & Co., of the city of New York, were creditors of Lisso and Scheen, and on the 4th day of December, 1878, they commenced, in the proper state court of Louisiana, a suit with an attachment against Lisso and Scheen and their wives, Clara Forcheimer and Nancy A. Bradley, and others, in accordance with the law and practice of Louisiana. The attachment was levied upon property, real estate mainly, which is the subject of controversy in this case. The suit was afterwards removed into the Circuit Court of the United States. The record of the case in the Circuit Court commences with a bill in chancery filed on the 13th day of November, 1879, in that court, by H. B. Claflin *et al.* against Julius Lisso *et al.* To this suit Lisso and Clara Forcheimer, his wife, and John H. Scheen and Nancy A. Bradley, his wife, are made defendants. This bill, after giving the names of the

persons composing the partnership of plaintiffs, who are citizens of New York, and of the defendants, who are citizens of Louisiana, alleges that the defendants Lisso and Scheen are indebted to the plaintiffs in the sum of $9580.14 on promissory notes, which are described in the bill and on an open account. It then sets out the commencement of the suit and attachment of December 4, 1878, and that certain property was seized under that attachment as the partnership and individual property of Lisso and Scheen, a schedule of which is said to be annexed to the bill. The plaintiffs further allege that by said seizure they have acquired a just and valid lien upon the property seized under the laws of Louisiana. They allege that said Lisso and Scheen obtained the goods sold by complainants to them by false representations as to their solvency made to plaintiffs in New York, and in contemplation of the fraud and insolvency hereinafter set forth. "Among other assets they reported the real estate herein mentioned, which they declared to be and which is justly worth upwards of $20,000."

"That thereafter, and on or about the 23d November, 1878, being entirely insolvent and largely indebted not only to your orators but to others, the said Julius Lisso and John H. Scheen did conspire and collude with their said wives and their said wives with them, to cheat, hinder, delay and defraud your orators, by making a pretended, simulated and fraudulent transfer of all the real estate of the said Lisso and Scheen unto their said wives, respectively, including alike the partnership and individual real property of said Lisso and Scheen in the town of Coushatta and parish of Red River, and also the interest in the telegraph line described in the deeds.

"That said pretended, simulated and fraudulent transfers were made on the 23d day of November, 1878, and recorded in the office of the parish recorder at Coushatta, and were by acts before D. H. Hayes, notary public, and for greater certainty your orators annex hereto and refer to said acts as a part of this bill.

"Now your orators aver that said acts purported to be *dations en paiement*, but they allege and charge that they and each of them was and is illegal, fraudulent, simulated and void,

and worked and still work great injury to your orators; that they were and each of them was made when the transferors were insolvent; that after such transfers the transferors had not property enough left to pay orators' claims; that the said transferees and each of them knew of the insolvency of the said Lisso and Scheen, and was a party to and colluded in said fraud. They further show that the price named in said pretended *dations en paiement* or transfers was wholly inadequate and fraudulent; and they show that even if the said acts or transfers had and have any reality in law they gave and give an unjust and unlawful preference and are null and void; but they expressly aver and charge that the said Lisso and the said Scheen owed their said wives nothing whatever at the time of said pretended transfers, whether on paraphernal account or otherwise.

"And your orators exhibit this their bill as well in aid of the proceedings in said suit No. 8883 as for such discovery and relief as they may be entitled to in the premises."

The prayer of the bill is, that defendants may be required to answer, "and that the said transfers, or *dations en paiement*, passed before D. H. Hayes, notary public, on the 23d November, 1878, may be declared to be simulated, fraudulent, injurious, illegal, null and void, and all the property therein described subjected to the just claims of and debts due your orators as aforesaid, and sold to pay the same; and that the debts due and owing to your orators may be duly liquidated by proper decree as to the said defendants, Lisso and Scheen, as well as to the other defendants."

Other proceedings of a similar character were instituted against the same defendants at about the same time by Henry Bernheim *et al.* Simon August *et al.* and Charles F. Claflin *et al.* Bills identical in their language with those of Claflin & Co. were filed against defendants. They were afterwards, by an agreement of counsel and the order of the court, consolidated and tried together as one cause. In these cases thus consolidated there was, by consent of all the parties in open court, as shown by the record, entered a decree on January 22, 1883. This decree declared —

"That as to the act of conveyance, or *dation en paiement*,

recited in the bills of complaint herein made by the defendant, John H. Scheen, unto the defendant, Nancy A. Bradley, his wife, by act passed before D. H. Hayes, notary, parish of Red River, November 23d, 1878, and filed for record and recorded in said parish in conveyance and mortgage books the same day, and whereof a certified copy has been filed as an exhibit herein November 26th, 1879, and is now annexed hereto as part hereof, be, and the same hereby is, in all things revoked, annulled and set aside, and the property therein described and purporting thereby to be conveyed to said Mrs. Nancy A. Bradley, wife of John H. Scheen, declared to have been the property of said John H. Scheen at the time the bills of complaint herein were filed, to wit, November 13th, 1879, and is hereby subjected to the just claims, demands and judgments of the complainants herein, subject to provisions hereinafter made, which judgments of complainants herein against said Julius Lisso and John H. Scheen *in solido* are as follows:

"*H. B. Claflin & Co.* v. *Lisso & Scheen*, No. 8883 of the docket of this court, $9580.14, with interest as therein set forth.

"*H. Bernheim & August* v. *Lisso & Scheen*, No. 8880, $655.38, with interest as therein set forth.

"*August, Bernheim & Bauer* v. *Lisso & Scheen*, No. 8881, $2326.36, with interest as therein set forth.

"*Claflin & Thayer* v. *Lisso & Scheen*, No. 8882, $2298.57, with interest as therein set forth.

"And it is further ordered that any mortgage claims which said Mrs. Scheen may have against said property described in said deed of November 23, 1878, be, and the same are hereby, reserved for further decision."

This reservation had reference to a claim by Mrs. Bradley, the wife of Scheen, under a mortgage which she asserted on the property in controversy, filed in the proper parishes where the land in question lay, where they were duly recorded, namely, in the proper office at Bienville, April 30, 1879, and that of the parish of Red River, June 6, 1879. After the consent-decree had been rendered, Mrs. Bradley was permitted

to file an answer and cross-bill against complainants in the original suit, setting up her claim under this mortgage, to which there were a demurrer and answer; also replications. On the 19th of December, 1885, the following agreement was filed, by which the case came on to be heard on the bills, answers, and demurrers:

"Claflin et al. *vs.* Lisso et al. } Nos. 8896–'9. — Four consolidated causes.

"To save time and expense to both sides, it is agreed that the complainants may withdraw their replication to answer of Mrs. Nancy A Bradley, wife, etc., filed April 26th, 1884, and their answer to said Mrs. Bradley's cross-bill filed, and the said Mrs. Bradley may withdraw her replication to said answer (with rights, however, reserved to both parties to renew said pleadings and reinstate the issues as hereinafter reserved,) and that complainants may file their annexed demurrers and the cause may be set down on the bills, answers and demurrers.

"In case said demurrers are overruled, the answers and replications above mentioned may be renewed and stand restored to the record, and cause proceed on traverse and issues thereby made as if they had not been withdrawn, the object of this agreement being to present in the simplest and least expensive manner the questions raised by said demurrers.

"Dec. 19th, '85.

"KENNARD, HOWE & PRENTISS,
For Complainants,

"W. H. ROGERS,
For Defendants."

The decree of the court, rendered on February 6, 1886, declared:

"That the demurrers of the complainants herein to the said cross-bill of the said Mrs. Nancy A. Bradley, wife of John H. Scheen, be, and the same hereby are, sustained, and the said cross-bill dismissed.

"It is further ordered and decreed that the lien privilege

and preference of the complainants herein on the property or its proceeds described in the conveyance thereof, made November 3, 1878, from said John H. Scheen to said Nancy A. Bradley, his wife, by act before D. H. Hayes, notary public for the parish of Red River (which conveyance has been revoked as to the complainants by the decree herein of January 22, 1883, and which property has been subjected to the judgments of the complainants in said decree specially detailed), be, and are hereby, recognized, declared, and made executory, and are adjudged to be in all respects superior and paramount to all and any mortgage, claim or other debt or demand of the said Mrs. Nancy A. Bradley, wife of said John H. Scheen, set up in this cause, and are declared to be a first lien, privilege, and preference on the said property, its proceeds, fruits, revenues, rents, and profits."

It is from this decree that the present appeal by Mrs. Bradley, wife of Scheen, is taken, and all other questions are by the original consent-decree and by the state of the record eliminated from the case, except that which concerns the validity of the mortgage of Mrs. Bradley on account of the paraphernal property which passed to her husband, for which this mortgage was inscribed. It is necessary to add that in the progress of this case the attachments which had been issued and levied on the property in controversy were dissolved, and that an ordinary judgment was rendered personally against Lisso and Scheen for their indebtedness to the parties plaintiff to this suit. It is therefore clear that the plaintiffs derived no aid in establishing their lien upon the property by reason of these attachments, and it seems to be conceded in the argument of counsel that such lien as they may have, commenced with the filing of their bills on the 13th of November, 1879. The object of those bills, it will be observed, was to set aside the conveyance made by Lisso and Scheen to their wives of November 23, 1878, which is said to be a *dation en paiement* under the Louisiana law, that is, a proceeding by which the husband, in this case, conveyed to his wife certain real estate, which she accepted as payment *pro tanto*, to wit, at $10,000, on her debt against him arising out of her paraphernal property that came

into his control; and although the subsequent mortgage instituted by Mrs. Scheen, which it was supposed would cover the property now in controversy, had been recorded in the proper parishes April 30, 1879, and June 6, 1879, which was in one instance seven months and the other nearly six months before the bill of complaint was filed, no reference is made in that bill to this mortgage and no attempt made to have it declared void or set aside, but the plaintiffs were content to take a decree setting aside the first conveyance of November 23, 1878; and it is only by reference to the reservation in the decree that any notice is taken of the mortgage of Mrs. Bradley.

As there is no answer to Mrs. Bradley's cross-bill, and as the case before us rests altogether upon the sufficiency of the allegations of that bill to establish her right under that mortgage, we must look to that alone to determine the question. Mrs. Bradley sets out in very distinct terms that her husband at various times received from her father advancements made to her and from her estate, which are specifically set out and amount to the sum of $29,321.23, for which she claims interest at the rate of five per cent per annum. By the law of Louisiana the assertion of this claim of a wife against a husband and against his property is an *ex parte* proceeding, by which the wife, with certain formalities, makes out an account of the foundation of her claims against her husband, and has it recorded in the proper book of records of the parish or parishes where the lands of her husband lie. Until this is done her claim affects no other person, and this act of recording what is called a mortgage is the initial proceeding by which the claim against her husband's property is made effective. But after it is so recorded all persons are bound to take notice of the existence of the claim as though the husband had himself executed a mortgage to his wife to secure the payment of the debt. What may be set up by creditors of the husband or by purchasers of his real estate to defeat the claim thus instituted, it is not necessary to inquire in this case, because no attack is made upon the justice of the claims of Mrs. Bradley against her husband nor upon the regularity of the proceedings by which this mortgage was instituted. No answer being filed to

the cross-bill, the statements in it are to be taken as true so far as they are pertinent to the question before the court. It is thus admitted by the demurrer to the bill that Scheen had, prior to the 30th day of April, 1879, received of the paraphernal and dotal property of Mrs. Bradley coming through her father the sum alleged in her bill, $29,321.23, for which he was indebted to her, and that she followed the course pointed out by the law in establishing what the statute of Louisiana calls a mortgage on his real estate to secure the payment of that indebtedness. No fraud is alleged by appellees in regard to this transaction. No denial of its truth is made in the record. Some attempt is made in the way of argument to assert the priority of the appellees because their attachment was levied upon the property before a record was made of appellant's mortgage, but with the dissolution of that attachment any lien which could depend upon it fell. In the language of counsel for the appellees in this case, the attachments having been dissolved on technical grounds only, judgment for the money demand was rendered in each case in June, 1880. As these judgments were rendered long after the recording of Mrs. Bradley's mortgage, they could not effect a lien prior to hers, and by the dissolution of the attachments no lien acquired by them could affect her interest at all.

The ground on which the invalidity of this mortgage is asserted by appellees is that at the time Mrs. Bradley had it inscribed in the proper book the property was her own, and the title to it was in her by reason of the conveyance made by Scheen to her in payment of his debt to her, which was the subject of the controversy between the parties, and which was set aside in the consent-decree rendered January 22, 1883. It is asserted in argument that, because the title and ownership of that property was in her at the time she inscribed the mortgage now in controversy, she could not in such a proceeding create a valid mortgage on her own property; that at that time Scheen, her husband, against whom the mortgage lien was asserted, had no title or interest in the property, and that therefore the proceeding was of no effect. This proposition is earnestly insisted upon by counsel, and seems to have been the

one on which the Circuit Court rested its decision dismissing Mrs. Bradley's bill. *Claflin* v. *Lisso*, 27 Fed. Rep. 420. We are not referred to any clause of the Code of Louisiana which asserts this principle, nor have we been able to find it in any article or section of that code. It seems to be counsel's inference from the general state of the law concerning mortgages and the title to real estate. Reference is made in the brief of counsel to the case of *Townsend* v. *Miller*, 7 La. Ann. 632, and to the cases of *Miller* v. *Sherry*, 2 Wall. 249, and *Lyon* v. *Robbins*, 46 Illinois, 279, which are also mentioned in the opinion of the judge, who decided the case below, but these cases only concern the effect to be given to a decree rendered in favor of a judgment creditor setting aside a prior conveyance of the debtor as a fraudulent obstruction in the way of the judgment creditor. None of them establish the doctrine contended for in this case, that a person who has received a conveyance of the legal title to real estate from his debtor may not institute other proceedings against that debtor in relation to the same property to strengthen his title or establish his lien, if it is his interest to do so. That this may be done under the English system of equitable jurisprudence is well established, and no reason can be seen either in law or in equity why a party who has received such conveyance, coming to see that his title through it is not perfect, that the conveyance itself may be void or voidable, and that thereby he may lose the debt or consideration of the conveyance, may not institute any proceeding known to the law, and not unjust or inequitable, by which his defective title may be strengthened or his original lien made effectual and established in regard to the property. One of the most common instances of this character, very similar in its nature to the transaction now under consideration, is that of a mortgagee who, by the English common law, was treated as holding the legal title with an equity of redemption in the mortgagor, but who accepts a conveyance of that equity of redemption to himself by the mortgagor as payment of the debt secured by the mortgage. In such case it may happen that the mortgagor has created other liens or encumbrances upon the property between the execution of the mortgage and that

of the deed conveying to the mortgagee the equity of redemption. If this conveyance of the equity of redemption is to be treated as absolute payment of the debt secured by the mortgage, which, as between the mortgagor and mortgagee, it is intended to be, then the mortgage being paid off and discharged, and of no further effect, the parties who have obtained a lien subsequent to that mortgage, but prior to the sale to the mortgagee, would find their lien to be a prior encumbrance upon the property, and superior to the title conveyed by the mortgagor to the mortgagee. To prevent this injustice, equity has established the principle that by holding the possession of his mortgage, and not making any release or satisfaction, he may continue to have the benefit of that mortgage as a lien prior to that of the parties whose rights have intervened, and thus he takes the title, which is intended to be a discharge of that debt as between him and his debtor, while he holds the mortgage itself to be so far alive as to protect him against the subsequent encumbrances on his own land. The analogy of that principle of equitable jurisprudence to the case before us is obvious. In both cases, because equity requires it, the common law doctrine of merger of the two titles does not occur. In favor of the party whose interest would otherwise suffer, they are both kept alive. In this case the mortgage which the law gave Mrs. Bradley on her husband's real estate for her money which came to his hands, though not registered, was not merged in the simulated and fraudulent title conveyed by her husband as *dation en paiement*. *Forbes* v. *Moffatt*, 18 Ves. 384; *Mulford* v. *Peterson*, 35 N. J. Law (6 Vroom), 127; *Mallory* v. *Hitchcock*, 29 Conn. 127; *Slocum* v. *Catlin*, 22 Vermont, 137; *Wickersham* v. *Reeves*, 1 Iowa, 413.

By the Code of Louisiana, article 3319 [3287]:

"The wife has a legal mortgage on the property of her husband in the following cases:

"1. For the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of the marriage.

"2. For the restitution or reinvestment of dotal property which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected.

"3. For the restitution or reimbursement of her paraphernal property."

We understand this article as declaring the existence of such mortgage or lien from the time when the dotal or paraphernal property of the wife was received by the husband. *Scheen* v. *Chaffe*, 36 La. Ann. 217, 220. Certainly such is the meaning of the article as between the husband and wife. But as to other parties, it is declared by section 3347 that "no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated;" and by section 3349, that when the evidence of such legal mortgage existing in favor of a married woman shall not exist in writing, then "a written statement, under oath, made by the married woman, her husband, or any other person having knowledge of all the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based, shall be recorded."

The appellant in this case having this undisputed right of mortgage for the $29,321.23 set out in her bill, and perceiving that it might be lost either by the fraud of her husband in making the conveyance to her or by some other imperfection, by which it did not transfer to her a clear title to the property mentioned in the conveyance, resorted to her original right of mortgage against the property, which she undertook to make effectual by recording it, as the law required, in the parishes where the real estate lay. She thus, as in the case of the mortgage mentioned in the English equity jurisprudence, reverted to her original right, which was prior to all the conveyances and all the suits about this property set out in this record, and as it was inscribed before any lien accrued to the appellees on that property, or any right to appropriate it to the payment of that debt, it is not perceived why her mortgage does not constitute a prior and superior claim to theirs.

There is found running through the whole of this record an

attempt to control the action of the Circuit Court of the United States in the case by the introduction of proceedings had in the local court of Louisiana, which would have undoubted jurisdiction if it were not for the prior commencement of proceedings in the Circuit Court in the present case. These state court proceedings originated in a surrender by Lisso and Scheen of all their property of whatever description for the benefit of all their creditors, after the proceedings in this case had been commenced, and the appointment by the tenth district court of the parish of Red River of a syndic, namely, Christopher Chaffe, Jr., to take charge of all their assets, convert them into money, and pay it out on the debts of the firm of Lisso & Scheen. In that proceeding, which of course could not oust the Circuit Court of the United States of its jurisdiction to proceed in the present case already before it, Mrs. Bradley filed her claim under the original *dation en paiement* made by Scheen to her, and her mortgage, the same that is in controversy here, asserting the superiority of her claim on the real estate in controversy in this suit against the syndic and the creditors whom he represented. That case, so far as Mrs. Bradley was concerned, followed very much the same course as the present case, and it came twice before the Supreme Court of Louisiana. The first of these cases, that of *Chaffe, Syndic* v. *Scheen*, is reported in volume 34 of the Louisiana Annual Reports, at page 684. The question there had relation to the validity of the same conveyance by Scheen to his wife as a *dation en paiement*, in which the court declared that conveyance to be void in the following language (page 690):

"For these reasons, and after a thorough and prolonged study of the question, and of all the law and the facts bearing on it, we are forced to conclude that this act of giving in payment was null and void and without effect as to the creditors of J. H. Scheen."

But the court in that case declared that whatever other claims Mrs. Scheen may have against her husband, J. H. Scheen, are reserved to her with the right to prosecute them in such mode and manner as the law may provide. Subse-

quently, Mrs. Scheen did prosecute in the District Court of the parish of Red River her claim under the mortgage, which is now the subject of controversy, and that case, which also went to the Supreme Court of Louisiana, and is reported in 36 La. Ann. 217, was decided in her favor as to the validity of the mortgage. The court says: "The greater part of the indebtedness claimed grows out of the husband collecting and using the moneys realized on promissory notes taken on the sales of lands, and alleged, as stated, to have been donated to the plaintiff." The court says further: "The validity of these donations is not questioned by the donor nor his heirs, nor his creditors, and we cannot perceive any right in the creditors of Scheen to raise such objection. It is sufficient that the husband received or collected the funds in question as agent of his wife, and under color of the right claimed by her and recognized by him." "The most serious contest," says the court, "is in regard to the legal mortgage claimed. One of the grounds was that it was not inscribed prior to the 1st of January, 1870." To this the court replies "that the omission to register at that time only deprived the mortgage of force with respect to third persons, who at that date had mortgages or pledges upon the property of the husband that are so far superior to the claims of the wife. So far as relates to the husband and his property, the mortgage in favor of the wife, if there existed one, continued to exist without registry, and if recorded subsequently took effect as to third persons from the date of its registry. The evidence of plaintiff's legal mortgage against her husband was recorded in the parish of Red River in 1879, and its effect upon the immovables in that parish surrendered by the insolvent was properly recognized by the judgment." There was then considered a question as to the registry in the parish of Bienville, which seems not to have been proved, and which was left open for further consideration. Although the direct question of the effect of the prior conveyance of Scheen as a *dation en paiement* is not referred to in this last report, it is obvious that the whole case was a proceeding in the tenth district court of the parish of Red River in regard to the rights of the syndic Chaffe in this property;

and, in the one case, that part of it which related to the *dation en paiement*, the court in the first of these reports declared that conveyance void, but remitted Mrs. Bradley to her rights, if she had any, under the mortgage inscribed April 30th, 1879; and that, when the proceedings to enforce that right came before the same court, it declared the mortgage to be valid for all property within the parish where it was recorded. It must necessarily have considered the effect of the previous conveyance in payment which it had set aside, upon the mortgage it now declared to be valid. It can hardly be believed that if that prior conveyance constituted any lawful obstruction to the right of Mrs. Bradley to record and assert her mortgage, which the court said had existed long prior to any of these proceedings as between her and her husband, and which was made effectual when it was recorded, it would not have been considered and referred to. It is a fair, if not a necessary inference from these two cases, that the counsel engaged in them and the court which decided them did not perceive in the conveyance of Scheen to his wife anything which defeated her right to the mortgage for her dotal or paraphernal property. The question as to the validity of that mortgage after the court had set aside the conveyance as *dation en paiement* was precisely the same as the one in the Circuit Court of the United States, whose decree we are called to revise, and we think we are safe in following the decision of the Supreme Court of Louisiana on the same facts under Louisiana law. The result of these considerations is, that

The decree of the Circuit Court dismissing Mrs. Bradley's bill is reversed, and the case remanded to that court for further proceedings.

AYERS *v.* WATSON.

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

No. 119. Argued November 18, 1889. — Decided December 9, 1889.

Before former declarations of a witness can be used to impeach or contradict his testimony, his attention must be drawn to what may be brought forward for that purpose, with particularity as to time, place and circumstance, so that he can deny it, or make any explanation tending to reconcile what he formerly said with what he is testifying.

After a witness' testimony has been taken, committed to writing and used in the court, and by death he is placed beyond the power of explanation, then, in another trial had after his death, former declarations by him, whether by deposition or otherwise, contradictory to those made by him in that testimony, cannot for the first time be brought forward and used to impeach it.

THIS is the same cause brought here and heard at October term, 1884, and reported 113 U. S. 594. The case now made is thus stated in the opinion of the court:

This is an action of ejectment brought by Watson, the original plaintiff, in the District Court for the county of Bell, in the State of Texas, and afterwards removed into the Circuit Court of the United States for the Northern District of that State. It was twice tried before a jury, which failed in each of these trials to come to an agreement. It was tried a third time, which resulted in a verdict and judgment for the plaintiff. A writ of error was taken to that judgment, by which it was brought to this court and reversed. The case is reported as *Ayers* v. *Watson*, 113 U. S. 594. It was thereupon remanded to the Circuit Court for a new trial, where a verdict was again had for the plaintiff, and the judgment rendered on that verdict is before us for review.

The details of the controversy may be found in the report of the case above mentioned. While it was pending in the District Court of Bell County the following agreement between the parties was made, which simplifies the case very much:

Statement of the Case.

"A. E. Watson
v.
Frank Ayers, et al.

"It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16, A.D. 1850, said land patented being one-third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said one-third of a league of land so patented as aforesaid to the heirs of Walter W. Daws is covered by the grant of the government of Coahuila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition; which said eleven-league grant is an older and superior title to that of plaintiff, and the title to which is in the defendants in this cause.

"X. B. Saunders,
"W. T. Rucker,
"F. H. Sleeper, and
"A. M. Monteith,
"*Att's for defendants.*"

By this agreement it will be seen that the sole question at issue was whether the land in controversy was covered by the eleven-league grant to Maximo Moreno. A plat of that survey is found in the bill of exceptions. On the trial which resulted in the judgment, which we are now called to reconsider, and which, as we understand it, was the fourth time the case had been tried by a jury, the defendant introduced the deposition of F. W. Johnson, the surveyor who had made the survey under the Moreno grant. It seems that his deposition had been taken twice in this action, and, though the details of those trials are not before us, it had no doubt been used in them. But prior to the trial which we are now reviewing, he had died. It appears from the bill of exceptions that in these depositions he had been cross-examined by plaintiff's counsel. Plaintiff in rebuttal to this testimony of Johnson offered

in evidence a deposition of the said Johnson taken in 1860, in a suit between other parties, in which his testimony with regard to the matters to which he testified in the depositions offered by defendant varied materially from these latter depositions. To the introduction of this deposition of 1860 the defendants objected, and, their objection being overruled, took this exception. As we think the judgment of the court below must be reversed on account of this ruling, all that relates to it in the bill of exceptions is here reproduced:

"It was admitted by both parties that the upper and lower corners on the river of the Maximo Moreno 11-league grant are extant as called for in the original grant to Maximo Moreno, and their corners are not in dispute.

"The defendant read in evidence the depositions of F. W. Johnson, taken in 1878 and 1880, in which he testified that he was principal surveyor for Austin's colony. . . . The first survey made was the Maximo Moreno 11-league survey. This survey was commenced at the point opposite the mouth of the Lampasas River, as called for in the field-notes of the grant, and a line was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. In running the west line I made an offset to avoid crossing the Leon River, which was about 50 or 60 vrs. wide. This offset was made soon after leaving the beginning corner, there being a peculiar bend in the river at that point. From the northwest corner thus established the second line was run the course and distance called for in the grant. Several streams were crossed on this line at distances not now recollected, and the northeast corner established on two small hackberries in Cow Creek bottom. From the northeast or third corner so established a line was run in the course called for in the grant to San Andres River. This last line was marked but not measured, because it was not usual or necessary to measure the closing line.

"It was admitted by the defendant that the distance as measured on the ground from the northeast corner to a creek

called for in the grant was some four thousand varas more than the distance called for; that is, the distance is 7500 instead of 3500 vrs.; and on cross-examination, being asked to account for the discrepancy, said the distances called on that line were not measured but guessed at. No part of the east line was measured. The exterior lines were marked with blazes. The corner trees and bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to question, on cross-examination, he said that he did not begin the survey at the southeast corner, but he began at the southwest corner, at the three forks at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field-notes. The field-book containing the same, which I kept, I examined, which I don't remember to examine until a month ago, and as hereinbefore stated.

"The plaintiff, in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of said Johnson, taken in 1860, in a certain suit then pending in Bell County, Texas, wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated in answer to question therein propounded that he began the Moreno survey at the southeast corner and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured. It was not usual to measure the closing line. To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendants objected upon the ground that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendants, notwithstanding the death of Johnson; which objection the court overruled and admitted

the testimony so objected to; to which ruling of the court the defendants then and there excepted and still except, and the same is allowed as exception No. 1."

Mr. William E. Earle for plaintiffs in error.

Mr. W. Hallett Phillips for defendant in error.

We submit that the deposition of Johnson was properly admitted as evidence to go to the jury with the other evidence in the case, in order to enable them to ascertain the disputed lines of the Moreno survey, which had been run by the party making the deposition.

The precise point was determined in favor of the admissibility of the evidence, by Mr. Justice Field, in delivering the opinion of the Supreme Court of California in the case of *Morton* v. *Folger*, 15 California, 275, 277. See also *Cornwall* v. *Culver*, 16 California, 423. The rule is well settled in Texas that such a deposition is admissible. *George* v. *Thomas*, 16 Texas, 74; *S. C.* 67 Am. Dec. 612; *Stroud* v. *Springfield*, 28 Texas, 649; *Welder* v. *Carroll*, 29 Texas, 317; *Evans* v. *Hunt*, 34 Texas, 111; *Smith* v. *Russell*, 37 Texas, 247; *Hunt* v. *Evans*, 49 Texas, 311; *Coleman* v. *Smith*, 55 Texas, 254; *Tucker* v. *Smith*, 68 Texas, 473.

The record shows that the deposition now in question was taken in a suit wherein David Ayers was plaintiff and Lancaster was defendant. It also shows, by the answer of one of the defendants, that the plaintiff in error, Frank H. Ayers, claims title to the tract in question through David Ayers.

The deposition, it thus appears, was taken in a suit in which the present plaintiff in error, Frank H. Ayers, was in privity with the plaintiff in that action, David Ayers.

Under the rule stated in the cases relied on by plaintiff in error, the deposition was admissible in the present suit. The answer of Anderson containing the statement of the derivation of title, was filed in order to compel his landlord and warrantor, Frank H. Ayers, to come in and defend the title. This Ayers accordingly did and set up title to the land in con-

troversy. Hall, another tenant of Ayers, was also a party defendant. He filed no answer and judgment went against him, as of course. He is, however, joined in the writ of error.

The privity being established, it is not necessary that the parties in the two suits should be identical. *Phil., Wilm. & Balt. Railroad* v. *Howard*, 13 How. 307.

The depositions of Johnson, made as far back as 1880, at a former trial of the present case, were admitted by the court at the instance of the plaintiff in error. The deposition which he made on the same subject matter in the previous suit, and offered by defendant in error, we submit, was equally admissible.

But what does the deposition objected to contain, and what bearing did it have on the determination of the case? That is the real inquiry.

If the subject matter of the deposition became wholly immaterial in the progress of the cause, its admission cannot support an assignment of error, even if it had been erroneous. The plaintiff in error recognizes this fact, and endeavors to meet it. He says that "the erroneous admission of this evidence led the court below into a string of errors." But when he comes to point out any particular error it will be seen to consist in that portion of the charge of the court which he specifies, as follows: "If, however, in your judgment, the proof in this case is not sufficient to enable you to fix the point where said two hackberries called for in the field notes of the original surveyor stood, and the proof does not satisfy you that the west and north lines were actually run and measured by the original surveyor, you may fix the north line of this grant in either of these two ways, adopting that one of these two ways which, in your judgment, from the proof will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the S. W. corner on the river and find the northwest corner by the course and distance of the first line, and extend the second line for the north or back line so as to intersect the east line (a line run N. 20° E. from the S. E. corner on the river, or you may begin at the S.

E. corner on the river and follow thence the east line N. 20° E. the distance called for in the field-notes for said line 26,400 varas), *and as much farther as the proof satisfies you that said line was actually marked on the ground by the original surveyor and at a point beyond which the proof fails to show to your satisfaction that this line was marked by Johnson.* You may fix the N. E. corner and thence extend the line N. 70° W. to the west line of said grant as the north or back line of said grant, and if the north or back line as fixed by you does not cut the Daws survey you will find for the plaintiff; if it does cut said survey you will find for the defendant."

The court had, in a previous portion of the charge, directed the jury as follows; no exception was taken to such part of the charge: "In order to reconcile or elucidate the calls of a survey in seeking to trace and fix the lines upon the ground, you are not required to begin at the corner called for in the grant as the 'beginning' corner. The corner so named as the beginning corner does not control more than any other corner actually well ascertained and established, nor are you constrained to follow the calls of the grant in the order that said calls stand recorded in the field-notes, but you may reverse the calls and trace the lines the other way, and should do so if from your view of the proof to so reverse the calls will aid you to so fix the boundaries of the Maximo Moreno grant as will most nearly harmonize all the calls in the grant with the corners and lines that are established, and with the object of the grant."

This portion of the charge, it must be admitted, stated correctly a general rule of law applicable to the case.

The whole deposition of Johnson, objected to, is as follows: "That he began the Moreno survey at the southeast corner and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run at all, but was left open; but the eastern and northern line were run and measured. It was not usual to measure the closing line."

Nothing said in this deposition, we submit, had any effect

upon anything material said by the court in any portion of the charge excepted to, nor did its admission in any way harm the plaintiff in error. Whether the east line was or was not the first line run, was immaterial, nor as the court charged were the jury obliged to begin at the corner called for in the grant as the "beginning corner."

The questions arising under the conflict of evidence as to the true location of the northern line of the Moreno survey were properly left to the jury, and the deposition of Johnson did not affect these questions nor add anything to the evidence regarding them.

The points touched in the deposition were not those upon which the case went off, and we submit that its admission neither affected what the court charged nor what it refused to charge.

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

A very earnest and able argument is presented to us to sustain this ruling, upon the general ground of the liberality of courts in admitting what would be otherwise called hearsay evidence in regard to boundaries, such as tradition, general understanding in the neighborhood, declarations of persons familiar with the boundaries and with the objects on the lines of the survey, and others of similar character. An opinion of Mr. Justice Field, delivered in the Supreme Court of California in 1860, in the case of *Morton* v. *Folger*, 15 California, 275, is much relied on in this case, and it is also said that the courts of the State of Texas have established the same principle, which has thus become a rule of property in that State, which should be followed in this case. If the principle stated in the decision of the California court, and in the decisions of the Supreme Court of the State of Texas, were indeed applicable to the case before us, we would hesitate very much in reversing the judgment on this ground, and, indeed, should be inclined, on the weight of those authorities, and in the belief that in the main they are sound, to overrule the exception. But

the objection in the present case to the deposition of Johnson, taken in 1860, does not rest upon the ground that it is hearsay testimony, or that it does not come within the general principle which admits declarations of persons made during their lifetime of matters important to the location of surveys and objects showing the line of those surveys. Johnson's deposition of 1860, if it stood alone and was introduced upon the trial of this case for the first time as independent testimony in favor of plaintiffs, might be admissible. It is not necessary to decide that question, because such is not the character of the circumstances under which the testimony was admitted. As we have already said, there had been three trials of this action, during which Johnson was alive and was a competent witness for either party. All his testimony was given by way of deposition. This only renders the manner of taking it more deliberate, and if it was to be contradicted by anything he had said on former occasions, made it the more easy and reasonable that plaintiff should have called his attention to the former statements which they proposed to use. It will be observed that the plaintiffs did not introduce, or offer to introduce, this deposition of Johnson of 1860 as a part of their case, when it was their duty to introduce their testimony. They, therefore, did not rely on it as independent testimony in their favor. But after Johnson's deposition had been given in the case itself, and he had been cross-examined by the plaintiffs in that deposition in regard to his testimony, and after he was dead and could give no explanation of his previous testimony of 1860, which might show a mistake in that deposition, or give some satisfactory account of it consistent with his testimony in the principal case, this old deposition is for the first time brought forward to contradict the most important part of his testimony given on the present trial. The importance of this matter as it was presented to the jury will be readily understood when we revert to the fact that the two southern corners of the survey are established without question and are found on the San Andres River, and the controversy concerns the question whether the east line and the west line of that survey, which are straight lines almost due north, extend so far north that

the northern line between these lines is so far north as to include the survey of Daws under which plaintiff claims. In the principal deposition of Johnson, as we have seen by the bill of exceptions, he states that this survey commenced at the southwestern corner on the San Andres River and was run northward the distance called for in the grant, and actually measured by the chain. The northwest or second corner called for in the grant was established by him, the distance giving out in the prairie. From the northwest corner thus established, the second, the line was run for the course and distance called for in the grant, and the northeast corner established on two small hackberries on Cow Creek bottom. From the northeast or third corner thus established, the course was run to the San Andres River. This last line was marked but not measured, because it was not necessary to measure the closing line. In answer to questions on cross-examination, he said he did not begin at the southeast corner but he began at the southwest corner, and actually traced the lines in the order set forth in the field-notes. He said the field-book containing these notes "I kept and examined, which I do not remember to have examined till a month ago, as hereinbefore stated." The deposition offered by plaintiff states distinctly that he began the Moreno survey at the southeast corner, and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southward to the river. And he further says: "I am of the opinion that no western line was run but was left open, but the eastern and northern lines were run and measured. It was not usual to measure the closing line." It was admitted that the distance as measured on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for, and the witness on cross-examinations in the principal depositions read by the defendant in this case, being asked to account for this discrepancy, said: "The distances called on that line were not measured but guessed at. No part of the east line was measured." The discrepancy between these two depositions is manifest, and that discrepancy is in a matter which relates directly to the question whether the Moreno grant as it

was surveyed included the land embraced within the Daws grant, under which plaintiff asserts claim. If the jury believed in the truth of the depositions of Johnson taken by the defendant in this case, at which he was cross-examined by the plaintiff, it affords the strongest evidence that the Daws claim was included in the lines of the Moreno survey. This deposition is supported by the field-notes and by the reference of Johnson himself to those field-notes a very little while before he gave his deposition. If, on the contrary, the eastern line was the one which was actually run and measured, beginning at the southeast corner of the survey on the San Andres River, then the fact that that line was actually run and measured would probably have a very great influence in the mind of the jury on the question in issue. And whether this was so or not, the contradictory statements of Johnson under oath might destroy the value of his testimony before the jury.

The circumstances under which the former statements of a witness in regard to the subject matter of his testimony when examined in the principal case can be introduced to contradict or impeach his testimony, are well settled, and are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition afterwards read to them. In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objectionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation, intended to reconcile what he formerly said with what he is now testifying. While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that in no case has any court deliberately held that after the witness's

testimony has been taken, committed to writing and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony. Least of all would this seem to be admissible in the present case, where three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition nor any attempt to call his attention to it. This principle of the rule of evidence is so well understood that authorities are not necessary to be cited. It is so well stated, with its qualifications and the reasons for it, by Mr. Greenleaf in his work on Evidence, vol. 1, in §§ 462 and 464 inclusive, that nothing need be added to it here except a reference to the decisions cited in his notes to those sections. See also *Weir* v. *McGee*, 25 Texas, Supplement, 20, 32.

It will thus be seen that the principle on which counsel for plaintiff in error objected to this deposition of Johnson is not in conflict with the case of *Morton* v. *Folger*, in 15 California, 275, nor with any case to which we are cited, decided by the Supreme Court of Texas. That ground, as stated in the bill of exceptions, is "that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence, nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendant, notwithstanding the death of Johnson."

We are very clear that the deposition of 1860 was improperly admitted, and its important relation to the issue tried by the jury was such that the judgment rendered on it must be reversed, and the verdict set aside and a new trial granted. There are other assignments of error, the consideration of which is not necessary in the decision of the case before us,

which, with due attention to what we decided when the case was here before, to which we still adhere, may not arise in another trial.

Reversed.

HUME *v.* UNITED STATES.

UNITED STATES *v.* HUME.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 102, 103. Submitted November 13, 1889. — Decided December 16, 1889.

When a contract is so extortionate and unconscionable on its face as to raise a presumption of fraud or to require but slight additional evidence to justify such presumption, fraud may be set up as a defence in an action at law with the same effect with which it could be set up in equity as a ground for affirmative relief; and if articles delivered in performance of such an unconscionable contract have been accepted in ignorance, and under circumstances excusing their non-return, and they have some value, the amount sued for will be reduced to that value in the judgment.

Persons dealing with public officers are bound to inquire about their authority to bind the government, and are held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principals.

The plaintiff contracted in writing to sell to the government a quantity of shucks at 60 cents a pound at a time when the market value of that article was $1\frac{3}{4}$ cents a pound. He delivered them and they were consumed in the government service. He then claimed to be paid at the contract price, which, being refused, he sued therefor in the Court of Claims: *Held,* that he could only recover the market value of the shucks.

The court in its opinion stated the case as follows:

Claimant filed his petition against the United States in the Court of Claims, averring that on the 9th day of August, 1883, he entered into a contract in writing with the Acting Secretary of the Interior Department for the furnishing of certain articles, constituting items in his proposal numbered 2, 9, 19, 32, 42, 56, 71, 77, 78, 79, 89, 90, 91, 97, 102 and 103, to the Government Hospital for the Insane near Washington, at rates

specified therein; that he had furnished merchandise amounting to the sum of $5695.89, according to the prices established by the terms of the contract, and had been paid only the sum of $1663.89, and that there was still due and owing to him the sum of $4032, which he was entitled to recover with interest from the first day of July, 1884; and that the accounting officers of the Interior Department had refused and neglected to pay such balance of $4032, because, as they alleged, the price charged for item 97 in claimant's proposal was excessive, "notwithstanding the charge therefor was based upon the amount stated in said proposal, and accepted by said defendant's officers and agents, and by them incorporated in said contract as aforesaid."

To this petition a special plea was filed February 12, 1886, on behalf of the United States, to the effect that claimant had agreed to furnish shucks to the government hospital at the rate of sixty cents per hundred weight, and entered into a written contract, to recover damages for the breach of which this suit was instituted, whereby he agreed to furnish (*inter alia*) shucks at the rate of sixty cents per pound; that this was a clerical error, the real contract being that shucks were to be furnished by claimant to said hospital at sixty cents per hundred weight; that notwithstanding this "claimant attempts to practise a fraud against the United States in attempting to establish an allowance of the claim as made by him, and by his effort to obtain a judgment in this court upon such written contract, as if such mistake and clerical error had not been made, and for the amount due for the shucks furnished, as expressed by mistake in said written contract."

To this special plea claimant replied, by his attorney, denying that he agreed to furnish shucks at the rate of sixty cents per hundred weight, and averring that he bid for shucks "at the rate of sixty cents per pound, in accordance with the printed schedule furnished him by the United States upon which to make out his bid; that the said price was the price at which he intended to bid, and that there was no mistake on his part in making out the bid; . . . that the said contract contained fifteen other items of goods, which were fur-

nished as ordered, and some items furnished in much larger quantities than the estimated quantity contained on the printed schedule; that upon some of the items the claimant lost money; upon others there was a very small profit; and that upon the whole contract, adjusted at contract rates, the claimant will not receive more than a fair and reasonable profit. Claimant denies emphatically any attempt to practise a fraud on the United States, and avers that the whole transaction was in absolute good faith in the ordinary course of business; that there was no inducement or promise made in regard to the matter, except the written proposal of the claimant and the written contract."

Evidence was adduced on behalf of the United States, tending to show that shucks at the time of the contract were worth from three-fifths of a cent to one cent and three-quarters per pound; that it was the custom of the government to buy shucks by the hundred weight; and that the mistake in question had occurred by reason of the word "pounds" in the printed form not having been struck out and "hundred weight" inserted; all of which evidence was objected to on behalf of the claimant.

The Court of Claims filed its findings of fact and conclusion of law on the 3d of May, 1886.

The first finding sets forth the advertisement of the Secretary of the Interior for proposals for furnishing supplies to the Government Hospital for the Insane for the fiscal year ending June 30, 1884, stating, among other things, "Proposals must be made in duplicate on the forms furnished by the Department." "Bids will be considered on each item separately. Schedules containing blank forms for bidding, items and approximate estimates of amounts will be furnished on application." A description of what the quality of many of the articles, not including shucks, must be, is given at length in the advertisement.

The second finding contains the bids of the claimant on forms furnished by the department, the schedule attached to his proposal enumerating some one hundred and seven articles, on all but twelve of which claimant made bids. This schedule,

under the head of estimated quantity, enumerates the articles by pound, dozen, gross, bushel, box, ton, barrel, bale, gallon, case, quart and sack, and the bids are carried out per pound, per dozen, per gallon, etc.

The third finding gives the contract, by the terms of which the claimant agrees to furnish the items in the proposal, numbered as in the petition, and the Acting Secretary of the Interior agrees to pay or cause to be paid on behalf of the United States the prices specified in the proposal and contract, "for all the articles delivered and accepted," the right being reserved to order a greater or less quantity of each.

The fourth and fifth findings and conclusion of law are as follows:

"IV. He (claimant) furnished under said contract all the articles included under items Nos. 2, 9, 19, 32, 42, 56, 71, 78, 79, 89, 90, 91, 102, 103, and has been paid therefor according to the contract. He also furnished in two or three lots, in the latter part of the year 1883, 6720 pounds shucks under item No. 97, with memorandum-bills accompanying the delivery thereof, with the price carried out, at 60 cents per pound, the whole aggregating $4032. For the shucks he has not been paid.

"V. At the time said contract was made shucks were of the market value of from $12 to $35 a ton, according to quality, and whether they were hackled or unhackled; and those furnished by the claimant were of the market value of $35 a ton, or $1\frac{3}{4}$ cents per pound, aggregating, for all that were delivered, $117.60.

"Conclusion of law. Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover $117.60 and no more."

The opinion of the court was delivered by Richardson, C. J., 21 Ct. Cl. 328, who, after stating the facts and pointing out that the claimant was the only bidder for shucks, says:

"At the time the contract was made shucks were worth from $12 to $35 a ton, or from 6 mills to $1\frac{3}{4}$ cents a pound, while the claimant was to receive nearly forty times as much as the highest value.

"That an agreement to pay $1200 a ton for shucks, actually worth not more than $35 a ton, is a grossly unconscionable bargain, defined in Bouvier's Law Dictionary to be 'a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other,' nobody can doubt. Such a contract, whether founded on fraud, accident, mistake, folly, or ignorance, is void at common law. It is not necessary to invoke the aid of a court of equity to reform it. Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair dealing, and good morals."

After citing Story's Equity Jurisprudence, § 188; *James* v. *Morgan*, 1 Levinz, 111; *Baxter* v. *Wales*, 12 Mass. 365; and *Leland* v. *Stone*, 10 Mass. 459, the opinion thus concludes:

"These citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement.

"If it be so in suits on contracts between private parties who act by and for themselves, how much more is it so in suits on agreements by the United States, acting always through public officers, who are mere agents, required to act in good faith towards their principal according to the laws of the land, as everybody dealing with them is bound to know.

"There is no finding by the court of actual fraud by any of the persons engaged in making the contract now under consideration. The unconscionable price inserted for shucks was no doubt a mere accident, perhaps from an idea that it was the price per *hundred pounds* instead of per *pound*, as printed in the proposals and contract, and from neglect to change the printed words accordingly, which, if it had been done, would have fixed the price at $12 a ton, the very price which the findings show to have been the lowest value of shucks of any kind at that time. But, however it may have happened, we hold, as was held in the case of *Leland* v. *Stone*, from which we have quoted the words of the court, that a contract may be held unconscionable without proof of *actual fraud* at its inception if its *enforcement* would be unconscionable.

"It would be a fraud upon the United States to enforce such a contract as the one now in suit, and it never can be done through the Court of Claims."

Judgment was accordingly rendered in favor of the claimant for $117.60, and both parties appealed.

Mr. Robert Christy and *Mr. John C. Fay* for Hume.

Mr. Assistant Attorney General Maury for the United States.

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

In his celebrated judgment in *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sen. 125, 155, Lord Hardwicke arranged all the forms of fraud, recognized by equity, in four classes, the first two of which he gives in these words:

"1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited *James* v. *Morgan*, 1 Lev. 111."

The case referred to by the Lord Chancellor was ruled by Sir Robert Hyde, then at the head of the King's Bench, and is reported in 1 Levinz, 111, in these words:

"Assumpsit to pay for a Horse a Barley-Corn a Nail, doubling it every Nail; and avers that there were thirty-two Nails in the Shoes of the Horse, which, being doubled every Nail, came to five hundred Quarters of Barley. And on *Non-Assumpsit* pleaded, the Cause being tried before *Hyde* at *Hereford*, he directed the Jury to give the Value of the Horse in Damages, being £8, and so they did. And it was afterwards moved

in Arrest of Judgment for a small Fault in the Declaration, which was overruled, and Judgment given for the Plaintiff."

James v. *Morgan* is cited by Lord Chief Justice Hale, 1 Ventris, 267, *Lord Eure and Turton*, note, to the point that "upon certain contracts the jury may give less damages than the debt amounts to," and also in Bacon's Abridgment, Damages, D. 1, together with *Thornborough* v. *Whiteacre*, 6 Mod. 305; *S. C.* 2 Ld. Raym. 1164, *sub nom. Thornborow* v. *Whitacre;* to the same point, stated thus: "Though in contracts the very sum specified and agreed on is usually given, yet if there are circumstances of hardship, fraud or deceit, though not sufficient to invalidate the contract, the jury may consider of them and proportionate and mitigate the damages accordingly."

In *Thornborough* v. *Whiteacre*, the plaintiff declared that the defendant, in consideration of 2*s.* 6*d.* paid down, and £4 17*s.* 6*d.* to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on a certain Monday, and to double it successively on every Monday for a year; and the defendant demurred to the declaration. Upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters. The court recognized the case of *James* v. *Morgan* as good law, and said that though the contract was a foolish one, the defendant ought to pay something for his folly. "The counsel for the defendant, perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case."

In *Leland* v. *Stone*, 10 Mass. 459, *James* v. *Morgan* and *Thornborough* v. *Whiteacre* are referred to with approbation, and the principle of mitigating the damages applied, as also in *Cutler* v. *How*, 8 Mass. 257; *Cutler* v. *Johnson*, 8 Mass. 266; and *Baxter* v. *Wales*, 12 Mass. 365. And see *Greer* v. *Tweed*, 13 Abb. Pr. N. S. 427, and *Russell* v. *Roberts*, 3 E. D. Smith, 318.

Mr. Justice Swayne remarks, in *Scott* v. *United States*, 12 Wall. 443, 445: "Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is

bound, because their minds have not met. Where there is a written contract and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter but only such as he is equitably entitled to. *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Baxter* v. *Wales*, 12 Mass. 365."

But *James* v. *Morgan* and *Thornborough* v. *Whiteacre* were plainly cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent upon the face of the contracts. In the latter case the defendant, by demurring, admitted that there was no fraud, and consequently the only question was on the validity of the contract in the absence of fraud, and it was sustained, but the plaintiff was allowed to take nominal damages only. And as to many of the cases it may be objected that they are at variance with the rule that a party must recover according to his contract if he sue upon it, or not at all, although, if the express contract were void, the defendant might nevertheless be held in general assumpsit, upon the implied contract to pay for property received from the plaintiff and retained.

The true principle deducible from the authorities, and most consistent with the reason of the thing, seems to be this: In the instance of a special contract which has been wholly executed and the time of payment passed, if the plaintiff proceeds in general assumpsit, the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages. But, where the action is in special assumpsit, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled. And while the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale, the defendant having accepted performance, cannot interpose this defence to defeat the contract, unless he returns the article or proves it to have been entirely worthless, though he may ordinarily recoup the damages which he can show he has sustained through

the fraud. And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defence at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value.

In the case at bar the shucks had been appropriated by the government before the discovery of the error in the schedule and the position of the claimant in regard to it, and if the defendant successfully impeached the contract on the ground of fraud, the judgment for the actual market value of the shucks was correct, and sustainable under the pleadings.

In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Whiteside* v. *United States*, 93 U. S. 247, 257; *United States* v. *Barlow*, *ante*, 271.

If the claimant intended to induce the agents of the government to contract to pay for these shucks thirty-five times their highest market value, and the agents of the government knowingly entered into such a contract, it will not be denied that such conduct would be fraudulent and the agreement vitiated accordingly. If the claimant knew that a clerical error had been committed, of which the agents of the government were ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must be held to have known that their action, if understandingly taken, would be in palpable dereliction of their duty to their principal, and, notwithstanding, sought to profit

by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part.

The claimant by his replication insists that the price of sixty cents per pound for shucks "was the price at which he intended to bid, and that there was no mistake on his part in making out the bid." This is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to a contract "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other," and is fatal to his recovery according to the letter of the contract. Nor is its effect in that regard weakened in any degree by the suggestion that, under bids on each item separately, the claimant made but little profit, or none at all, on some of the articles.

The Court of Claims did not err in the admission of the evidence upon which the fifth finding of fact is based, nor in its refusal to permit the claimant to recover more than the market value of the shucks, its allowance of which we will not disturb.

The judgment is *Affirmed.*

GREENE *v.* TAYLOR.

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

No. 128. Argued November 20, 21, 1889. — Decided December 16, 1889.

The right of action of a plaintiff under a title derived from an assignee in bankruptcy, to redeem from a sale under a deed of trust, was held in this case to be barred by the two years' limitation contained in § 5057 of the Revised Statutes.

That section does not apply only to a suit to which the assignee in bankruptcy is a party; but it applies to a case where nearly a year of the two years had run against the right while the assignee owned it, after his appointment, and the rest of the two years ran against it in the hands

Statement of the Case.

of the plaintiff, his transferee, so that more than two years elapsed between such appointment and the bringing of the suit to redeem, and the property covered by the trust deed was held adversely by the defendant, under a sale under the trust deed, for more than two years before the bringing of that suit.

On the facts of this case there was no fraudulent concealment by the defendants from the assignee in bankruptcy or the plaintiff.

Sufficient information as to the trust deed, and its contents, was given in the bankruptcy schedule, filed more than eleven months before the assignee was appointed, and more than one month before the sale under the trust deed, to put the assignee in bankruptcy and the plaintiff on inquiry.

Moreover it appeared that, two days before the sale under the deed of trust, the plaintiff knew of the contents of the schedule in bankruptcy and who held the debt secured by the deed of trust.

The plaintiff having, by a petition to the bankruptcy court, procured the sale of the property by the assignee in bankruptcy, and the application of its proceeds on the debt on which his suit to redeem was founded, waived any right to redeem arising under a judgment before recovered by him for his debt.

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

On the 1st of April, 1871, Nathan S. Grow, of Chicago, Illinois, executed a trust deed to Benjamin E. Gallup, of the same place, to secure the payment of a promissory note for $35,000, payable in five years from that date, with interest at the rate of 9 per cent per annum, payable half-yearly on October 1 and April 1, as evidenced by 10 interest coupons, bearing the same date, for $1575 each. The note was payable to the order of Grow, and was endorsed by him payable to David R. Greene or order. The trust deed stated that the $35,000 was a loan to Grow made by the legal holder of the note. Greene was the person who loaned the money. He resided in New Bedford, Massachusetts. The real estate covered by that trust deed was at the northeast corner of West Madison and Sheldon streets, in Chicago, being 73 feet on West Madison Street, in front, 116 feet deep, on Sheldon Street, 73 feet in the rear, on a line parallel with West Madison Street and on a 16-feet alley, running east and west, and 116 feet on the east line, parallel with Sheldon Street. It was described as having on it three four-story brick stores with stone fronts, fronting on West

Madison Street; and it was stated that a block of two-story and basement brick dwelling-houses was about to be erected on the property. The front piece was 60 feet deep; then came a 12-feet court; and the rear part was 44 feet deep. The entire property came afterwards to be known as "the Jefferson-Park Hotel property." This trust deed was recorded April 1, 1871.

Grow on the 9th of February, 1876, conveyed the entire property to William Scott Robertson, subject to an incumbrance of $35,000, by a warranty deed, which was recorded February 18, 1876. The loan to Grow matured on the 1st of April, 1876, and in the spring of 1877 negotiations were had between Robertson and Greene for a renewal of the loan. These negotiations were successful, and Robertson executed a trust deed dated April 2, 1877, (the 1st of April, 1877, being Sunday,) covering the same property, to Francis B. Peabody, of Chicago, to secure the payment of a promissory note for $35,000, which, the trust deed stated, was for a loan of that sum, made on the day of the date of the trust deed, by the legal holder of the note, to Robertson, the note being payable three years after date, with interest at the rate of 7½ per cent per annum, payable half-yearly on the 2d of October and 2d of April, with six interest coupons for $1312.50 each. The name of David R. Greene was not mentioned in the trust deed or in the promissory note. The six interest coupons were each of them signed by Robertson, and made payable to his order, and each was endorsed by him payable to the order of David R. Greene. The note was payable to the order of Robertson and was endorsed by him payable to David R. Greene or order. It stated that it was expressly agreed that if default should be made in the payment of any instalment of interest when it should become due, and such default should continue for 30 days thereafter, the principal sum should, at the election of the legal holder of the note, at once become due and payable, such election to be made at any time after the expiration of said 30 days, without notice; and this provision of the note was recited in the trust deed. It was provided in the trust deed, that if default should be made in the payment of the

principal sum secured by the note, whether it should have become due by election or by the regular maturity of the note, or if Robertson should fail to perform its agreements, it should be lawful for the trustee, on application of the legal holder of the note, with or without a previous entry on the premises, to sell and dispose of them and all right, title, benefit, and equity of redemption of Robertson, his heirs and assigns, therein, at public auction, to the highest bidder, for cash, having first given notice of the time and place of such sale, (such sale to be made at some place in Cook County, Illinois,) by publication once in each week for four successive weeks, the first publication to be at least 30 days before the day of sale, in some newspaper published in Cook County, authorized by law to publish legal notices, personal notice to Robertson, his heirs or assigns, or any person claiming by, through, or under him, of such sale, being expressly waived, and in the name of the trustee to execute and deliver to the purchaser at the sale a deed of conveyance of the premises in fee simple; and that all the recitals that might be contained in such deed, setting forth the fact of such default, due notice, advertisement and sale, and any and all such other facts and statements as might be proper to evidence the legality of such sale and conveyance, should be considered and taken, on all occasions and as between all persons, to be *prima facie* evidence of the truth of all the facts and matters set forth in such recitals, and such deed should be effectual to pass the title, and all the right and equity of redemption of Robertson, his heirs and assigns, in and to the premises sold. This trust deed was acknowledged by Robertson on the 23d of July, 1877, and was recorded on the same day.

On the 30th of July, 1877, James Taylor and John Bruce recovered a judgment against Robertson in the Circuit Court of the United States for the Northern District of Illinois, for $21,666.66 damages and $120.05 costs. Robertson took steps toward bringing a writ of error to review that judgment, and for that purpose procured one Hugh Templeton to sign a bond as surety, and, to indemnify Templeton therefor, executed to him a bond and a mortgage covering the real estate aforesaid,

subject to the encumbrance of the trust deed to Peabody. This mortgage was acknowledged August 17, 1877, and recorded August 22, 1877. As the writ of error was never perfected, Templeton did not become liable, and the mortgage to him was no encumbrance on the premises.

Robertson, on the 1st of September, 1877, leased to John McAllister the second, third and fourth stories of the three stores fronting on West Madison Street, and known as the Jefferson-Park Hotel, for two years, at a rent of $300 a month. This rent was afterwards reduced to $30 a month from January 1, 1878.

On the 15th of October, 1877, Taylor and Bruce issued to the marshal an execution on their judgment. This was returned wholly unsatisfied on the 12th of January, 1878; and, on the 24th of January, 1878, they, being aliens, filed a bill in equity, in the form of a creditors' bill, in the Circuit Court of the United States for the Northern District of Illinois, against Robertson, Templeton, McAllister, Gallup and Peabody. The bill was founded on their judgment and the issuing of their execution and its return unsatisfied. It set forth that Robertson was interested in a large quantity of real estate, including the before-mentioned property, 73 feet by 116 feet, at the corner of West Madison Street and Sheldon Street, which, it stated, brought in a large rental monthly. It contained the allegations usual in creditors' bills, and alleged that Robertson had property which ought to be applied to the payment of the plaintiffs' judgment, and prayed that he might discover on oath what assignments or transfers he had made of his property. It averred that the defendants other than Robertson held the title to real estate belonging to Robertson, for the purpose of defrauding the plaintiffs, and prayed for a discovery on oath by such defendants of all such real estate. It did not mention the trust deed to Gallup, or the trust deed to Peabody, or the mortgage to Templeton, or the lease to McAllister.

The plaintiffs, on the 29th of January, 1878, issued to the marshal a second execution on their judgment, which, on the 15th of February, 1878, was levied on real estate of Robertson, not including the premises at the corner of West Madison and Sheldon streets.

On the 2d of March, 1878, the five defendants to the bill filed a general demurrer to it, for want of equity. On the 25th of March, 1878, the court entered an order sustaining the demurrer.

Robertson failed to pay to Greene any of his interest due October 2, 1877, and April 2, 1878, being two instalments, amounting to $2625, and was pressed for payment by Greene, through Peabody, in April and May, 1878. This pressure continued through the summer of 1878, and Greene complained directly to Robertson that the latter was receiving the rents of the property and paying him no interest. This pressure took the shape of a request by Greene to Robertson that the latter should turn over to the former the rents of the property, and a statement that otherwise the trust deed would be foreclosed.

Greene, on the 27th of August, 1878, notified Peabody in writing that, by reason of the default, continued for more than 30 days, in the payment of the instalments of interest due October 2, 1877, and April 2, 1878, on the note secured by the trust deed of April 2, 1877, Greene had elected to make the principal note at once due and payable; and that, default having been made in its payment, he requested Peabody to proceed at once, under the powers contained in the trust deed, to advertise and sell the premises.

Robertson, on the 29th of August, 1878, notified Peabody and Greene that he intended to file a petition in bankruptcy; and that he proposed to go to Scotland (which was his native country) to see what arrangement could be made of his affairs, and to turn over to Greene, from the 1st of September, 1878, the rents of the property monthly.

On the 30th of August, 1878, Robertson signed a paper, addressed and delivered to Peabody as trustee, which stated that the note secured by the deed of trust was held by Greene; that Peabody had that day demanded of Robertson the possession of the premises covered by the deed of trust, on account of a breach of the covenants contained therein; that Robertson consented to Peabody's taking possession of the premises; that he thereby delivered such possession to Peabody, and requested the tenants of the premises severally to attorn to Peabody; and

that it was understood that Peabody should respect the leases granted by Robertson and his reservation of certain rooms mentioned in the lease to McAllister. On this paper Peabody, as trustee, wrote an order addressed to Edmund A. Cummings, directing him, for Peabody and as his agent, to receive from Robertson possession of the premises and the attornment of the tenants. Six of the tenants, including McAllister, on the same day signed a paper by which they recognized the transfer of the possession of the premises from Robertson to Peabody as trustee, and respectively attorned to Peabody as to the premises occupied by them.

Robertson, on the 31st of August, 1878, filed in the District Court of the United States for the Northern District of Illinois his voluntary petition in bankruptcy, with schedules. In the schedule of "Bankrupt creditors holding securities," there appeared, under the heading "names of creditors," "David R. Greene;" under the heading "residence and occupation," "New Bedford, Mass.;" under the heading "when and where contracted," "April 2, 1877, at Chicago, Illinois;" under the heading, "value of securities," "unknown;" under the heading, "amount of debt," "$35,000 and interest at 7½ per cent since April 2, 1877;" and under the heading, "particulars," "note for money borrowed to take up old mortgage upon property when bought, and secured by trust deed to F. B. Peabody upon lot 26 (except the east two feet thereof) and lots 27 & 28, all in block 6, in McNeill's subdivision, in Wright's addition to Chicago, with improvements and appurtenances; property known as 487 & 489 and 491 West Madison Street, Chicago, and 52 and 54 Sheldon Street;" being the premises in question.

Peabody, on the 2d of September, 1878, notified Greene that he would forthwith proceed to advertise the foreclosure sale. On the same day, Peabody, as successor in trust to Gallup under the trust deed of April 1, 1871, made to Gallup by Grow, executed and acknowledged a paper releasing to Grow all the interest acquired under the trust deed, the paper stating that the indebtedness secured by that deed had been cancelled.

Statement of the Case.

On the 3d of September, 1878, Peabody, as trustee, prepared a notice of sale, dated that day, setting forth the facts of the date and record of the trust deed of April 2, 1877; the contents of the note secured by it; the fact that its legal holder, as thereby authorized, had elected to make the principal sum therein mentioned, and the same had thereby become, at once due and payable, by reason of the default, continued for more than 30 days, in the payment of the instalments of interest due thereon October 2, 1877, and April 2, 1878, respectively; that there was due on the note the principal sum of $35,000, with interest thereon at the rate of 7½ per cent per annum, from April 2, 1878, and the two defaulted instalments of interest, of $1312.50 each, with interest on each at the rate of 10 per cent per annum, from the dates when they respectively became due; that default had been made in the payment thereof; that, on the demand of the legal holder of the note, the trustee, on October 7, 1878, at 11 o'clock in the forenoon, at the southwest corner of Dearborn and Monroe streets, in Chicago, at the door of No. 174 Dearborn Street, would sell at public auction to the highest bidder for cash, for the uses and purposes specified in the trust deed, the premises described therein, (repeating the description contained in the trust deed,) together with all the right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein; and that the records of the recorder's office showed that Templeton had acquired some title or interest in the premises, as assignee of Robertson, subject to the trust deed. This notice was published in the "Chicago Journal," a newspaper of general circulation, printed and published in Chicago, four times, being one time a week for four successive weeks, the date of the first paper containing the same being September 4, 1878, having been published and issued on that day, and the date of the last paper containing the same being September 23, 1878, having been published and issued on that day.

Robertson, on the 7th of September, 1878, left Chicago for Scotland; and on the same day he was adjudicated a bankrupt. He has never since been in Chicago.

On the 5th of October, 1878, Taylor and Bruce, as creditors

of Robertson, filed a petition in the District Court, in bankruptcy, sworn to by Charles B. McCoy, their agent at Chicago, setting forth their judgment, and stating that no assignee of the estate of Robertson had yet been chosen; that Robertson, in his inventory of assets, had scheduled a large amount of property, which required the immediate personal attention of some person properly authorized to care therefor and preserve the same for the benefit of the estate, and prevent waste, injury and loss thereof; that among the assets so scheduled, with other real estate, was "the property known as the Jefferson-Park Hotel, on West Madison Street, Chicago." The petition prayed that a provisional assignee be appointed for the estate of Robertson, with the usual powers in such cases, to act in the premises until the regular assignee should be chosen. On the same day, Bradford Hancock was appointed by the District Court provisional assignee of the estate of Robertson, "with full power and authority to take possession of, manage, and control the same, and to collect the rents due said estate."

The sale under the trust deed took place on the 7th of October, 1878, at the hour and place named in the published notice. Greene became the purchaser, and Peabody, as trustee, on the same day executed and acknowledged a deed to him, which was recorded October 10, 1878. That deed recited the making of the note and its contents, including the provision for election by the legal holder of the note as to the becoming due of the entire principal; the making and recording of the trust deed; the power of sale given by it to the trustee; and the provisions in it for notice and for giving a deed to the purchaser. It also recited the default in the payment of the two instalments of interest; the election by the legal holder of the note that the principal sum should at once become due and payable; the amount that was due for principal and interest; that the legal holder had applied to the trustee to advertise and sell the premises; that he had advertised them, and all right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein, for sale at public auction to the highest bidder for cash, on the day and at the place before mentioned;

the notice he had given; that the contents of the notice were in conformity with the provisions of the trust deed and of the statute; that, in pursuance of said notice, and at the time and place of sale therein mentioned, he had offered the premises described in the trust deed, and all right, title and equity of redemption of Robertson, his heirs and assigns, therein, for sale at public auction to the highest bidder for cash; that Greene was such highest bidder, and bid therefor $30,000, which was the highest bid; and that the same were accordingly struck off and sold to Greene at that price. The deed then conveyed to Greene, his heirs and assigns forever, the premises described in the trust deed, by the description therein contained, together with all the right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein, to have and to hold the same, with the appurtenances, to Greene, his heirs and assigns forever. It further stated that Peabody covenanted to the extent, and no more, that he had fulfilled all the powers and trusts in said deed contained, in respect to the sale, in accordance with the terms of the trust deed.

The $30,000 for which Greene purchased the property was applied to pay the first and second interest coupons, with interest thereon to October 17, 1878, and interest on the note to that date from April 2, 1878, the expense of advertising, the fees of the trustee, and sundry back taxes, and the balance of the amount, $24,107.43, was endorsed by the trustee as paid on the principal of the note for $35,000, on the 17th of October, 1878.

On the 23d of October, 1878, the release by Peabody, as successor in trust, of the trust deed from Grow to Gallup, was recorded.

Greene died at New Bedford on the 19th of May, 1879.

On the 7th of July, 1879, a warrant in bankruptcy was issued against the estate of Robertson.

Bradford Hancock was, on the 24th of July, 1879, appointed assignee in bankruptcy of Robertson, and on the same day the register assigned to him all the estate real and personal, of Robertson, including all the property, of whatever kind, of

which he was possessed, or in which he was interested, or entitled to have, on the 31st of August, 1878, except property exempt by § 5045 of the Revised Statutes.

Taylor & Bruce, on the 23d of March, 1880, filed in the bankruptcy court a proof of debt against Robertson, founded on their judgment and on the levy made February 15, 1878, under the execution issued January 29, 1878. They claimed therein a lien, by virtue of the judgment, on all the real estate of Robertson, and, by virtue of such levy, on the portion thereof on which it was levied, and a first preference on all the proceeds of the property covered by the lien of the judgment and the levy.

On the 25th of March, 1880, Taylor and Bruce filed a petition in the bankruptcy court, setting forth the recovery of their judgment; the issuing and return unsatisfied of their execution of October 15, 1877; the filing of their creditors' bill in the Circuit Court on the 24th of January, 1878; the fact that they had proved their debt in the bankruptcy court; that on the 30th of July, 1877, the date of the recovery of their judgment, Robertson owned real estate, all of which was encumbered with sales for taxes, and the greater part with mortgages or deeds of trust to about or near the full value thereof, so that of the latter class he was, at the time of the filing of the petition in bankruptcy, at best only invested with an equity of redemption; that at the time their judgment was rendered, and at the time of the filing of the petition in bankruptcy, he owned sundry real estate which was unencumbered except by tax sales and judgments (describing it); that, at those times, he owned or had interest in real estate encumbered by mortgages and trust deeds, and also by tax liens, describing it, and as part of it describing the property 73 feet by 116 feet, on the corner of West Madison Street and Sheldon Street, "incumbrance, $35,000, besides interest and taxes;" that on the 29th of January, 1878, they issued a second execution on their judgment; that on the 15th of February, 1878, it was levied on all the real estate described in the petition, except a small portion in Cook County, Illinois, which was heavily encumbered; that before any sale was made by the marshal,

Statement of the Case.

Robertson went into bankruptcy, and no sale had ever been made under the execution, but the levy was in force as a first lien of any judgment; that they were entitled to have the amount of their judgment paid out of the proceeds of the sale of the property, to the exclusion of all the other creditors of Robertson, except those who held mortgages or liens prior to their judgment; and that they were willing and desirous to have the administration and enforcement of the lien of their judgment transferred to the bankruptcy court, and established by that court, and enforced against the property of the bankrupt estate. They prayed that their lien might be established against the described real estate; that Hancock, the assignee, might be ordered to sell said real estate and apply the proceeds to pay their judgment; and that they might be permitted to purchase at the sale and credit their bids on the judgment.

Hancock, the assignee, on the 2d of April, 1880, presented a petition to the bankruptcy court, in answer to a rule for him to show cause, issued on the filing of the petition of Taylor and Bruce of March 25, 1880, setting forth that he believed the allegations of that petition to be substantially correct, and that he believed it was for the best interest of the bankrupt's estate that said real estate should be sold without further delay. He prayed for an order directing him to sell it; that it be sold subject to all taxes, liens and incumbrances thereon, except the judgment of Taylor and Bruce and judgments rendered subsequently thereto; and that he be ordered to bring the proceeds of sale into court or make such other disposition of them as the court should direct. On this petition, and on the same day, an order was made by the bankruptcy court, on the consent of the assignee, of Taylor and Bruce, of the bankrupt, and of two creditors by a judgment subsequent to that of Taylor and Bruce, directing the assignee to sell all the real estate of the bankrupt, free and clear of the lien of the judgments mentioned, "but subject to all other liens and incumbrances thereon, and all taxes and assessments thereon," and to bring the proceeds of the sale into court, to be paid to such judgment creditors according to the priority of their liens on the property sold, to the amount of their respective judgments.

Statement of the Case.

On the 26th of April, 1880, the assignee made a report to the bankruptcy court, setting forth that, on the 24th of April, 1880, he had sold to the highest bidder for cash all the right, title and interest of the bankrupt, and of himself as assignee, to real estate which he described, free and clear of the lien of the judgment and execution-levy of the creditors mentioned in the order of sale, "but subject to all other liens and incumbrances thereon, and taxes and assessments thereon." The description included the premises at the corner of West Madison Street and Sheldon Street, with the buildings thereon, at the sum of $250, to L. G. Pratt, trustee. The gross proceeds of sale were $6122, and the net proceeds $5107.42, which the assignee reported to the register on the 27th of May, 1880.

The register, on the 14th of June, 1880, made an order directing the assignee to pay to Taylor and Bruce $5053 out of the proceeds of the sale.

On the 17th of June, 1880, the assignee, by a deed recorded on the 30th of August, 1880, conveyed to Lorin G. Pratt, trustee, certain real estate purchased by him at said sale, including the premises at the corner of West Madison and Sheldon streets. The deed recited the prior proceedings in bankruptcy, the order of sale and its confirmation, and the order for a deed, and conveyed all the right, title and interest of the bankrupt, which he had on the 31st of August, 1878, and of the assignee, subject to all unpaid taxes and to all liens and incumbrances, unless by the terms of sale expressly excepted, to the real estate described in the deed.

Robertson, on the 4th of December, 1880, filed his petition for a discharge in bankruptcy.

Taylor and Bruce, on the 22d of December, 1880, directed the marshal to release the levy made February 15, 1878, and to return the execution of January 29, 1878, unsatisfied. This was done.

On the 5th of January, 1881, under an execution issued to the marshal on the previous day, on the judgment of Taylor and Bruce, he levied on certain real estate of Robertson, including the premises at the corner of West Madison and Sheldon

streets, with all the buildings and improvements thereon, and on the 27th of January, 1881, sold the premises at the corner of West Madison and Sheldon streets, to Lorin G. Pratt, trustee, for the sum of $5000. No deed appears to have been made under this sale.

No proceedings having been taken in this suit since the demurrer to the original bill was sustained, an order was made, on the 6th of July, 1881, after an interval of more than three years and three months, giving leave to the plaintiffs to amend their bill and also to file a supplemental bill.

On the 17th of September, 1881, they filed an amended and supplemental bill, dismissing the original bill as to all the real estate except that situated at the corner of West Madison and Sheldon streets, 73 feet by 116 feet, with the buildings thereon erected. This new bill recited the contents of the original bill, and stated that, on a demurrer thereto, the court held that all the property and estate of Robertson, so far as it could be discovered, must first be exhausted, before the court could interfere in equity to compel the discovery and relief sought, and required the plaintiffs to wait until all such visible property and estate was so sold and exhausted. It set forth the contents of the trust deed from Grow to Gallup; that Peabody was the successor in trust of Gallup; that the deed was made to secure the payment of an indebtedness of $35,000 to Greene; that Peabody had been in possession of the premises, and receiving the rents and profits, amounting to more than sufficient to pay all the interest on the debt, and the taxes, insurance and expenses of carrying the property; that, in pursuance of a fraudulent scheme to place the property beyond the reach of the plaintiffs, Robertson, on the 23d of July, 1877, which was two days after the verdict was returned in their suit against Robertson and seven days prior to the rendering of their judgment, executed a second deed of trust to Peabody, to secure an alleged additional indebtedness of Robertson of $35,000; that, for the purpose of making it appear that the trust deed had been made before the verdict was rendered, it and the note were dated back to April 2, 1877; that, for the purpose of preventing the plaintiffs from learning who was

the real holder of the note and the interest coupons, or whether the deed was a *bona fide* lien in addition to the first lien, the note was made payable to the order of Robertson and endorsed by him in blank; that said trust deed was only a renewal of the former trust deed from Grow to Gallup, and was made to secure to Greene said debt to him, and was not an additional incumbrance on the property; that said first mortgage should have been released of record so that the plaintiffs might ascertain from the record the true amount of the encumbrance, but it was withheld, making it appear that the property was subject to $70,000 incumbrance, instead of only $35,000; and that Robertson prayed an appeal from said judgment to the Supreme Court of the United States, which appeal was not perfected, but on account of its pendency the plaintiffs were unable to issue an execution on their judgment until October 15, 1877. The new bill then recited the mortgage to Templeton, and averred that it ought to be cancelled of record. It then set forth the making of the lease to McAllister for two years from September 1, 1877, at a rent of $300 a month, and the reduction of the rent to $30 a month from January 1, 1878, and averred that this was done for the purpose of lessening the income from the property, so that it would be insufficient to pay the taxes, insurance and expenses, and the interest on the loan; and that the plaintiffs used due diligence to reach the estate of Robertson, but were unable to realize anything therefrom by execution. It then set forth the turning over by Robertson to Peabody, as agent and trustee for Greene, of all the leases, rents and profits of the premises; and alleged that this was done in pursuance of the fraudulent scheme aforesaid, and under an arrangement substantially as follows: Robertson was to go through bankruptcy and obtain a discharge; Greene and Peabody were to carry the property and collect the income from it, but by reason of such reduction of the rent the income would be insufficient to carry it; Peabody was thereupon to declare a forfeiture for non-payment of interest, and sell the property under the deed of trust, and thus cut out the lien of the plaintiffs' judgment, and also prevent the property from coming to the hands of the assignee in

bankruptcy, but Robertson, or his agent, said McAllister, was to be allowed to redeem from such sale, after Robertson had procured his discharge, upon paying the amount actually due according to the terms of the loan, and the expenses incurred in carrying the property, less the amount received from the rents and profits thereof, the same as if no sale had been made; the release of the trust deed to Gallup was to be withheld from record, so as to prevent any outside bidder and the plaintiffs from bidding at the sale; such arrangement was made with Robertson and McAllister, his agent, and Peabody, as agent for Greene, began to collect the rents of the premises under the leases, and they were, if judiciously and honestly applied, more than sufficient to carry the property and pay the interest on the loan, but they were not applied to that purpose. The new bill further set forth that, immediately on the making of such arrangement, Robertson filed his petition in bankruptcy, and very soon afterwards left the United States and had since remained continuously absent therefrom, so that he could not be examined; that Peabody proceeded to declare a forfeiture of the trust deed for non-payment of interest on the loan, and, on October 7, 1878, pretended to sell the premises, and executed a deed thereof to Greene for a pretended bid at the sale of $30,000; that after the sale an agreement was made by Robertson, either in person or by his agent McAllister, with Greene, and Peabody, as the agent of Greene, whereby Greene was to hold the property and collect the rents and apply them to carrying the property, and to allow Robertson or McAllister to redeem on payment of the amount of the incumbrance and interest, and the cost of carrying the property, less the amount of rents received, the same as if no sale had been made; that the notice of sale was insufficient and defective; that the release of the trust deed to Gallup was purposely withheld from record; that the plaintiffs had no actual notice of the sale, but it was concealed from them and they did not learn of it until long afterwards; and that the deed of June 17, 1880, by the assignee in bankruptcy, on his sale, was made to Lorin Grant Pratt as trustee for the plaintiffs. It then set forth the purchase of the property by the plaintiffs for $5000, at the

marshal's sale; that Greene died after the pretended purchase by him of the premises at the sale by Peabody; that on his death whatever right, title, or interest he had in and to the premises passed to and became vested in Mehitable B. Greene, his widow; William W. Crapo and Charles W. Clifford, as trustees of Robert B. Greene, Susan G. Page, Horatio N. Greene, and Francis B. Greene; and said Robert B. Greene, Susan G. Page, Horatio N. Greene, and Francis B. Greene, as the heirs at law or devisees of said David R. Greene, and was still so held by and vested in them; that such heirs at law or devisees are citizens of Massachusetts and of full age; and that E. A. Cummings, a citizen of Illinois, is the agent for the property, and collecting the rents for the heirs or devisees of Greene.

The new bill made as defendants the five persons who were defendants to the original bill, and also the widow, and the heirs or devisees above named of Greene, and their trustees, and Cummings, their agent. Its prayer was that the mortgage to Templeton might be declared void; that the deed from Peabody to Greene might be set aside as against the rights of the plaintiffs; that Greene, during his lifetime, and his heirs or devisees, and Cummings as their agent, might be decreed to be mortgagees in possession; that they and Peabody make full answer in the premises; that an account be taken; and that the plaintiffs be allowed to redeem on paying the amount found to be due.

All the defendants, except Robertson and Templeton, entered an appearance in the suit on the 21st of November, 1881.

The plaintiffs, on the 15th of December, 1881, consented to the discharge of Robertson in bankruptcy.

On the 31st of December, 1881, all of the defendants who so appeared, except McAllister, put in an answer to the original bill and the amended and supplemental bill, denying all the allegations imputing fraud to the said defendants or to Greene in his lifetime, and claiming that the foreclosure proceedings by Greene and Peabody were had in good faith.

On the 6th of February, 1882, a replication to this answer was filed, and on the 6th of June, 1882, the cause was referred to a master, to take proofs and report them.

After some proofs had been taken on the part of the plain-

tiffs, and on the 4th of January, 1883, the plaintiffs filed an amendment to their amended and supplemental bill, which averred that Peabody, in order to conceal the time of the sale from the plaintiffs, caused the notice of sale to be published in "The Chicago Weekly Journal," a newspaper which was not read in the city of Chicago and had no circulation in said city or in Cook County; that the premises sold were composed of three separate lots; that the north 44 feet of the property was separated from the south portion, fronting on West Madison Street, by an alley or court 12 feet wide; that such north 44 feet were divided into two lots of 22 feet each, on each of which stood a brick dwelling-house 22 feet wide and fronting on Sheldon Street, which were used for private dwelling-houses, and were entirely distinct from the hotel part of the premises; that Peabody sold the property in bulk to Greene, at half its value, when it was his duty to have sold it in separate lots; and that, if he had so offered it, the part of it used for a hotel, and fronting on Madison Street, south of the alley or court, would have brought more than sufficient to pay off the debt, interest and costs.

On the 6th of January, 1883, the defendants answered this amendment, denying its allegations; and, on the 29th of January, 1883, they amended their answer by averring that, as to so much of the bill, amended bill, and supplement, as alleged any agreement between Greene and Robertson for the redemption or repurchase of the premises by Robertson, such supposed agreement was not in writing, signed by Greene or by any person by him authorized in writing, according to the statute of Illinois in such case made and provided.

On the 27th of October, 1883, the master reported the proofs to the court, and the cause was heard before Judge Blodgett, in November, 1883; and, on the 14th of April, 1884, he filed an opinion, which is reported in 21 Fed. Rep. 209, deciding the case in favor of the plaintiffs.

A motion for a rehearing was made and overruled on the 7th of July, 1884, and on the 29th of July, 1884, an interlocutory decree was entered, finding that the equities of the cause were with the plaintiffs; that they were entitled to redeem the

premises in question from the indebtedness secured thereon in favor of the heirs and representatives of the estate of David R. Greene, deceased, upon such terms as might be thereafter fixed by the court; and that a reference be had to a master, who was named, to take and report to the court an account of what was due to such heirs and representatives, for principal and interest, on the debt secured by the trust deed to Peabody, and of the amounts paid for taxes, assessments and charges provided for in such trust deed, and an account of what had been paid by said defendants for necessary repairs and improvements, and an account of the rents and profits of the premises, and to report such accounts with the evidence.

Those accounts were taken, and the master filed his report on the 15th of July, 1885, finding due to the defendants on the 12th of June, 1885, on the principles stated in the interlocutory decree, $45,641.66. Both parties filed exceptions to this report. Before they came on for hearing, and on the 4th of January, 1886, the defendants moved for leave to amend their answer, so as to set up the limitation of actions provided by the bankruptcy statute. The consideration of the motion was postponed until the final hearing of the cause.

The case came on to be heard on the 1st of April, 1886, and on the 3d of April, 1886, the court made an order allowing the defendants so to amend their answer, and also granting leave to the plaintiffs to amend their bill, and ordering the replication to the original answer to stand as a replication to such amendment thereto, and giving leave to either party to put in before the master further evidence on the subject matter of such amendments, directing the master to continue the account from June 12th, 1885, to April 1, 1886, and ordering that such additional evidence and statement of account be considered as if taken before the hearing, and that all exceptions to the former report of the master be considered as exceptions to such supplemental matters.

In pursuance of such leave, the plaintiffs amended their amended and supplemental bill, by averring that neither they nor the assignee in bankruptcy had any knowledge that the sale by Peabody had been made, until the 24th of April, 1880;

that they did not have any knowledge of such collusive agreement between Robertson and his agents, and Peabody as trustee for Greene, until on or about September 13, 1881; that the details of such agreement did not come to their knowledge until the taking of the evidence in the cause; that such sale and agreement were purposely concealed by all parties thereto, notwithstanding all due diligence was used to discover the same; that Peabody having been, prior to the making of the sale, placed in possession of the property as agent and trustee, and there being no apparent change in the possession of the property thereafter, there was nothing to advise the plaintiffs of the sale, unless they had accidentally discovered the record of the deed from Peabody to Greene, and they made no examination for that, for the reason that, by the conduct of Robertson and his agents and of Peabody, they had been lulled into the belief that no foreclosure or sale would be made, at least prior to April 2, 1880, when the debt secured by the trust deed to Peabody would mature; that the sale made by Peabody, October 7, 1878, was made after the filing of the petition of Robertson in bankruptcy, August 31, 1878, and before the appointment of his assignee, July 24, 1879, and while there was no representative of the estate of Robertson and of his equity of redemption in the property, on whom the notice of sale could operate, or who could protect the estate and the creditors; that the sale was, therefore, void as against the rights of the plaintiffs, and as against the assignee in bankruptcy and the plaintiffs as purchasers of the title and right of such assignee, under the provisions of the bankruptcy statute; that such sale, made under such circumstances, should not in equity be allowed to cut off the plaintiffs from their right to redeem from the trust deed notwithstanding the sale and the deed thereunder; and that the plaintiffs should be decreed to have taken the title of Robertson in and to the property in the same condition as it was on the 31st of August, 1878, unaffected by the sale by Peabody, and with full right to redeem from the trust deed as if no sale had been made.

The defendants filed the proposed amendment to their answer. As to the allegation that the sale by Peabody took

place, and his deed to Greene was made, pending the proceedings in bankruptcy, and before the election of an assignee, or at a time when the power of sale under the trust deed was suspended, and as to any other irregularity in the notice of sale, or any right in the plaintiffs or in said Pratt, derived from the assignee in bankruptcy, to set aside the deed from Peabody to Greene for any matter alleged, it said that the right to do so, if it ever existed, belonged to the assignee and the provisional assignee, as representing the creditors in the bankruptcy proceeding; that the assignees and the plaintiffs waived such claims and equities and failed to assert them; that at the time Peabody made the deed to Greene, on October 7, 1878, Hancock was provisional assignee in the bankruptcy matter, and on the 24th of July, 1879, became assignee; that the supposed equities and claims under which the plaintiffs pretended to have derived a right, under such assignee, to vacate such foreclosure and redeem the premises, did not accrue within two years next before the bringing of the amended and supplemental bill of September 17, 1881, wherein the defendants, excepting Peabody, were for the first time impleaded in this suit, and wherein, as to all of the defendants, said pretended rights were for the first time asserted; and that those claims and equities, if they ever existed, were barred by such laches and by the statute at the time when the supplemental bill was filed. The amendment set up such laches as an equitable bar and defence to so much of the bill as rested upon such pretended equities, and averred that, by the bankruptcy act, the plaintiffs, by reason of such lapse of time and of the said facts, were barred from claiming any relief by reason of such pretended equities, and set up said bar and limitation of two years. The amendment to the answer also denied the allegations contained in the amendment so filed by the plaintiffs to the amended and supplemental bill.

The master, on the 12th of April, 1886, filed a supplemental report, bringing down the account to the 1st of April, 1886, and finding to be due to the defendants on that day $45,342.86.

The case was brought to a hearing before Judge Blodgett,

and he filed his opinion on the 24th of May, 1886 (27 Fed. Rep. 537). He adhered to his former views.

On the 28th of May, 1886, Robertson, Templeton and McAllister filed an answer disclaiming all interest in the property in controversy, admitting that the plaintiffs were entitled to the relief prayed by them, and consenting to the entry of such decree as might seem proper to the court.

The court, on the 1st of July, 1886, made a final decree, adjudging that there was due to the defendants, the widow, heirs and representatives of the estate of David R. Greene, deceased, on their lien on the premises in question, $45,342.86, with interest thereon from April 1, 1886, at six per cent per annum; that the plaintiffs pay to them that sum, with the interest, within 90 days, in redemption of all lien of the defendants on the premises; and that, on such payment being made, the defendants convey the premises to the plaintiffs by a quit-claim deed.

The widow, heirs and representatives of the estate of David R. Greene, deceased, with Peabody & Cummings, appealed to this court from that decree.

Mr. John Lowell and *Mr. George L. Paddock*, for appellants, cited: *Anderson* v. *Strauss*, 98 Illinois, 485; *Strother* v. *Law*, 54 Illinois, 413; *Bergen* v. *Bennett*, 1 Caines' Cas. 1; *S. C.* 2 Am. Dec. 281; *Hall* v. *Bliss*, 118 Mass. 554; *Hunt* v. *Rousmaniere*, 2 Mason, 244; *Sargent* v. *Helton*, 115 U. S. 348; *Bank* v. *Sherman*, 101 U. S. 403; *Gifford* v. *Helms*, 98 U. S. 248; *Jenkins* v. *International Bank*, 106 U. S. 571; *Wisner* v. *Brown*, 122 U. S. 214; *Miller's Heirs* v. *McIntyre*, 6 Pet. 61; *Phelps* v. *Illinois Central Railroad*, 94 Illinois, 548; *Dunphy* v. *Riddle*, 86 Illinois, 22; *Crowl* v. *Nagle*, 86 Illinois, 437; *Norton* v. *De la Villebeuve*, 1 Woods, 163; *McIver* v. *Ragan*, 2 Wheat. 25; *Phelps* v. *Elliott*, 29 Fed. Rep. 53; *Nugent* v. *Boyd*, 3 How. 426; *Jerome* v. *McCarter*, 94 U. S. 734; *Eyster* v. *Gaff*, 91 U. S. 521; *In re Grinnell*, 9 Nat. Bankr. Reg. 137; *Sedgwick* v. *Grinnell*, 9 Ben. 429; *In re Moller*, 8 Ben. 526, affirmed 14 Blatchford, 207; *Bradley* v. *Adams Ex. Co.*, 3 Fed. Rep. 895; *Goddard* v. *Weaver*, 6 Nat. Bankr. Reg. 440;

Washburn v. *Tisdale*, 143 Mass. 376; *Ex parte Belcher*, 2 Deac. & Ch. 587; *Ex parte Rolfe*, 3 Mont. & Ayr. 305; *Ex parte Geller*, 2 Madd. 262; *McHenry* v. *La Société Française*, 95 U. S. 58; *Dudley* v. *Easton*, 104 U. S. 99; *In re Iron Mountain Co.*, 9 Blatchford, 320; *In re Diuard*, 9 Nat. Bankr. Reg. 8, 12; *Ex parte Cooper*, L. R. 10 Ch. 510.

Mr. Charles B. McCoy and *Mr. Charles E. Pope* (with whom was *Mr. Alexander McCoy* on the brief) for appellees.

I. The trustee's sale, having been made after the adjudication in bankruptcy, without leave of the bankrupt court, while the equity of redemption was part of the bankrupt's estate, and before the assignee was appointed and capacitated to exercise the right of redemption, was subject to the right of the assignee, (which became vested in him, when he was appointed, as of August 31st, 1878, the date of filing of the petition in bankruptcy,) to redeem and discharge the mortgage; and the sale was void as against the assignee and his grantees, and redemption should be allowed on the application now made by the grantees of the assignee holding a conveyance of this right of redemption.

We submit that the following authorities fully sustain the foregoing proposition of law:

Yeatman v. *Savings Institution*, 95 U. S. 764; *Conner* v. *Long*, 104 U. S. 228; *Bank* v. *Sherman*, 101 U. S. 403; *In re Grinnell*, 9 Nat. Bankr. Reg. 137 (Blatchford, J.); *Foster* v. *Ames*, 2 Nat. Bankr. Reg. 455 (Lowell, J.); *In re Snedaker*, 3 Nat. Bankr. Reg. 629, 636 (Hawley, J.); *Davis Ass'n* v. *Anderson*, 6 Nat. Bankr. Reg. 145 (Treat, J.); *Smith Ass'n* v. *Kehr*, 7 Nat. Bankr. Reg. 97 (Treat, J.); *In re Brinkman*, 7 Nat. Bankr. Reg. 421 (Blatchford, J.); *Hutchings Ass'n* v. *Muzzy Iron Works*, 8 Nat. Bankr. Reg. 458 (Fox, J.); *Whitman* v. *Butler*, 8 Nat. Bankr. Reg. 487 (Knowles, J.); *Barron* v. *Newberry*, 1 Bissell, 149 (McLean, J., Drummond, J., concurring); *Dooley* v. *Va. Fire Ins. Co.*, 2 Hughes, 482 (Hughes, J.); *Ex parte Christy*, 3 How. 292; *Houston* v. *City Bank*, 6 How. 486.

II. The appellees acquired the assignee's right to redeem. It was undoubtedly the intention of Congress, in enacting the bankrupt law, that the assignee's sale and deed to the purchaser — in a case of this kind — should transfer to him the whole title of the assignee, including all objections to the trustee's voidable sale, together with the right of redemption from the trust deed. The mere fact that he advertised to sell, subject to a prior lien, could no more waive any right which he was selling to the purchaser, than an administrator would by advertising the equity of redemption to land of his decedent, subject to a prior lien or mortgage.

III. This case was not within the terms of the statute of limitations. The limitation clause of the bankrupt act, by its terms, only applies to contests between an assignee in bankruptcy and a person claiming an interest adverse to such assignee. *Bailey* v. *Glover*, 21 Wall. 342; *Sargent* v. *Helton*, 115 U. S. 348; *Bartles* v. *Gibson*, 17 Fed. Rep. 293; *Gifford* v. *Helms*, 98 U. S. 248; *Jenkins* v. *International Bank*, 106 U. S. 571; *Wisner* v. *Brown*, 122 U. S. 214.

IV. The Trustees' sale was improper while the original bill was pending. *Freedman's Saving and Trust Co.* v. *Earle*, 110 U. S. 710; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Kervison* v. *Stewart*, 93 U. S. 155; *Ryan* v. *Newcomb*, 125 Illinois, 91; *Miller's Heirs* v. *McIntyre*, 6 Pet. 61; *Phelps* v. *Illinois Central Railroad*, 94 Illinois, 548; *Crowl* v. *Nagle*, 86 Illinois, 437; *Dunphy* v. *Riddle*, 85 Illinois, 22.

V. Where the interest adverse to that of the assignee has been acquired through fraud and the fraud has been concealed, the two years' statute of limitation does not commence to run until the discovery of the fraud. *Bailey* v. *Glover*, *supra*; *Upton* v. *McLaughlin*, 105 U. S. 640; *Rosenthal* v. *Walker*, 111 U. S. 185; *Traer* v. *Clews*, 115 U. S. 528; *Bartles* v. *Gibson*, 17 Fed. Rep. 293; *Retzer* v. *Wood*, 109 U. S. 185; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *De Bussche* v. *Alt*, 8 Ch. Div. 286.

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

Opinion of the Court.

The plaintiffs claim a right to redeem from the sale to Greene, made by Peabody as trustee, or from the trust deed under which that sale was made, on payment of the mortgage debt, (1) as owners of Robertson's equity of redemption by virtue of their purchase from the assignee in bankruptcy; and (2) as judgment creditors of Robertson, having a lien on the property by virtue of their judgment, prior in time to the sale by Peabody as trustee, and by their purchase of the property at the sale under the execution issued on their judgment.

They rest their claim under their purchase from the assignee in bankruptcy, first, on the ground that the sale by Peabody as trustee was made after the commencement of the proceedings in bankruptcy, and after the adjudication thereon, before an assignee was appointed, and without leave of the bankruptcy court, and was void as against such assignee and those claiming under him, that the property was still subject to the right of redemption by the assignee, and that such right has been conveyed by him to the plaintiffs; second, on the ground that there was a collusive agreement made with Robertson, by Peabody as agent for Greene, giving to Robertson the right to redeem from the sale by Peabody, and that such right of redemption passed from Robertson to his assignee in bankruptcy, and from the latter to the plaintiffs.

The claim of the plaintiffs to redeem, as judgment creditors of Robertson, is based on the allegation that they were led by the wrongful conduct of the defendants to believe that the property was subject to the deed of trust to Gallup, as well as to that to Peabody; that they were not allowed an opportunity to pay off the incumbrance before the sale by Peabody, although they were ready and willing to do so; that, by reason of the collusive agreement referred to, the sale by Peabody was part of a scheme to hinder them in collecting their judgment, by cutting off their lien on Robertson's equity of redemption, and giving the property back to him, after he should have been discharged in bankruptcy from the judgment; that the sale by Peabody was not properly advertised; that the plaintiffs had no notice of such sale prior to its being made; that such notice was intentionally withheld from

them; that the sale by Peabody, with the prior incumbrance of the trust deed to Gallup apparently standing against the property, when such incumbrance had been paid, was made with a view to prevent competition in bidding at the sale; that the property was sold in bulk, and not offered for sale in parcels; and that it was sold for an inadequate price.

But we do not find it necessary to consider any of these questions, because we are of opinion that the right of action of the plaintiffs, under their title derived from the assignee in bankruptcy, was barred by the two years' limitation enacted by the bankruptcy statute.

Section 5057 of the Revised Statutes provides as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

It is contended for the plaintiffs that the limitation provided by section 5057 applies only to the case of a contest between an assignee in bankruptcy and a person claiming an interest adversely to such assignee, touching property of the bankrupt, in a suit to which the assignee is a party; that when the assignee transferred his rights to Pratt, who acted for the plaintiffs, on the 17th of June, 1880, under the sale to Pratt made on the 24th of April, 1880, the statute ceased to run, and the interest which thus passed from the assignee then ceased to be within the terms of the bankruptcy statute of limitation, and became subject to the ordinary statute of limitation, and that the two years' limitation had not run on the 24th of April, 1880, or on the 17th of June, 1880, the register's deed to the assignee in bankruptcy having been made on the 24th of July, 1879.

But we are of opinion that the right which passed to the assignee, to file a bill to redeem, began to exist on the 24th of July, 1879; that, as the bankruptcy statute of limitation began then to run against such right in the hands of the assignee, it continued to run after such right passed to the plaintiffs, by

the assignee's deed to Pratt on their behalf, of June 17, 1880, made in pursuance of the sale of April 24, 1880; that the two years' statute of limitation bars the right asserted by the plaintiffs in their bill, in like manner as it would have barred the right of the assignee to redeem, if he had never made any sale or conveyance to Pratt, and if he were now the plaintiff in this suit; that the suit cannot be regarded as having been brought against the widow, heirs and representatives of David R. Greene until the supplemental bill was filed, on the 17th of September, 1881, when, for the first time, the sale by Peabody, as trustee, to Greene, was drawn in question in this suit; and that, as more than two years elapsed between July 24, 1879, and September 17, 1881, the two years' bar of the statute is complete.

That the two years' bar of the statute applies in favor of a purchaser from an assignee in bankruptcy has been decided by this court.

In *Gifford* v. *Helms*, 98 U. S. 248, the assignee in bankruptcy was appointed in May, 1868, and sold all the assets of the bankrupt to the plaintiff in May, 1871. Afterwards the plaintiff brought suit to set aside an alleged fraudulent conveyance which had been made by the bankrupt in June, 1867. It was held that, as the right of action on the part of the assignee in bankruptcy was barred in May, 1871, it was barred as against the plaintiff. This could not have been held if the two years' statute of limitation had been regarded as one applying only in a suit brought by the assignee. It was said by the court, that if the conveyance sought to be impeached was made in fraud of creditors, the equities in controversy were vested in the assignee in bankruptcy when he was appointed, and his right of action commenced at the time the assignment was made to him, and he might have pursued such right at any time thereafter; that, as the plaintiff claimed as purchaser from the assignee, he did not acquire, under the sale made to him by the assignee, any greater rights than those possessed by the latter; that those rights were acquired by the assignee in May, 1868; that throughout the period intervening between that date and May, 1871, the equities in controversy were held

by the defendant adversely to the supposed right of the assignee; and that the right, if any, of the assignee, was barred by the two years' statute of limitation, before the purchase by the plaintiff.

In *Wisner* v. *Brown*, 122 U. S. 214, it was held that an assignee in bankruptcy cannot transfer to a purchaser the bankrupt's adverse interest in real estate in the possession of another claiming title to it, if two years have elapsed from the time when the cause of action therefor accrued to the assignee; and that the right of the purchaser in such case is as fully barred by the bankruptcy statute of limitation as is that of the assignee. In that case, the suit was brought by a person who had purchased property of the estate from the assignee in bankruptcy, and received a conveyance thereof, more than seven years after the title of the assignee accrued. The defendants pleaded the two years' bankruptcy statute of limitations. At the time of the appointment of the assignee the property sued for was held adversely by the defendants. The court held that the assignee could not, after two years from the time of his appointment had expired, himself bring an action to recover the property, or, by selling the lands to a third person after such time had expired, enable the latter to maintain an action therefor; and it quotes with approval the remark made in *Gifford* v. *Helms*, (*supra*,) that the purchaser from the assignee did not acquire by his purchase any greater rights than those possessed by the latter.

These cases show that a conveyance by the assignee in bankruptcy cannot prevent the operation of the bar of the statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation, dating from the time of the conveyance. Nor can it interrupt the running of the statute against the claim or right, when it has once commenced to run as against the assignee. The purchaser takes the right *cum onere*, subject to the continuance of the running of the statute, and subject to the fact that a part of the two years has already run as against the claim or right, while it was in the hands of the assignee, and to the consequence that when sufficient additional time shall

have run against it, in the hands of the purchaser, to make up the entire two years, the claim or right will be wholly barred. No initiation of a new period of limitation, under any statute, begins to run in favor of the purchaser at the time of his purchase, whether the two years wholly elapsed, or only a part thereof elapsed, while the claim was owned by the assignee.

But the plaintiffs seek to take the case out of the bar of the statute, by alleging that they were ignorant of their rights, and did not discover the facts relating to the sale by Peabody as trustee, and the other matters set up in their supplemental bill, until the 24th of April, 1880, which was within two years of September 17, 1881; and that the sale by Peabody was kept secret by the defendants, as far as possible, although the plaintiffs used diligence to discover the facts.

Even if the allegations in the supplemental bill and in the amendments thereto be regarded as sufficiently charging a fraudulent concealment by the defendants of the facts of the case, from the assignee in bankruptcy, or from Pratt, or from the plaintiffs, we do not think the evidence establishes any such fraudulent concealment.

With the petition in bankruptcy, filed August 31, 1878, there was filed a schedule naming the creditors of Robertson holding securities, giving the name of David R. Greene as one of such creditors, his place of residence, the date of the contracting of his debt, its amount, a statement that the security was a trust deed on property in Chicago, a description of such property, the street and number where it was situated, and the name of Peabody as trustee. It also disclosed the fact that the only incumbrance on the property was the trust deed to Peabody, thus excluding the idea that the trust deed to Gallup was in force.

Here was information, accessible to the assignee in bankruptcy when he was appointed, information which he was bound to take notice of, information equally accessible to the plaintiffs, being in a public record, which information referred the assignee and the plaintiffs to David R. Greene for full particulars as to the property in question, and the transactions in regard to the trust deed. The petition in bankruptcy was

filed thirty-seven days before the sale of the property to Greene by Peabody as trustee. Moreover, in the petition of the plaintiffs, filed in the bankruptcy court October 5, 1878, two days before the sale by Peabody, and sworn to by the agents of the plaintiffs, the contents of the schedules in bankruptcy of Robertson are referred to, and it is stated that among the assets set forth in such schedules is the property in question, identifying it. This shows that information was actually had by such agent, at that time, of the facts before set forth as contained in one of such schedules, as to the particulars of the trust deed to Peabody, and as to who was the holder of the note secured by it and where he resided. That petition was filed more than nine months before the assignee in bankruptcy was appointed.

The rights of the plaintiffs must depend wholly upon such right of redemption as existed in Robertson, and passed to his assignee in bankruptcy, and from the latter to the plaintiffs. That being extinguished, no other right exists, and the plaintiffs have no right to redeem through any separate title acquired under their judgment against Robertson. They did not become, by the recovery of their judgment, or by anything done under it, the successors of Robertson in respect of any right of redemption, but they must follow and acquire their only title to such right, through the assignee in bankruptcy. Moreover, whatever right to redeem they could have acquired by virtue of their judgment was waived by them by their petition of March 25, 1880, to the bankruptcy court, and by their procuring the property in question to be sold by the assignee in bankruptcy, and its proceeds to be applied on their judgment. At their own suggestion the equity of redemption, which was sold by the assignee, was thus put beyond their reach.

The result of these views is 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 dismissing the bill, with costs.

McGILLIN v. BENNETT.

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

No. 146. Argued December 5, 6, 1889. — Decided December 16, 1889.

A contract between the parties as to the sale of, and payment for, a ranch and cattle, interpreted as to the mode of payment provided for.

Where a defendant, on a trial, introduces, under the objection of the plaintiff, parol evidence of what occurred in negotiations between the parties prior to the making of a contract between them, with a view to the construction of the contract, he cannot on a writ of error to review a judgment against him, allege as error the admission of such evidence.

THE case is stated in the opinion.

Mr. S. V. White (with whom was *Mr. Charles W. Gould* on the brief) for plaintiff in error.

Mr. J. B. Johnson and *Mr. Charles E. Pope* (with whom were *Mr. John L. Peak* and *Mr. A. McCoy* on the brief) for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Superior Court of Cook County, Illinois, by Milton H. Bennett and Robert L. Dunman against Edward M. McGillin, and removed by the defendant into the Circuit Court of the United States for the Northern District of Illinois. The suit was brought to recover the sum of $108,150, with interest at six per cent per annum from the 15th of July, 1885. The defendant pleaded the general issue and sundry special pleas. The plaintiffs demurred to the latter, the demurrer was sustained, and leave to amend the pleas was denied. There was also a plea of set-off, to which there was a replication, joining issue; and there was a similiter to the plea of the general issue. On the written waiver of a jury, the case was tried before the court, which found the issues for the plaintiffs, and also made special find-

ings, and assessed the damages of the plaintiffs, at $115,580.55; for which amount, with costs, judgment was entered in their favor. To review that judgment, the defendant has brought a writ of error.

The suit was founded on a written instrument, dated April 16, 1885, a copy of which, as set out in the first count of the plaintiff's declaration, is contained in the margin.[1]

---

[1] "Know all men by these presents that we, Milton H. Bennett and Robert L. Dunman, composing the firm of Bennett and Dunman, for and in consideration of the sum of four hundred thousand dollars, to be paid as hereinafter provided, have this day sold, and do by these presents sell, transfer, assign and convey, unto Edward M. McGillin, of Cleveland, State of Ohio, the following-described personal property, to wit:

"All our ranch, cattle, horses, wagons, mules, hogs and ranch outfit, located in the Indian Territory, at or near the junction of the Arkansas and Cimaron Rivers, and more particularly described as follows, to wit, twelve thousand and five hundred head of cattle, to be counted, and averaging in age and sex about as follows: Three thousand head of three, four and five-year old steers; three thousand head of two-year olds, mixed; five thousand head of one-year olds, mixed; and fifteen hundred head of cows and bulls, calves born in 1885 not to be counted; all of said cattle being branded in one or more of the following brands, to wit:" [Here follow the brands.] "One hundred and twenty-five head of horses, branded in one or more of the above-described brands, and all the mules, wagons, harness, hogs and ranch outfit located on their said ranch and used in connection therewith, and all their right, title and interest in and to the above-described brands; also all their right, title and interest in and to a certain lease for one hundred and twenty-eight thousand acres of land, known as the Cherokee lease, dated October, 1883, and running five years from date thereof, at a yearly rental of two and one-half cents per acre; also all their right, title and interest in and to a certain lease for one hundred and twenty-seven thousand and two hundred and sixty-five acres of land, known as the Pawnee lease, dated June 1, 1884, and running five years from date thereof, at a yearly rental of three cents per acre, and if the Cherokee Stock Association shall get their lease extended we guarantee an extension of said lease on same terms and at the same prices secured by other members of said association; also three good ranch houses, three good corals, corn-cribs, stables, blacksmith shop, and everything used in operating said ranch; also twenty-two and one-half miles of wire fence, Glidden wire, four strands, and nearly all black walnut posts, and one horse pasture, two miles square, near ranch headquarters, to be fenced and completed; to have and to hold the said property above-described unto him, the said Edward M. McGillin, his heirs and assigns, forever.

"We agree to deliver possession of all the above-described property to

There is a bill of exceptions, which contains all the evidence offered on the trial by either party, and the special findings

---

the said Edward M. McGillin on the ranch on or before the 15th day of July, 1885, we to pay all ranch expenses, taxes and rental on lease up to date of delivery, the said Edward M. McGillin to refund to us all money paid by us on leases beyond date of delivery.

"Should the number of cattle delivered by us to the said Edward M. McGillin exceed twelve thousand and five hundred head, the said Edward M. McGillin is to pay us in cash the sum of twenty-five dollars per head for such excess, in addition to the other consideration herein provided for; and should said number fall short of twelve thousand five hundred head we are to credit the said Edward M. McGillin on the amount herein provided, to be paid at the rate of twenty-five dollars per head for such deficit.

"The consideration of four hundred thousand dollars above specified is to be paid by the said Edward M. McGillin as follows, to wit: The sum of twenty-five thousand dollars paid cash in hand, the receipt whereof is hereby acknowledged; the sum of seventy-five thousand dollars to be paid July 25, 1885, for which the said Edward M. McGillin is to execute his negotiable promissory notes of even date herewith, payable to us or our order at the Fourth National Bank of New York City on said 25th day of July, 1885, with eight per cent interest from date; sixty-six thousand dollars to be paid July 1, 1886; sixty-six thousand dollars to be paid November 1, 1886; for which said two last-named amounts the said Edward M. McGillin is to execute his several negotiable promissory notes bearing date on July 15, 1885, and payable to us or our order at the Fourth National Bank of New York City on said 1st day of July, 1886, and 1st day of November, 1886, with eight per cent interest per annum from date of said notes; the remaining one hundred and sixty-eight thousand dollars is to be paid by the said Edward M. McGillin on the 15th day of July, 1885, as follows, to wit: On said 15th day of July, 1885, the said Edward M. McGillin is to convey to us, the said Milton H. Bennett and Robert L. Dunman, by deed of general warranty, free and clear from all incumbrances, taxes and liens of every kind and character, eighty-four acres of land lying and situate in the county of Cook and State of Illinois, more particularly described as being in certain blocks of Crosby's and others' subdivision of the south half of section five, township thirty-seven N., R. thirteen, lying west of the Chicago, Rock Island and Pacific Railway; we, the said Milton H. Bennett and Robert L. Dunman, hereby covenanting that the property herein sold and conveyed to the said Edward M. McGillin is free and clear from all incumbrance, and that we will warrant and defend the title to the said cattle, horses and stock unto the said Edward M. McGillin, his heirs and assigns, forever; we, the said Milton H. Bennett and Robert L. Dunman, hereby expressly reserving a vendor's lien on all the property herein sold and conveyed for the security and payment of the two amounts of sixty-six thousand dollars each herein provided to be paid, respectively, on the 1st day of July, 1886, and the 1st day of November, 1886, hereby ex-

made by the court. The material parts of those findings are as follows: The parties executed the contract sued on. At the date of its execution, the defendant paid to the plaintiffs $25,000, and also delivered to them his promissory notes of that date for $75,000, due and payable July 25, 1885, with interest at eight per cent per annum. Those notes were thereafter, and before maturity, transferred for value, and were, after the commencement of this suit, paid in full by the defendant to the legal holders thereof. On and prior to July 14, 1885, the plaintiffs delivered to the defendant, and he accepted, the ranch and ranch outfit, as called for and described in the contract, and he took possession of the same; and, at the same time, they delivered to him 4854 head of the cattle called for by the contract, which were accepted by him, and were the only cattle delivered by them to him on the contract. There was a deficiency of 7646 cattle in the number called for by the contract. This deficiency, at the rate of $25 per head, amounted to $191,150, which the defendant was entitled to have credited upon the $400,000 which he was, by the contract, to pay to the plaintiffs for the ranch, ranch outfit and cattle. The failure of the plaintiffs to deliver the full number of cattle called for by the contract was by reason of heavy losses of cattle sustained by them, from cold and starvation, during the winter of 1884 and the spring of 1885, whereby their herd was reduced from about the number called for by the contract to the number actually delivered. When they made the contract they in

---

pressly reserving the right, power and authority to advertise and sell any or all of said property by giving thirty days' notice of the time and place of such sale in some daily newspaper published in the city of Kansas, Jackson County, Missouri, if said sums, together with all the interest due thereon, are not paid when due, according to the terms and tenor of the notes to be executed by the said Edward M. McGillin therefor.

"In testimony whereof, witness our hands and seals, this 16th day of April, 1885.

"MILTON H. BENNETT. [SEAL.]
"ROBERT L. DUNMAN. [SEAL.]

"I accept the above conveyance, and am bound by the terms and conditions thereof. Witness my hand and seal.

"EDWARD M. MCGILLIN. [SEAL.]"

good faith believed that they had, and should be able to deliver to the defendant, the full number of 12,500 head, and were not aware of the losses until they attempted to round up or collect their cattle, at about the time the delivery was to be made. Neither the defendant nor his agents or employés had any information that the plaintiffs would not be able to deliver the 12,500 head of cattle, until notified by the latter, on the 14th of July, 1885, that they had delivered all the cattle belonging to the ranch, and could not deliver any more. Before the 1st of July, 1885, the defendant had caused a deed to be made out, and signed and acknowledged by himself and his wife, conveying to the plaintiffs the eighty-four acres of land in Cook County, Illinois, mentioned in the contract; but there was an apparent incumbrance upon the land, as shown by the record of land titles in Cook County, by a trust-deed dated June 28, 1878, to one Manning, as trustee, to secure the payment of $40,000 from the defendant to one Sawyer, and that trust-deed was not released and discharged until December 5, 1885; but, in fact, the indebtedness secured thereby had been fully paid on or before July 1, 1885. On the 15th of July, 1885, the plaintiffs did not transfer, or offer to transfer, to the defendant the two leases mentioned in the contract; and the parties agreed to meet at Kansas City, Missouri, within a few days after the said 15th of July, and then endeavor to adjust and settle all differences between them in regard to the contract. They did so meet in Kansas City, on the 17th of July, and the defendant then offered to convey to the plaintiffs the eighty-four acres of land in Cook County, on their paying to him $59,150, which conveyance the plaintiffs refused to accept on those terms. Thereupon, the defendant, to avoid litigation and as a compromise, as he said, offered to convey to the plaintiffs fifty-four acres of the Cook County land, in full payment of the balance due from him to them for the ranch and cattle. The plaintiffs refused to accept such offer; but the defendant did not tender any deed, either of the whole or of any part of the land. After such delivery of the ranch, ranch property and cattle to the defendant, the plaintiffs insisted that there was due to them from him $108,850, which should be divided

into two equal amounts and secured by the notes of the defendant, one payable on July 1, 1886, and the other on November 1, 1886, with interest on each note at the rate of eight per cent per annum. The plaintiffs also insisted that the sum of $191,150, to be credited to the defendant on the $400,000 purchase price to be paid for the ranch and cattle, should be applied as a credit to extinguish the payment to be made in the Cook County land. But the defendant refused to give the notes for $108,850, as demanded by the plaintiffs, and insisted that there was no cash payment or money due from him to them. The defendant declined to settle unless the plaintiffs would take in settlement the Cook County land. Thereupon, the defendant, by way of compromise, offered to the plaintiffs that if they would repay to him the $25,000 cash paid by him, and would return to him his notes for $75,000, given under the contract, he would surrender to them the possession of all property delivered, throw up the contract, and stand the loss of all moneys, amounting to about $5000, expended by him on the ranch. The plaintiffs declined this offer, stating that they had used the money and parted with the notes, and that the acceptance of the offer was entirely beyond their control. At the meeting in Kansas City, the plaintiffs advised the defendant of the amount which they had advanced for rent on the leases named in the contract, subsequently to July 15, 1885, and which was to be refunded by the defendant; and thereafter the latter paid said rental, and the plaintiffs duly transferred the leases to him. In the preliminary negotiations between the parties, which resulted in the contract, the defendant insisted that he would not purchase the ranch and cattle at the price of $400,000, unless the plaintiffs would take his Cook County land at the sum of $168,000, and the plaintiffs insisted that they would not sell for $400,000, unless they could receive about $250,000 in money, being willing to take the balance of such purchase price in the eighty-four acres of Cook County land. Before the contract was entered into, and while the negotiations for it were going on, the plaintiff Bennett visited Chicago and examined the Cook County land.

On these findings of fact, the court found against the de-

fendant, and he made a motion to set aside such finding, and for a new trial. The motion was denied, and the defendant excepted. He then moved in arrest of judgment; but the motion was denied, and he excepted. The court then rendered judgment upon the findings, in favor of the plaintiffs and against the defendant, and the latter excepted. There is no exception by the defendant to any ruling of the court in the course of the trial; and the only question open for consideration is whether the judgment is supported by the special findings.

The opinion of the Circuit Court, held by Judge Blodgett, accompanying its findings and forming part of the record, is reported as *Bennett v. McGillin*, 28 Fed. Rep. 411. The opinion states that the controversy in the case is as to whether the plaintiffs were bound to accept the Cook County land at the price of $168,000, and make up in cash the deficiency in that price, or whether the plaintiffs could insist that the credit for the $191,150 shortage on the cattle should be applied first to extinguish the payment of $168,000 to be made in Cook County land, and then upon the amount to be secured by the $132,000 of notes to fall due in July and November, 1886, thus leaving a balance of $108,150 due to the plaintiffs; and that the suit to recover that balance was brought on the ground that, the defendant having refused to give his notes, such balance became at once a money demand.

The court took the view that when the actual count of the cattle showed a shortage of 7646 head in the number necessary to make up the 12,500, the defendant might properly have refused to accept the property, and have put the plaintiffs in default on their part of the contract; but that he elected to accept what the plaintiffs had to deliver, and must be held to have assented thereby to such readjustment of the terms of the contract as was made necessary by the changed facts; that the contract gave to the defendant the option of paying $168,000 of the purchase-money by conveying the Cook County land; that if the defendant declined to make the conveyance, or was unable to give a good title, the $168,000 would at once become a money payment, payable in cash on the 15th of July,

1885; and that, if the plaintiffs delivered the whole number of 12,500 cattle, they would be entitled to the two notes of $66,000 each, and also to a deed of the Cook County land, or to the $168,000 in cash, in case the defendant should refuse, or be unable, to make a deed.

The court was, therefore, of opinion that the $168,000 was to be treated as a present or cash payment; that the deficiency in cattle, of $191,150, being 7646 head at $25 per head, which was to be credited to the defendant, should be appropriated in liquidation of the cash payment of $168,000, such credit being thus applied to the cash payment which the defendant would be called upon to make in case he should be unable to make the title at the time called for; that the $168,000 to be liquidated by the land was a present payment, whether made in money or land: that if, by the terms of the contract, the defendant was entitled to a credit equal to or exceeding the $168,000, that credit should be applied thereon, rather than upon the deferred payments to be evidenced by notes, because the $168,000 was a payment down, to be made on the 15th of July, 1885; that, therefore, as $100,000 had been paid in cash on the $400,000 purchase price, leaving $300,000 due, a credit thereon of the $191,150 deficiency in cattle left due to the plaintiffs $108,850, for which amount the court held that the defendant should have given his notes, payable in July and November, 1886, with interest, at eight per cent per annum; and that, as he declined to give such notes, or any notes, such balance became a present demand, for which the plaintiffs could sue. It therefore ordered judgment for the plaintiffs, for $108,850, with interest at six per cent from July 15, 1885.

Although, as appears by the bill of exceptions, the defendant at the trial introduced evidence, under the objections and exceptions of the plaintiffs, of the circumstances attending the execution of the contract, of the relative situation of the parties, and of the negotiations, correspondence, and interviews between them and their agents, leading up to its execution, to enable the court better to understand and construe the contract, the defendant now seriously alleges as error the admission of such parol evidence. The point is not tenable.

It appears, from the findings of fact, that the court considered the evidence so introduced by the defendant; and he cannot now object to it.

We are of opinion that the conclusion of law of the Circuit Court, from the findings of fact, was correct. Of course, the credit of $191,150 for the 7646 head of cattle deficient, at $25 per head, was not intended by the contract to be applied on the cash payment of $25,000, made April 16, 1885, or on the payment of $75,000 provided for by the promissory notes made April 16, 1885, and due July 25, 1885. The question of a shortage in the number of cattle was not to be determined, and was not determined, before the 15th of July, 1885, and the contract does not provide for repaying any part of the $100,000. Therefore, the credit of $191,150 could be applied only on the $300,000 remaining unpaid on the 15th of July, 1885. On that day, the payment of $168,000 was to be made. By the contract, if there was an excess of cattle over 12,500 head, the payment to be made by the defendant on that day would be more than $168,000, (exclusive of the $132,000 payable in 1886,) but that excess was to be paid in cash. If there was a shortage in the number of cattle, and a credit to be made to the defendant therefor on the $400,000 purchase price, the amount of that credit was to be made on the 15th of July, 1885, the same day the $168,000 was to be paid. It is clear, therefore, that the amount of the excess was to be added to that payment, or the amount of the credit was to be deducted therefrom. The payment to be made on the 15th of July, 1885, would be greater or less than the $168,000, as the number of cattle exceeded or fell short of 12,500 head. The $108,850 became due July 15, 1885, and the defendant, according to the terms of the contract, ought then to have given his notes therefor, payable, one-half July 1, 1886, and one-half November 1, 1886. He refused to give such notes. As the payments to be made July 1, 1886, and November 1, 1886, were not due on July 15, 1885, and a vendors' lien was expressly reserved in respect of those payments, there is no solution of the problem, except to deduct from the $191,150 deficiency in cattle the $168,000 payment to be made in land

Counsel for Parties.

or money, July 15, 1885, leaving $23,150, and to deduct that from the $132,000 payable in 1886, leaving $108,850 due to the plaintiffs, with interest from July 15, 1885; for which sum judgment was had. On the facts found, showing that the defendant was not prepared or able to deliver to the plaintiffs, on the 15th of July, 1885, a deed for the 84 acres of land in Cook County, Illinois, the $168,000 became on that day a cash payment.

The judgment of the Circuit Court is

Affirmed.

ROBERTSON *v.* GERDAN.

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

No. 56. Argued December 4, 1889. — Decided December 16, 1889.

Pieces of ivory for the keys of pianos and organs, matched to certain octaves, sold to manufacturers, who scrape them to make them adhere to wood, and then glue them to wood, were charged with duty as manufactures of ivory, under Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 474, and under Schedule N of section 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 511. The importer claimed that they were liable to a less duty, as musical instruments, under Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 478, and under Schedule N of section 2502 of the Revised Statutes as enacted by said act of March 3, 1883, 22 Stat. 513. In a suit by him against the collector to recover the alleged excess of duty paid, the court charged the jury that if the articles were made on purpose to be used in pianos and organs, and were used exclusively in them, they were dutiable as musical instruments and not as manufactures of ivory; *Held*, that this was error; and that the articles, as imported, were manufactures of ivory.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. E. B. Smith for defendant in error. *Mr. Stephen G. Clarke* filed a brief for the same.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought in the Superior Court of the city of New York, and removed by *certiorari* by the defendant into the Circuit Court of the United States for the Southern District of New York, by Otto Gerdan against William H. Robertson, collector of customs of the port of New York, to recover duties paid under protest on certain ivory pieces for the keys of pianos or organs, imported into the port of New York, and entered there, some of them in September and October, 1882, and the rest of them in January, October and November, 1884. Upon those imported in 1882, the collector assessed a duty of 35 per cent ad valorem under the provision of Schedule M of section 2504 of the Revised Statutes, 2d ed. p. 474, enacted June 22, 1874, which imposes that rate of duty on "Manufactures of bones, horn, ivory, or vegetable ivory." On the articles imported in 1884, the collector assessed a duty of 30 per cent ad valorem, under that provision of Schedule N of section 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 511, which imposes that rate of duty on "bone, horn, ivory, or vegetable ivory, all manufactures of, not specially enumerated or provided for in this act."

The importer claimed in his protest that the goods imported in 1882 were subject to a duty of 30 per cent ad valorem, under that provision of Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 478, which imposes that rate of duty on "Musical instruments of all kinds;" and that the goods imported in 1884 were liable to a duty of 25 per cent ad valorem, under that provision of Schedule N of section 2502 of the Revised Statutes, as enacted by the said act of March 3, 1883, 22 Stat. 513, which imposes that rate of duty on "Musical instruments of all kinds."

On appeal, the decision of the collector was affirmed by the Secretary of the Treasury, and suit was brought in due time.

The plaintiff had a verdict at the trial, and judgment was entered for him, for $345.50, to review which the defendant has brought a writ of error.

The bill of exceptions states as follows: "Plaintiff called

as his only witness George W. Clark, who, being duly sworn, testified that he was in the employ of plaintiff; that he identified the samples produced as similar to the articles which were imported; that they are pieces for the keys of pianos or organs; that they come in packages and are matched to certain octaves for certain instruments, to wit, organs and pianos, five octaves for organs and seven octaves for pianos, and are glued on the keys; that they are sawed and cut in a particular shape for that purpose, and are tapered in thickness, so that the end meets and the shaft comes in between. Q. They are used for no other purpose than for pianos and organ keys? A. That is it, sir. On cross-examination this witness testified that he had never put them on pianos or organs; that there are different grades and two sizes of the articles in question. Q. Do you know how they are put on the piano? A. We don't do that; we sell to the piano makers and key-board makers. I have seen it done. They scrape them to make them hold to the wood; then they are put on the key-board, and then sawed out and stuck on in that way on a large board, and then sawed out, and this, the ivory piece, is then glued on top of it, and then it is polished. Q. Are the corners rounded off? A. We don't do that; we sell to the makers. Q. As a matter of fact, don't you know that the outside corners are rounded off? A. I have seen it so, yes, sir; on the pianos. We are not piano makers; we sell to the piano and key-board makers." No other evidence was offered on either side.

The defendant asked the court to direct a verdict in his favor, because (1) the imported article was not a musical instrument, and (2) it was not a completed, indispensable part of a musical instrument. This motion was denied, and the defendant excepted. The defendant then asked the court to charge the jury that, in order to find for the plaintiff, they must find that the imported articles were completed, indispensable parts of a musical instrument. But the court charged that if the articles were used exclusively for pianos and organs, the jury should return a verdict for the plaintiff; if not, for the defendant; to which instruction the defendant excepted. The court also charged that if the articles were made on pur-

pose for pianos and organs, as musical instruments, and no other purpose, the jury might return a verdict for the plaintiff. To this instruction the defendant excepted.

We think there was error in the charge of the court. The substance of the charge was that, if the articles were made on purpose to be used in pianos and organs, and were used exclusively in pianos and organs, they were dutiable as musical instruments, and not as manufactures of ivory. That the articles were in themselves musical instruments, cannot be gravely contended. They were ivory pieces for the keys of pianos or organs. As imported, they were simply pieces of ivory, which had undergone a process of manufacture; were of a shape and size to be used for certain octaves of pianos and organs; and were sold to piano makers and key-board makers. Those persons scraped the lower surface of the ivory, to make it adhere to a piece of wood to which it was afterwards glued. In the shape in which the articles were imported, they were clearly manufactures of ivory.

Neither of the statutes in question imposes on parts of musical instruments the same rate of duty which it imposes on musical instruments.

By Schedule E of section 11 of the act of July 30, 1846, 9 Stat. 47, a duty of 20 per cent ad valorem was imposed on "musical instruments of all kinds, and strings for musical instruments of whip-gut or catgut, and all other strings of the same material;" and, by the same act (p. 45) a duty of 30 per cent ad valorem was imposed on "manufactures of bone, shell, horn, pearl, ivory, or vegetable ivory."

By section 20 of the act of March 2, 1861, 12 Stat. 190, a duty of 20 per cent ad valorem was imposed on "Musical instruments of all kinds, and strings for musical instruments of whip-gut, or catgut, and all other strings of the same material;" and by section 22 of the same act (p. 192) a duty of 30 per cent ad valorem was imposed on "Manufactures of bone, shell, horn, ivory, or vegetable ivory."

By section 6 of the act of July 14, 1862, 12 Stat. 550, a duty of 10 per cent ad valorem, in addition to then existing duties, was imposed on "Musical instruments of all kinds, and

strings for musical instruments of whip-gut or catgut, and all other strings of the same material;" and by section 13 of the same act (p. 557) a duty of 5 per cent ad valorem, in addition to then existing duties, was imposed on "Manufactures of bone, shell, horn, ivory or vegetable ivory."

By Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 481, a duty of 30 per cent ad valorem was imposed on "Strings: all strings of whip-gut or catgut, other than strings for musical instruments;" and by section 2505 of said Revised Statutes, 2d ed. p. 484, "Catgut strings, or gut-cord, for musical instruments" were made free of duty.

By section 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 514, a duty of 25 per cent ad valorem was imposed on "Strings: all strings of catgut, or any other like material, other than strings for musical instruments;" and, by section 2503 of the same enactment, 22 Stat. 518, "Catgut strings, or gut-cord, for musical instruments," were made free of duty.

It is thus seen that, by the act of 1846, by the act of 1861 and by the act of 1862, provision was made for imposing a duty on parts of stringed musical instruments, by laying a duty on "strings for musical instruments of whip-gut or catgut," leaving other parts of musical instruments, imported in parts, to be dutiable under other provisions of law. So, in the Revised Statutes of 1874, and as enacted in 1883, while there is no specific duty on parts of musical instruments, as such parts, "catgut strings or gut-cord, for musical instruments," are made free of duty, leaving other parts of musical instruments to be dutiable under other provisions than that applicable to "musical instruments of all kinds."

This view of the legislation of Congress is fortified by the fact that in the Revised Statutes of 1874, and in the same as enacted in 1883, a duty is imposed on carriages and parts of carriages; on chronometers and parts of chronometers; on clocks and parts of clocks; and on watches and parts of watches. If Congress had intended, in either enactment of the Revised Statutes, to impose the same duty on parts of musical instruments which it imposed on musical instruments, it

would have been easy to impose that duty on "musical instruments of all kinds, and parts of the same."

It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments.

The contention of the plaintiff is thought to be supported by the fact that, in the case of *Foote* v. *Arthur*, tried in the Circuit Court for the Southern District of New York early in the year 1880, and unreported, it was held that a completed violin-bow was a musical instrument, and subject to duty as such under the statute, and by the fact that the Treasury Department acquiesced in that decision, under the advice of the Attorney General of the United States. It is sufficient to say that the pieces of ivory in question were not violin-bows; and that, whatever the true view may be as to violin-bows the same considerations applicable to them do not apply to the articles in question here.

Attention is called by the plaintiff to the fact that the provision in the Revised Statutes, as enacted in 1883, in regard to manufactures of ivory, imposes the duty of 30 per cent ad valorem on all manufactures of ivory "not specially enumerated or provided for in this act." But those words have no bearing on the present case, because the pieces of ivory in question are not specially enumerated or provided for in the act of 1883.

The judgment is reversed, and the case remanded to the Circuit Court with a direction to grant a new trial.

ROBERTSON *v.* ROSENTHAL.

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

No. 57. Argued November 4, 1889. — Decided December 16, 1889.

Ordinary headless hair-pins, made of steel wire and iron wire, when imported into the United States, are subject to a duty of 45 per cent as "manufactures, articles or wares, not specially enumerated or provided for," "composed wholly or in part of iron, steel, copper," etc., and not as "pins, solid-head, or other."

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

This was an action brought to recover duty alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon certain merchandise imported by the plaintiffs. It was stipulated on the trial that if the plaintiffs should be entitled to recover on the main question raised by their protest, a verdict should be entered generally in plaintiffs' favor, subject to adjustment as to formal requisites and to amount, at the custom-house, under the direction of the court.

Evidence was given tending to show that on or about July 5th and 7th, 1884, the plaintiffs imported certain iron wire and steel wire hair-pins, upon which the collector assessed a duty of 45 per cent ad valorem, under that part of Schedule C, section 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 488, 501, c. 121, which reads:

"Manufactures, articles or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, . . . and whether partly or wholly manufactured, forty-five per centum ad valorem."

The plaintiffs paid the amount of duty assessed, and protested as follows:

"We protest against your decision as to the rate and amount of duties to be paid on the hair-pins entered by us for consumption July 5, 1884, per Donau 86,888, from Bremen, because

they are dutiable at 30 per cent ad valorem under tariff Schedule C, pins, solid-head, or other.

"If not so dutiable they are dutiable under said schedule at the rates per pound prescribed for the iron or steel wire of which they are made.

"We pay the excess exacted under compulsion solely to get the goods."

To sustain the issues upon their part, the plaintiffs introduced Leopold Kramer, who testified that he was an importer of fancy goods in the house of plaintiffs, and that their business was the general importation of notions, etc., and who identified the invoices and entries involved in this action, and also showed that the rate of duty upon said hair-pins, if classified as "Pins, solid-head or other," would not be less than the rate of duty chargeable upon the iron or steel wire from which they were made.

Witness testified further as follows: "These samples are samples of the articles imported, and are known ordinarily as hair-pins. There are also samples of various other kinds of pins: one is a crimping pin, one a solid-head pin, one a pin with a black head called a bonnet pin, used to fasten shawls; also diaper pins. They are made of iron wire and steel wire, and have no heads at all. Diaper pins and crimping pins have not solid heads. They have no heads."

And on cross-examination: "Some pins have heads, but are not solid-headed pins. Bonnet pins and shawl pins are pins with heads, but are not solid-headed pins. Those pins [referring to card] are pins with heads, but are not solid-headed pins." "Q. Are solid-headed pins the ordinary pins that everybody has? Ans. Yes; not everybody. I am familiar with dress-pins. I don't know anything about clothes-pins, except that there are such things. I know there are linch-pins and king-pins, for locomotives, but they are not used for the same purpose as the articles in suit."

Plaintiffs having rested, defendant's counsel moved the court to direct a verdict for the defendant upon the following grounds, to wit.

"1st. That in prior laws pins, solid-head or other, and hair-

pins were both provided for, which shows that, as Congress uses the phrase pins, solid-head, or other, it does not include hair-pins.

"2d. That the phrase pins, solid-head, or other, applies only to pins with heads of some kind.

"3d. Generally; that the evidence does not make out a case for recovery by the plaintiffs."

Which motion the court denied; to which ruling defendant's counsel then and there excepted.

The court thereupon charged the jury as follows:

"Gentlemen, if you think these articles are pins, according to the common understanding of the class of pins that are known as solid-head pins, or other pins, return a verdict for the plaintiffs; if not, return a verdict for the defendant. You may take the case."

The jury having returned a verdict for the plaintiffs, and the amount having been subsequently ascertained as agreed, judgment was entered against the collector accordingly, and the cause brought here on writ of error.

Mr. Solicitor General for plaintiff in error.

Mr. Edward Hartley (with whom was *Mr. Walter H. Coleman* on the brief) for defendants in error.

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

The articles in question were ordinary headless hair-pins, made of steel wire and iron wire, and the question is whether they were dutiable as "pins, solid-head or other."

By section 13 of the act of July 14, 1862, 12 Stat. 555, 557, c. 163, a duty of five per centum ad valorem, in addition to then existing duties, was levied on many articles, including "pins, solid-head or other," and "manufactures, articles, vessels and wares, not otherwise provided for, of gold, silver, copper, brass, iron, steel, lead, pewter, tin, or other metal, or of which either of these metals or any other metal shall be the component material of chief value."

By section 21 of the act of July 14, 1870, 16 Stat. 264, c. 255, a duty of fifty per centum ad valorem was levied "on hair-pins made of iron wire."

Under section 2504, Title XXXIII of the Revised Statutes, "Schedule M, — Sundries," we find, "Hair-pins, made of iron wire: fifty per centum ad valorem." "Pins, solid-head or other: thirty-five per centum ad valorem." 2d ed., pp. 476, 480. And in "Schedule E, — Metals," (p. 465): "All manufactures of steel, or of which steel shall be a component part, not otherwise provided for; forty-five per centum ad valorem. But all articles of steel partially manufactured, or of which steel shall be a component part, not otherwise provided for: shall pay the same rate of duty as if wholly manufactured." And also (p. 467): "Manufactures, articles, vessels, and wares not otherwise provided for, of . . . iron, . . . or other metal, (except . . . steel,) or of which either of these metals shall be the component material of chief value: thirty-five per centum ad valorem."

In March, 1875, certain imported steel hair-pins having been held at the port of New York dutiable at fifty per cent ad valorem, because of their similarity to iron wire hair-pins, the Treasury Department decided that this was erroneous, and that they were properly chargeable with the rate of duty applicable to manufactures of steel not otherwise provided for. Synopsis T. Dec. 1875, p. 56, No. 2140.

By section 2502 of Title XXXIII of the Revised Statutes as enacted by the act of March 3, 1883, 22 Stat. 501, c. 121, "Schedule C, — Metals," a duty of thirty per centum ad valorem was levied on "Pins, solid-head or other;" and by the last paragraph in the same schedule, on "Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, . . . or any other metal, and whether partly or wholly manufactured: forty-five per centum ad valorem."

It will be perceived that although hair-pins are not mentioned *eo nomine*, this last paragraph covers iron and steel hair-pins, as was ruled as to the latter by the department in 1875, in the construction and application of similar language.

Syllabus.

Inasmuch as Congress, for the thirteen years prior to 1883, treated hair-pins for revenue purposes as a distinct article from "pins, solid-head or other," we consider it unreasonable to conclude that the legislation of 1883 was intended to do away with a distinction manifestly regarded as inherent in the thing itself.

In short, it is doubtful if it could ever have been properly held that hair-pins were *ejusdem generis* with the pins referred to in the tariff acts, but if this could have been so prior to 1870, we are of opinion that at that time Congress assigned them to a class by themselves, because essentially *sui generis*, and, therefore, that their not being specifically enumerated in 1883 did not relegate them to the category of "pins, solid-head or other," as ingeniously argued by counsel.

From these views the conclusion follows that the court below should have instructed the jury to find for the defendant.

The judgment is reversed, and the cause remanded with a direction to award a new trial.

PENNIE *v.* REIS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 1260. Submitted December 2, 1889. — Decided December 16, 1889.

When a pleading misstates the effect and purpose of a statute upon which the party relies, a demurrer to it does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges.

The legislature of California, in 1878, enacted a statute which provided for the payment of the police force of San Francisco at a rate "which should not exceed $102 a month for each one," subject to the condition that the treasurer of the city and county "should retain from the pay of each police officer the sum of two dollars per month to be paid into a fund to be known as the police life and health insurance fund." The act further provided that upon the death of any member of the police force after June 1, 1878, there should be paid by said treasurer out of said life and health insurance fund to his legal representative the sum of $1000. On the 4th of March, 1889, this act was repealed and another statute enacted

creating "a police relief and pension fund," and transferring to it the police life and health insurance fund, which had been created under the other act, and making new and different provisions for the distribution of the new fund. W. was a police officer of the city and county from 1869 until his death on March 13, 1889, after the repealing act had gone into operation. His administrator sued to recover $1000 from the police life and health insurance fund, which then amounted to $40,000; *Held*, that this fund was a public fund, subject to legislative control, and that W. had no vested interest in it, which could not be taken away by the legislature during his lifetime.

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

This case comes from the Supreme Court of the State of California. The petitioner is the administrator of one Edward A. Ward, deceased, who was a police officer of the city and county of San Francisco from the 24th of September, 1869, until his death, which occurred on the 13th of March, 1889.

On the 1st of April, 1878, an act of the legislature of California was approved, entitled, "An act to enable the Board of Supervisors of the city and county of San Francisco to increase the police force of said city and county, and provide for the appointment, regulation and payment thereof." Statutes of California of 1877, p. 879. The first section of this act authorized the Board of Supervisors to increase the existing force of the police, which consisted of one hundred and fifty members, not exceeding two hundred and fifty more; the whole number not to make in all more than four hundred; and provided that they should be appointed and governed in the same manner as the then existing force. The second section declared that the compensation of the two hundred and fifty, or such part thereof as the board might allow, should not exceed $102 a month for each one, and that the compensation of those then in office should continue at the rate prescribed by the acts under which they were appointed until June 1, 1879, when their pay should be fixed by a board of commissioners created under the act; that the police officers then in office should be known as the "old police," and those appointed under the act as the "new police;" and that the officers subsequently appointed to fill vacancies on the old police should receive the

same pay as the new police, subject to the condition that the treasurer of said city and county should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'police life and health insurance fund,'" to be administered as provided in the act. The mayor, auditor and treasurer of the city and county of San Francisco were constituted a board to be known as the "police, life and health insurance board," and required from time to time to invest, as it might deem best, the moneys of the police life and health insurance fund in various designated securities, to be held by the treasurer, subject to the order of the board. The act declared that upon the death of any member of the police force, after the first day of June, 1878, there should be paid, by the treasurer, out of the said life and health insurance fund, to his legal representative, the sum of one thousand dollars; that in case any officer should resign from bad health or bodily infirmity, there should be paid to him, from that fund, the amount of the principal which he may have contributed thereto; and that, in case such fund should not be sufficient to pay the demand upon it, such demand should be registered and paid in the order of its registry, out of the funds as received. Ward having been a police officer whilst this act was in force, the administrator of his estate demanded of the treasurer the one thousand dollars provided by it. There was in the treasury at the time the sum of forty thousand dollars. The treasurer having refused to pay the demand, the administrator applied to the Supreme Court for a writ of mandate upon him to compel its payment. To the petition for that writ the treasurer demurred on the ground that it did not state facts sufficient to constitute a cause of action; or entitle the petitioner to the writ of mandate, or to any relief whatever; and that the act of the legislature, passed March 4, 1889, entitled "An act to create a Police Relief Health and Life Insurance and Pension Fund in the several counties, cities and counties, cities and towns of the State," was a valid and constitutional enactment. Statutes of California, 1889, p. 56. This act creates a board of trustees of the police relief and pension fund of the police department in each

county, city and county, city or town, to be known as the board of police pension fund commissioners; and provides for its organization and the administration of the fund, and for pensions to officers over sixty years of age, who have been in the service over twenty years, to those who have become physically disabled in the performance of their duties, and to the widows and children of those who lose their lives in the discharge of their duties, and for the payment of certain sums of money to the widows or children of those who die from natural causes after ten and less than twenty years' service, and regulates the evidence of disability; and that retired officers shall report to the chief of police at certain stated periods, and perform duty under certain circumstances, and for the forfeiture of pensions by misconduct, and for the meetings of the board, and prescribes their duties as to the fund.

Sections 12 and 13 of the act are as follows:

"SEC. 12. The Board of Supervisors, or other governing authority, of any county, city and county, city or town shall, for the purposes of said 'Police Relief and Pension Fund' hereinbefore mentioned, direct the payment annually, and when the tax levy is made, into said fund of the following moneys:

"*First.* Not less than five nor more than ten per centum of all moneys collected and received from licenses for the keeping of places wherein spirituous, malt, or other intoxicating liquors are sold.

"*Second.* One-half of all moneys received from taxes or from licenses upon dogs.

"*Third.* All moneys received from fines imposed upon the members of the police force of said county, city and county, city or town, for violation of the rules and regulations of the police department.

"*Fourth.* All proceeds of sales of unclaimed property.

"*Fifth.* Not less than one-fourth nor more than one-half of all moneys received from licenses from pawnbrokers, billiard-hall keepers, second-hand dealers, and junk stores.

"*Sixth.* All moneys received from fines for carrying concealed weapons.

"*Seventh.* Twenty-five per centum of all fines collected in

Counsel for Plaintiff in Error.

money for violation of county, city and county, city or town ordinances.

"*Eighth.* All rewards given or paid to members of such police force, except such as shall be excepted by the chief of police.

"*Ninth.* The treasurer of any county, city and county, city or town shall retain from the pay of each member of police department the sum of two dollars per month, to be forthwith paid into said police relief and pension fund, and no other or further retention or deduction shall be made from such pay for any other fund or purpose whatever.

"SEC. 13. Any Police, Life, and Health Insurance Fund, or any fund provided by law, heretofore existing in any county, city and county, city or town for the relief or pensioning of police officers, or their life or health insurance, or for the payment of a sum of money on their death, shall be merged with, paid into, and constitute a part of the fund created under the provisions of this act; and no person who has resigned or been dismissed from said police department shall be entitled to any relief from such fund: *Provided*, That any person who, within one year prior to the passage of this act, has been dismissed from the police department for incompetency or inefficiency, and which incompetency or inefficiency was caused solely by sickness or disability contracted or suffered while in service as a member thereof, and who has, prior to said dismissal, served for twelve or more years as such member, shall be entitled to all the benefits of this act."

The act also repealed all acts or parts of acts in conflict with its provisions. Under this act the treasurer refused to pay the money demanded by the administrator of Ward. The Supreme Court of the State held that this latter act was a valid law, and that it repealed the former act, and denied the prayer of the petitioner and dismissed the writ.

From that judgment the administrator has brought the case to this court on a writ of error.

Mr. Alfred Clarke and *Mr. James A. Johnson* for plaintiff in error.

Mr. Davis Louderback and *Mr. W. W. Morrow* for defendant in error.

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

It was contended in the court below that this latter act of March 4, 1889, violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law. The Supreme Court of the State held that this contention went on the theory that the deceased police officer had, at the time of his death, a vested property right in the one thousand dollars of public money which the former statute had directed to be paid to his legal representative upon his death. The petitioner now insists that this statement of his contention below is erroneous; that he did not then contend and does not now contend that the fund in the hands of the treasurer was public money, but private money accumulated from the contributions of the members of the police force, and that by Ward's contribution the sum claimed became, on his death, — like money due on a life insurance policy — property of his estate. Such, at least, is his position, if we rightly understand it. Some plausibility is given to it by the language of the petition to which the treasurer demurred. The petition alleges that Ward, the deceased, contributed, out of his salary as a police officer, to the police life and health insurance fund, the sum of two dollars per month for each month from April 1, 1878, to and including the month of March, 1889, and that the whole amount of his contribution to that fund was $264; that, upon his death, there was due to the petitioner, as the legal representative of Ward, the sum of one thousand dollars, payable out of that fund; that it was the duty of the treasurer of that fund to pay it; and that there was in his possession, at the time, forty thousand dollars applicable to its payment.

The petitioner now contends that these several allegations are to be taken as literally true, from the fact that the treasurer demurred to the petition. But a demurrer admits only

allegations of fact and not conclusions of law. When therefore a plaintiff relies for recovery upon compliance with the provisions of a statute, and attempts to set forth conformity with them, the court will look to that statute and take the allegations as intended to meet its provisions, notwithstanding the inaccuracy of any statement respecting them. If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges. *Dillon* v. *Barnard*, 21 Wall. 430, 437. Notwithstanding, therefore, in this case, the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question, and, in substance, that the fund which was to pay the one thousand dollars claimed was created out of like contributions of the members of the police, the court, looking to the statute, sees that, in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance — one hundred dollars — being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. The statute, in legal effect, says that the police officer shall receive as compensation, each month, not exceeding one hundred dollars, or such sum as may be fixed after June 1, 1879, by a board of commissioners created under the act, and that, in addition thereto, the State will create a fund by appropriating two dollars each month for that purpose, from which, upon his resignation for bad health or bodily infirmity, or dismissal for mere incompetency not coupled with any offence against the laws of the State, a certain sum shall be paid to him, and, upon his death, a certain sum shall go to his legal representative.

Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated — the resignation, dismissal, or death of the officer — the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that act. Such being the nature of the intestate's interest in the fund provided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express any opinion. It is sufficient that the two dollars retained from the police officer each month, though called in

the law a part of his compensation, were, in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the legislature.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* ALABAMA STATE BOARD OF ASSESSMENT.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 115. Submitted November 15, 1889. — Decided December 16, 1889.

No tax can be imposed by a State upon telegraphic messages sent by a company which has accepted the provisions of Rev. Stat. §§ 5263–5268, or upon the receipts derived therefrom, where the communication is carried, either into the State from without, or from within the State to another State.

A statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this State." The Western Union Telegraph Company reported to the board of assessors only its gross receipts received from business wholly transacted within the State. The board required of the company a further return of its gross receipts from messages carried partly within and partly without the State. The company made such further return and the tax was imposed upon its gross receipts as shown by the two returns; *Held*, that the statute of Alabama thus construed was a regulation of commerce, and that the tax imposed upon the messages comprised in the second return was unconstitutional.

THE facts which raised the federal question are stated in the opinion.

Mr. Gaylord B. Clark and *Mr. Thomas G. Jones* for plaintiff in error.

Mr. John T. Morgan for defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of the State of Alabama.

Opinion of the Court.

The question on which the jurisdiction of this court depends has been decided in this court so frequently of late years, several of the decisions having been made since the judgment of the Supreme Court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principles of the cases referred to.

That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

The plaintiff in error instituted its proceedings in the state court by a writ of *certiorari*, directed to E. A. O'Neal, governor; C. C. Langdon, secretary of state; M. C. Burke, auditor; and Frederick H. Smith, treasurer; composing the state board of assessment, for the purpose of correcting the error which they had made in an assessment for taxation of the gross receipts of the company. This board was invested by the law of Alabama with authority to assess for taxation the items of property of railroad companies returned to the auditor of the state, (section 13 of the act approved February 17, 1885, Laws of 1884–5, p. 1,) and by section 15 of the same act a sim-

ilar authority is conferred upon it in reference to telegraph companies whose lines, or any part thereof, are within the State. By an act to levy taxes for the use of the State, and the counties thereof, approved December 12, 1884, it is declared by subdivision 6, section 1, that a tax shall be levied "on the gross amount of the receipts by any and every telegraph, telephone, electric light and express company, derived from the business done by it in this State, at the rate of two dollars on the hundred dollars." The telegraph company in making its report of gross receipts to this board of assessment included only those received from business transacted wholly within the State of Alabama. The board were not willing to accept this report, and required the company to make report of its receipts from all messages, whether carried wholly within or partly without the State, and, against the remonstrances of the company, decided that this sum should be the amount on which the tax of two per cent should be paid. It was to correct the supposed error of this assessment that the writ of *certiorari* was issued by the Circuit Court of Montgomery County to the governor and others constituting that board of assessment. That court held the assessment valid, and made an order quashing the writ of *certiorari* and dismissing the proceeding. On appeal to the Supreme Court of the State this decision was affirmed, (80 Alabama, 273,) and the case is now before us, on a writ of error, to review that judgment of affirmance. In the opinion of the Supreme Court of Alabama, which is found in the record, the point mainly discussed is the construction of the tax law, in regard to the meaning of the words "gross receipts derived from business done in this State," and also whether, "if that means all the receipts of the company for business having connection with lines within the State, it is consistent with the constitution of Alabama." Of these questions this court has no jurisdiction; but, having decided that the statute, by fair interpretation, included all receipts derived from business done in the State, and actually received there, though the message may have been delivered at, or may have been sent for delivery from, some office out of the jurisdiction of the State, the court proceeds: "Though thus con-

strued, the statute is not an unauthorized interference with interstate commerce. This question is fully and ably considered and discussed in the following cases: *Western Union Tel. Co.* v. *Richmond*, 26 Grattan, 1; *Western Union Tel. Co.* v. *State*, 55 Texas, 314; *Western Union Tel. Co.* v. *Mayer*, 28 Ohio St. 521; and *Port of Mobile* v. *Leloup*, 76 Alabama, 401; and is expressly decided in respect to a tax on the gross receipts of railroad companies, they consisting in part of freights received for transportation of merchandise from the state to another state, or into the state from another, in *State Tax on Railway Gross Receipts*, 15 Wall. 284; and in *Osborne* v. *Mobile*, 16 Wall. 479." 80 Alabama, 281.

It will be observed that the authorities relied on by the Supreme Court of Alabama to sustain its judgment in this case are mostly decisions of state courts. The case of *The Western Union Tel. Co.* v. *State*, 55 Texas, 314, and the case of *Port of Mobile* v. *Leloup*, 76 Alabama, 401, have been reversed by the decisions of this court in the same cases on writ of error to the state courts. Of the cases already referred to as establishing the proposition which we have stated in the early part of this opinion, those of *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411, and *Leloup* v. *Port of Mobile*, 127 U. S. 640, are all cases in regard to taxes upon telegraph companies by state authorities, and all of them hold that no tax can be imposed upon messages, or upon the receipts derived from messages, where the communication is carried either into the state from without, or from within the state to another state.

In the earliest of these cases, *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, the statute of Florida had attempted to confer upon a corporation of its own state, the Pensacola Telegraph Company, an exclusive right of doing the telegraph business within that state. This court held, affirming the judgment of the Circuit Court of the United States for that district, that this statute was a regulation of commerce among the States forbidden by the Constitution of the United States

to the State of Florida. In the next case, that of the *Telegraph Co.* v. *Texas*, in which that State had imposed a tax of one cent for every full rate message sent, and one-half cent for every message less than full rate, on the business of the Western Union Telegraph Company, many of the messages were by the officers of the government on public business, and a large portion of them were to places outside of the state. The company contested the constitutionality of this law, and the case came to this court, where it was said that a telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad does as a carrier of goods. Both companies are carriers, and their business is commerce itself. The court then went on to consider the authorities, and said further that it followed that the judgment under review, so far as it included the messages sent out of the state or for the government on public business, was erroneous. The rule that the regulation of commerce, which is confined exclusively within the jurisdiction and territory of the State, and does not affect other nations or states, that is to say, the purely internal commerce of the State, belongs exclusively to the State, was said to be as well settled as that the regulation of commerce, which does not affect other nations or states or Indian tribes, belongs to Congress. The judgment of the Supreme Court of Texas was, therefore, reversed.

The case of *Western Union Tel. Co.* v. *Massachusetts* was a question growing out of the taxation of the telegraph company by the State of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject.

In *Ratterman* v. *Western Union Tel. Co.*, the same question arose on a writ of error to the Circuit Court of the United States for the Southern District of Ohio, where, after a full review of the whole subject, this court said that there was really no question, under the decisions of this court, in regard to the proposition that so far as a tax was levied upon receipts properly appurtenant to interstate commerce it was void; and that so far as it was only upon commerce wholly within the State it was valid. The commerce here mentioned was tele-

graph business, and the receipts were receipts for telegraph messages. This case arose upon a certificate of division of the judges who presided at the trial, and in remanding the case the court said: "We answer the question in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce;" and, concurring with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the state, the decree was affirmed.

In the subsequent case, *Leloup* v. *Port of Mobile*, found in the same volume, the question arose upon a conviction under the statute of Alabama on an indictment for failing to take out a license tax by the telegraph company, imposed by the city of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under this proceeding, his conviction affirmed by the Supreme Court of Alabama, and its judgment brought to this court on writ of error. This court held that, his company having complied with the act of Congress of July 24, 1866, the State could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional.

We think these cases are so directly in point on the questions arising in the present case that they must control, and as the record of the case presents the means by which the receipts arising from commerce wholly within the State, and from that which, under these definitions, may be called inter-

state commerce, can be separated, the judgment of the Supreme Court of Alabama is

Reversed, and the case remanded to it, with directions for further proceedings in conformity with this opinion.

RIO GRANDE RAILROAD COMPANY *v.* GOMILA.

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

No. 113. Argued November 15, 1889. — Decided December 9, 1889.

Property of a debtor, brought within the custody of the Circuit Court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of its judgment, notwithstanding the subsequent death of the debtor before the sale under execution.

The jurisdiction of a court of the United States, once obtained over property by its being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings subsequently commenced in a state court.

Probate laws of a State which, upon the death of a party to a suit in a Federal Court, withdraw his estate from the operation of the execution laws of the State, and place it in the hands of his executor or administrator for the benefit of his creditors and distributees, do not apply when, previous to the death of the debtor, his property has been seized upon execution, and thus specifically appropriated to the satisfaction of a judgment in that court.

This case came from the Circuit Court of the United States for the Eastern District of Louisiana. It arose out of the following facts: On the 5th of June, 1885, the Rio Grande Railroad Company, a corporation, recovered a judgment in that court against a copartnership firm known as Gomila & Co., and against its members, Anthony J. Gomila and Larned Torrey, *in solido*, for $26,731.99, with interest from January 1, 1884. Upon this judgment execution was issued under which certain interests were attached, or seized, as it is termed in the laws of Louisiana, namely, a claim upon which, in February, 1885,

judgment was recovered in that court in favor of Gomila & Co. against Culliford & Clark, for $23,999.76, with interest at the rate of five per cent per annum from June 30, 1883, from which judgment an appeal was, at the time, pending in the Supreme Court of the United States; also a claim and judgment thereon in favor of Gomila & Co., against John T. Milliken, rendered in a state court of Louisiana, on the 27th of June, 1883, for $6200, with interest at the rate of eight per cent per annum from February 27, 1883; and also a claim made by Gomila & Co. against Kehlor Brothers, garnishees in the suit of Gomila & Co. against Milliken. Under this execution a parcel of real estate in the city of New Orleans was also seized. The property, except the real estate, was advertised by the marshal of the district for sale. Whilst thus advertised, and before the day of sale designated, Gomila, of the firm of Gomila & Co., died. The sale did not, therefore, take place, and the representatives of Gomila were made parties to the proceedings under the execution. Subsequently a new sale was advertised. Before the day of sale arrived, the public administrator, and, as such, dative testamentary executor of Gomila, upon an affidavit that three-fourths of these assets belonged to and were inventoried as of the succession of the deceased, and should be administered with his other assets in the Probate Court of the Parish of Orleans, moved the Circuit Court of the United States for an order directing the marshal of the district to discontinue and withdraw the advertisement of sale, and desist from making the sale as advertised, or offering for sale the property seized. To this motion the railroad company appeared, and by way of exception and demurrer, pleaded, 1st, that the executor could not proceed by motion if he had any cause of complaint, but must proceed by an original bill in equity; and, 2d, that the motion presented issues of law and fact, which, if within the jurisdiction of the law side of the court, should be tried in the ordinary way by a jury. The company further stated that, if the demurrer and exception were overruled, it desired to set up in answer to the motion the fact that the claims were seized and advertised for sale before the death of Gomila, and were in the custody and jurisdiction of

the court at the time of his death, and should not, therefore, be transferred to the Probate Court of the parish. Upon the hearing, which took place on the 5th of November, 1885, the court overruled the exception and demurrer, and ordered that the marshal discontinue and withdraw the advertisement of sale, which had been fixed for that day, and desist from making the sale until further order of the court, reserving to the parties all the rights not therein passed upon. This order merely operated to postpone the sale. Subsequently another rule was taken out by the executor upon the railroad company to show cause why the effects and property should not be delivered to him, burdened with any liens in its favor, which might have resulted from their seizure, and be received and held by him as executor for the purpose of administration, under the orders of the Probate Court. Upon the hearing which followed, the Circuit Court, in December, 1885, adjudged and decreed that the rule be made absolute, and that the property described in the motion, then in the possession and under the control of the marshal, be delivered to the executor as the officer of the Probate Court for the Parish of Orleans, the said property to pass into his possession burdened with any liens in favor of the plaintiff which might have resulted from its seizure, and that it be received and held by the executor for the purpose of administration under the orders of the Probate Court, and that the cost of the proceedings be paid by the Rio Grande Railroad Company. *Rio Grande Railway* v. *Gomila*, 28 Fed. Rep. 337.

To reverse this judgment the case was brought to this court on writ of error.

Mr. George L. Bright for plaintiff in error.

Mr. Gus. A. Breaux for defendant in error.

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

The question presented for our consideration is whether property of a debtor, brought within the custody of the Circuit

Court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of the judgment notwithstanding the subsequent death of the debtor, or is removed by such death from the jurisdiction of the Circuit Court and passes under the control of the Probate Court of the State, to be disposed of in the administration of the assets of the deceased. To this question we have no doubt the answer must be that the property remains in the custody of the Circuit Court of the United States, to be applied to the satisfaction of the judgment under which it was seized. The jurisdiction of a court of the United States once obtained over property by being brought within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in a state court. This exemption of the authority of the courts of the United States from interference by legislative or judicial action of the States is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such state action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor, appointed by the Probate Court of the Parish of Orleans, contends would be to subordinate the authority of the Federal courts in essential attributes to the regulation of the State, a position which is wholly inadmissible.

The principle declared in *Freeman* v. *Howe*, 24 How. 450, and in *Buck* v. *Colbath*, 3 Wall. 334, both of which have, from their importance, attracted special attention from the profession, in effect determines the question presented here.

In the first of these cases the marshal had levied a writ of attachment, issued from the Circuit Court of the United States for the District of Massachusetts, upon certain property which was subsequently taken from his possession by the sheriff of the county of Middlesex, in that State, under a writ of replevin issued from a state court, and the question presented was whether the sheriff was justified in thus taking the property from the marshal's possession, or whether the marshal had the

right to retain it. The court held that the property was, by its attachment under process of the Federal Court, brought within the custody of that court and under its jurisdiction; that it could not be taken from that custody by any tribunal of the State; and that if a conflict in the assertion of jurisdiction in such case arose, the determination of the question rested with the Federal Court, observing that "no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another." p. 459.

In the second of the above cases — *Buck* v. *Colbath*, 3 Wall. 334 — this court referred to the decision in *Freeman* v. *Howe*, and, after stating that, when first announced, it had taken the profession generally by surprise, said that the court was clearly satisfied with the principle upon which the decision was founded; "a principle," it added, "which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." p. 341. The doctrine of *Freeman* v. *Howe* was thus reaffirmed, with a statement of the limitation to which, in its application, it was subject, by allowing suits against officers and others for seizing the property of strangers, which did not invade the custody of the court over the property. With the property in custody, so long as it continues, no other tribunal can interfere, though, but for such custody, possession of it might be taken under process from state courts. *Covell* v. *Heyman*, 111 U. S. 176.

In *Riggs* v. *Johnson County*, 6 Wall. 166, which came from the Circuit Court for the District of Iowa, and was before us at December term, 1867, this doctrine finds illustration. There the plaintiff had obtained judgment in the Circuit Court against

the county upon certain of its bonds. Execution, issued upon the judgment, was returned unsatisfied. Thereupon he applied to the Circuit Court for a mandamus upon the supervisors of the county to compel the levy of a tax for the payment of the judgment. An alternative writ was issued commanding the supervisors to assess the tax or show cause to the contrary on a day designated. The supervisors appeared on the return day and alleged that they had been enjoined by proceedings in a state court from assessing a tax for that purpose, and that they could not do so without being guilty of contempt and becoming liable to punishment. To this return the plaintiff demurred on several grounds; and, among others, that the state court had no jurisdiction, power or authority to prevent him from using the process of the Circuit Court to collect its judgment; and that the decree for an injunction rendered in the state court was no bar to his application for relief. The court overruled the demurrer, and decided that the return was sufficient. Judgment was thereupon rendered for the supervisors, and the plaintiff brought the case to this court by writ of error. Here the judgment was reversed and the cause remanded with directions to sustain the demurrer, and take further proceedings in accordance with the opinion of the court. In considering the grounds of the demurrer, this court held that the jurisdiction of a court is not exhausted by the rendition of judgment, but continues until that judgment is satisfied; that process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment; observing that the judicial power would otherwise be incomplete and entirely inadequate to the purposes for which it is conferred by the constitution; that mandamus is an appropriate remedy to compel the levy of a tax to pay a debt contracted by a municipal corporation, where judgment has been recovered for the debt, and execution thereon has been returned unsatisfied; and that state laws cannot control its process. "Repeated decisions of this court," was its language, "have also determined that state laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts." p. 195. And it concluded

its consideration of the subject by holding that the injunction of the state court was "inoperative to control or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of the state tribunals." p. 196.

It is earnestly contended that this doctrine cannot apply where the property brought under the control of the Federal Court has by the subsequent death of the debtor become, under the statute of Louisiana, the subject of administration in the Probate Courts of the State. The doctrine as declared in the cases cited does not admit of any exception to the jurisdiction of the Circuit Court of the United States in such cases. Indeed, if an exception could be made in cases in the Probate Court, it might be made in other cases. Special jurisdiction in particular classes of cases might be authorized, so as to take a large portion of subjects from the jurisdiction of the Federal courts. When property is seized to satisfy a money judgment of the United States Court, and thus brought within its custody, it is appropriated to pay that judgment, and the court cannot surrender its jurisdiction over the property until it is applied to that judgment, or that judgment is otherwise satisfied. Only the part remaining after such appropriation goes, upon the death of the debtor, into the Probate Court as his assets. All proceedings under a levy of execution have relation back to the time of the seizure of the property. *Freeman* v. *Dawson*, 110 U. S. 264, 270.

We do not question the general doctrine laid down in *Yonley* v. *Lavender*, 21 Wall. 276, 279, 280, to the effect that the administration laws of a State are not merely rules of practice for the courts, but laws limiting the rights of the parties, and will be observed by the Federal courts in the enforcement of individual rights, and that those laws upon the death of a party withdraw the estate of the deceased from the operation of the execution laws of the State, and place them in the hands of his executor or administrator for the benefit of his creditors and distributees. But that doctrine only applies where the property has not been, previous to the death of the debtor,

taken into custody by the Federal Court upon its process, and thus specifically appropriated to the satisfaction of such judgment. In this case, had Gomila died before the property in question had been seized upon process issued upon a judgment against him, the doctrine of the case cited might have been applicable. We do not recall any case now where the Federal courts have not paid respect to the principle that all debts to be paid out of the decedent's estate are to be established in the court to which the law of his domicile has confided the general administration of estates, and that judgments against the deceased, unaccompanied by a seizure of property for their satisfaction, stand in the same position as other claims against his estate, and are to be paid in like manner. The jurisdiction of chancery to enforce the equitable rights of a non-resident creditor in the case of maladministration or non-administration of the estate of a decedent, stands upon a different principle, (*Payne* v. *Hook*, 7 Wall. 425,) the rule prevailing, as stated in *Hyde* v. *Stone*, 20 How. 170, 175, that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the State which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power.

Nor is there anything in the doctrine of the exclusive jurisdiction of the Federal Court to dispose of the property in its custody without any intervention of the Probate Court, until its judgment is satisfied, that in any way trenches upon that doctrine equally well established, that where a state and a Federal court have concurrent jurisdiction over the same subject matter, that court which first obtains jurisdiction will retain it to the end of the controversy, either to the exclusion of the other, or to its exclusion so far as to render the latter's decision subordinate to the other; a doctrine which, with some exceptions, is recognized both in Federal and state courts. *Wallace* v. *McConnell*, 13 Pet. 136, 143; *Taylor* v. *Taintor*, 16 Wall. 366, 370.

Wallace v. *McConnell*, 13 Pet. 136, 143, was a case brought in the District Court of the United States for the District of Alabama, exercising the power of a Circuit Court, upon the

promissory note of the defendant for $4880. The defendant appeared and pleaded payment and satisfaction, and, issue being joined, the case was continued until the succeeding term. The defendant then interposed a plea of *puis darrien continuance*, alleging that, as to $4204 of the sum, the plaintiff ought not to maintain his action, because that sum had been attached in proceedings commenced against him under the attachment law of the State in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case being taken to this court, it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount attached, and that, therefore, the demurrer ought to have been overruled. But the court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice."

From the views expressed it follows, that the court below erred in ordering the marshal to discontinue the advertisement for the sale of the property seized, and from proceeding with its sale, and directing its delivery over to the executor of the deceased, Gomila, for purposes of administration under the orders of the Probate Court of the Parish of Orleans. Only so much of the property, or of its proceeds, as may remain after the satisfaction of the judgment under which the property was seized, can be transferred to such executor. The judgment of the court below must, therefore, be

Reversed, and the cause remanded with directions to discharge the rule; and it is so ordered.

DRAVO *v.* FABEL.

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

No. 142. Argued December 4, 1889. — Decided December 16, 1889.

When the plaintiff in a suit in equity does not waive an answer under oath, the defendant's answer, directly responsive to the bill, is evidence in his behalf.

The statute of Pennsylvania providing that a party in a suit in equity may be examined as a witness by the other party as if under cross-examination, and that his evidence may be rebutted by counter testimony, has no application to suits in equity in courts of the United States held within the State.

The party offering in a court of the United States in Pennsylvania a deposition taken under that statute, makes the witness his own, and is not at liberty to contend that he is not entitled to credit.

A decision of a District Court on a question of fact, affirmed by the Circuit Court, will not be disturbed by this court unless the error is clear.

In equity. The case is stated in the opinion.

Mr. D. T. Watson (with whom was *Mr. William S. Pier* on the brief) for appellants.

Mr. G. A. Jenks for appellees.

Mr. Justice Harlan delivered the opinion of the court.

By two deeds, one dated January 22, 1876, reciting a consideration of $10,000, and the other, dated January 26, 1876, reciting a consideration of $18,000, and both executed, acknowledged and delivered to the grantees on the last-named day, John Dippold and wife conveyed to Philip Fabel and Kate Fabel, his wife, (the latter being a daughter of the grantors,) two tracts of land in the county of Beaver, State of Pennsylvania. Both deeds were recorded in the proper office, but not until the 16th day of February, 1878.

On the 1st of March, 1878, John Dippold, John H. Dippold, Martin Dippold and Jacob H. Dippold, doing business under the name of John Dippold & Sons, were adjudged bankrupts

by the District Court of the United States for the Western District of Pennsylvania. Their assignees in bankruptcy, duly appointed and qualified, were the present appellants, who, June 13, 1879, brought this suit in the same court against the appellees.

The bill alleged that neither of the grantees possessed means sufficient for the purchase of these lands, and that the deeds to them were executed with the intent and purpose of hindering, delaying and defrauding the creditors of John Dippold, and to prevent the lands from going to, and being distributed by, his assignees in bankruptcy. It, also, alleged a conspiracy and combination between Dippold and the grantees, pursuant to which the former was to make said conveyances in order that the lands could be held by the grantees for the benefit of themselves and of John Dippold, discharged from the claims of his creditors; and that the deeds were a mere contrivance between him and them, whereby the lands "were to be in such condition as to the title thereof that if at any time the said John Dippold should become seriously and financially embarrassed it might be made to seem" that he "was not the owner of said properties."

It further alleged that, in January, 1876, John Dippold, as a member of his firm, was largely engaged in business, borrowing large sums of money down until the date of the petition in bankruptcy, and that during all that time he and the respondents conspired to have it believed by the public generally, and by creditors dealing with him, that he was the owner of these lands, and, by reason of such belief, creditors would be and were, induced to trust and confide in his financial responsibility.

The relief sought was a decree declaring the deeds null and void, fraudulent as to creditors, and vesting no right in the grantees, as against Dippold's creditors and assignees in bankruptcy, and requiring Fabel and wife to release and convey their apparent title to the assignees in bankruptcy.

The bill was sworn to, and did not waive the oath of the defendants to their respective answers.

The answers, which were under oath, besides putting in issue

all the material allegations of the bill, averred that the transactions evidenced by the deeds were *bona fide;* that the deeds were executed and delivered at their respective dates; and that the consideration named in each was paid by the grantees to Dippold in money.

The District Court dismissed the bill with costs, and a similar decree was rendered upon appeal in the Circuit Court.

The only error assigned is the refusal of the Circuit Court to declare the deeds to Philip Fabel and his wife to be fraudulent and void as to the creditors and assignees in bankruptcy of John Dippold.

This case does not present any difficult question of law. Its determination depends entirely upon the special facts and circumstances disclosed by the evidence.

Conceding that the case was an uncommon one, and that some of its circumstances tended to excite suspicion as to the integrity of the transaction between Dippold and his grantees, the conclusion of the District Court was that the clear weight of the evidence was on the side of the defendants, and that the bill should be dismissed. It was accordingly so decreed. *Dravo* v. *Fabel*, 25 Fed. Rep. 116. A similar decree was passed in the Circuit Court.

The answers of the defendants, being directly responsive to the bill, are evidence in their behalf, the plaintiffs not having waived, as they might have done, answers under oath. *Conley* v. *Nailor*, 118 U. S. 127, 134; 41st Eq. rule, as amended.

Besides, the depositions upon which the plaintiffs must rely to sustain the charge of fraud are those of the principal defendants, John Dippold and Philip Fabel. These depositions were taken and read by the plaintiffs. It is true they were taken "as under cross-examination," pursuant to a statute of Pennsylvania, which declares that "a party to the record of any civil proceeding in law or equity, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled, in the same manner, and subject to the same rules for examination as any other witness, to testify;

but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony." 1 Brightly's Purdon's Digest, 728. But that statute has no application to suits in equity in the courts of the United States. The act of Congress providing that the practice, pleadings, forms and modes of proceedings in civil causes in the courts of the United States shall conform, as near as may be, to the practice, pleadings, forms and modes of proceedings existing at the time in like causes in the courts of record of the State, expressly excepts equity and admiralty causes. 17 Stat. 197, c. 255, § 5; Rev. Stat. § 914. So that, when the plaintiffs used the depositions of Dippold and Fabel, taken "as under cross-examination," they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be given such weight as under all the circumstances it is fairly entitled to receive. The case comes within the ruling in *Lammers* v. *Nissen*, (Sup. Ct. Rep. Lawyer's ed. Book 25, p. 562,) where the finding of the court of original jurisdiction, upon a mere question of fact, was affirmed by the Supreme Court of the State. Chief Justice Waite said: "Under such circumstances, we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way on a question of fact."

Without stating the evidence in detail, we content ourselves with saying that upon a careful review of all the circumstances disclosed by the record, we do not feel justified in disturbing the conclusion reached by the District and Circuit Courts upon mere questions of fact.

Decree affirmed

ROBERTSON *v.* BRADBURY.

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

No. 58. Argued November 22, 1889. — Decided December 16, 1889.

Section 7 of the act of March 3, 1883, 22 Stat. 488, c. 121, repealing Rev. Stat. §§ 2907, 2908, took effect immediately upon the passage of the act.

Contemporaneous construction by the Treasury Department of a repealing clause in the customs-laws is entitled to weight in favor of importers.

Prior to March 7, 1883, a collector of customs in the United States was required by law, under penalty for non-performance, to ascertain the dutiable value of imported goods by adding to their cost at the place of production the cost of transporting them to the place of shipment to the United States and of the box or case in which they were enclosed. This aggregate was called their price or value "free on board," which, in the absence of fraud, was taken to be their dutiable value. The act of March 3, 1883, 22 Stat. 488, c. 121, § 7, repealed this provision of law. Shortly after this section took effect, and in ignorance of its passage, a shipment of goods produced in Switzerland was made at Antwerp, the consular invoice of which contained in detail the original cost of the goods in Switzerland, the cost of transportation separately stated, and the aggregate "free on board at Antwerp." On their arrival at the port of New York the consignee cabled for a new invoice, to conform to the changed law. One was sent, but without a consular certificate. The consignee presented both invoices at the custom-house and asked to use the second as explanatory of the first, and to enter the goods at their net value, charges off. The weigher's return at the custom-house showed a less quantity of goods than that stated in the invoice. The custom-house officers required the importer to enter the goods at their dutiable value according to the first invoice and gave him to understand that that was all he could do. The collector decided and the Secretary of the Treasury affirmed the decision on appeal, that the cost of transportation, etc., was not to be deducted from the dutiable value of the goods, and that the duties were to be collected on the quantity as shown by the invoice; *Held*,

(1) That the levy of duties after March 3, 1883, on a valuation including the charges of transportation from the place of production to the place of shipment was contrary to law.

(2) That under the circumstances the importer was not bound to ask for an appraisement under Rev. Stat. § 2926.

(3) That the collector was not entitled to exact a duty upon a deficiency in weight arising from loss of goods and not from shrinkage.

(4) That the payment of the duties under these circumstances was not voluntary.

Opinion of the Court.

THIS was an action against a collector of customs to recover duties alleged to have been illegally exacted. Verdict for the plaintiff and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Edward Hartley and *Mr. Walter H. Coleman* for defendant in error.

Mr. Edwin B. Smith, on behalf of parties interested in the question, filed an additional brief by leave of court upon the question when section 7 of c. 121, act of March 3, 1883, 22 Stat. 488, took effect.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit to recover alleged excess of duties exacted on certain cargoes of asphaltum in cakes, imported by Bradbury, the plaintiff below, from Antwerp, in May, 1883. Two questions are presented in the case for our determination: *First*, whether the 7th section of the act of March 3d, 1883, entitled "An act to reduce internal revenue taxation, and for other purposes," 22 Stat. 488, c. 121, went into effect at the time of the passage of the act, or not until the 4th of July following; *Secondly*, if it did go into effect at the time of the passage of the act, whether, under the circumstances of this case, the plaintiff below was entitled to the benefit of that section.

Prior to the passage of the act referred to under the 2907th and the 2908th sections of the Revised Statutes, (which were taken from the 9th section of the act of July 28th, 1866, 14 Stat. 330, c. 298,) the collector, in determining the "dutiable value" of merchandise, was required to add to the cost, or actual wholesale price or general market value, at the time of exportation, in the principal markets of the country whence the goods were imported, the cost of transportation, shipment and transshipment, with all the expenses included, from the place of growth, production, or manufacture, to the vessel in which shipment was made to the United States; also the value of the

sack, box, or covering, and commissions and brokerage; which additions were to be regarded as part of the actual value, and a penalty was imposed for not including them. These sections were repealed by the 7th section of the act of March 3d, 1883. They are repealed by words in the present tense, thus: "That sections twenty-nine hundred and seven and twenty-nine hundred and eight . . . be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported." We do not see how there can be any doubt that this repealing section went into immediate effect. The law itself went into immediate effect, although, it is true, various provisions of it, contained in other sections, were postponed to take effect, some on the first of July and some on the first of May. But where such postponement was intended it was expressed, and only referred to the parts that were so postponed. It did not affect the section in question. And such was the understanding of the Treasury Department itself at the time. In a Treasury circular of March 12th, 1883, addressed to the collectors of customs, the Secretary, referring to the act in question, then just passed, said: "Various sections recite the date when each shall go into effect, and, so far as concerns these sections, those dates control. Section 7, however, names specifically no date when it is to go into operation, and the department holds that it takes effect from and after the date of the passage of the act." This cotemporaneous construction is entitled to some weight in favor of importers. *United States* v. *Johnston*, 124 U. S. 236, 253. At all events it was undoubtedly the correct construction.

The question then arises whether the plaintiff below, by anything that took place in the entry of the goods at the custom-house, or by any omission to do what the law required, precluded himself from being entitled to the benefit of this statute.

Under the old law, the cost or value of the goods at the place of production was often merged for convenience with the costs of transportation to the place of shipment and the other charges, and the aggregate was called the price or value "*free*

on board" of the vessel in which the goods were shipped to the United States. This price or value, *free on board*, or *f. o. b.*, in the absence of fraud, represented the "dutiable value," subject, of course, to correction by appraisement. When the vessel arrived, and the consignee presented the entry at the custom-house, it was accompanied with the invoice, showing this price or value. In the present case, although the goods were shipped in April, the consignors in Europe, not being aware of the passage of the act of March 3d, 1883, repealing sections 2907 and 2908, made out the invoices in the usual way, stating the price of the goods as free on board at Antwerp, including therein the original cost of the goods at the mines, near Neufchatel, Switzerland, their cost of transportation from Neufchatel to Antwerp, and the other charges required by the repealed sections. This invoice was duly certified by the consul at Mannheim, Germany. Before the entry of the goods, a corrected supplementary invoice had arrived, in answer to a telegram, and was presented at the time of the entry; but it had no consular certificate — that being supplied afterwards. On the trial of the cause, the plaintiff introduced evidence tending to show these facts. He produced the entry, which described the importation as "12,000 cakes, 300,000 kilometers asphaltum, marks 15,750, $3749," with the usual consignee's oath that the invoice and bill of lading produced with the entry were the true and only ones received, and that the invoice exhibited the actual cost or fair market value at Neufchatel of the goods and all charges thereon. The invoice, certified by the consul, on which the entry was based, was also produced in evidence, representing the goods as "a quantity of asphaltum, 300,000 kilograms, at 52.50 marks per 1000 kilograms, 15,750 marks, free on board — Antwerp." There was attached to this invoice on making the entry, and when produced in evidence, the uncertified, supplementary invoice before referred to, which represented the goods as "a quantity of asphaltum, 300,000 kilograms; value at the mines, 34.50 marks per 1000 kilos., M 10,350. Freight and charge from the mines to Antwerp, free on board, at 18 marks per 1000 kilos., 5400. Free on board Antwerp, marks 15,750."

Opinion of the Court.

Attached to the consular invoice was the oath of the owner of the goods, which stated, among other things, that said invoice contained the actual cost and quantity thereof and of all charges thereon. The certificate of the consul attached to said invoice was dated 20th of April, 1883, and certified, among other things, that the invoice, "in which are mentioned and described certain asphaltum, amounting with the charges thereon to the gross sum of, marks, 15,750, was produced to him by the owner," and that the actual market value of the goods (except as corrected by him) was correct and true.

The plaintiff further offered evidence to show that, being charged with duties on the entire amount of 15,750 marks, he protested against the assessment on the ground that the defendant "assessed duty upon the cost of transportation, shipment and transshipment, with all expenses included, from the place of production and manufacture to the vessel in which the shipment was made to the United States, contrary to section 7 of the act of March 3, 1883," claiming "that said charges were not subject of appraisement or duty;" and on a second ground that the weigher's return showed a less quantity than that on which duty was charged; and that he paid the excess of duties exacted under compulsion solely for the purpose of obtaining the goods.

An appeal was taken to the Secretary of the Treasury, who affirmed the decision of the collector, on the ground that the deduction for charges had not been made in the entry; and the action was brought within proper time thereafter.

A. W. Patterson, the plaintiff's custom-house broker, testified that he presented the two invoices above named at the custom-house on the entry of the goods; that he made the entry for the plaintiff; that he asked to make the entry on both the consular and supplemental invoices, the latter as explanatory of the former; that the custom-house officers refused to allow this to be done; that he asked permission to use the supplemental invoice in connection with the other invoice as explanatory, and enter in the net value, charges off, which was refused; that he then entered the goods according to the consular invoice; that the supplemental invoice had come in

answer to a telegram to the Neufchatel Asphaltum Company, to furnish a corrected invoice, showing what the charges were; that subsequently to the entry of the goods a copy of the supplemental invoice was received, properly certified by the consul. (This copy was admitted in evidence.) The weigher's certificate was also produced, showing a deficiency of 2740 pounds of asphaltum in the cargo of the Marshall, and over 9000 pounds in that of the Edith, for which no refund of duty had been made. The witness Patterson further testified as to the meaning of the expression "free on board," as before stated.

Potter, an examiner in the appraisers' department, testified that he passed the entry in question, and endorsed it "correct," which merely meant that the entry was sufficient to cover the market value of the goods. He further testified that he found from memory, and by comparison with other goods in the same markets, that the market value of these goods was 34 marks 50 pfennigs, or 35 marks at the mines, at the place of production. Being asked if he had passed, as a rule, invoices of asphaltum from Mannheim, Germany, for a considerable period before and after that time at the same rate of 34.50, he said that would be impossible to say without the papers, but he presumed that that was about the market value. On cross-examination he stated that he had no recollection as to what he found the market value of this importation to be, independent of what was written upon the entry and invoice. To the question "Have you any recollection at all of what you did, in fact, find the market value in the principal foreign ports to be?" his answer was "Yes; I have that recollection, because it is so stated on the invoice (supplemental); that 34 marks 50 pfennigs per thousand kilograms was about the usual price, and it seems to have been stated there on the invoice." To the further question, "Then, as I understand, the effect of your testimony is that from looking at the supplemental invoice you form the impression that the value at that time at the mines was 34 marks and 50 pfennigs per thousand kilograms?" his answer was "Yes, sir."

Esterbrook, chief liquidating clerk of the custom-house, tes-

tified that, according to the course of business in the custom-house, under the law, the entered value is the value declared upon the entry under oath, and that the practice is, that the collector shall not levy duty on less than the entered value, though the amount in the invoice is less. Another clerk testified to the same effect.

Thereupon, the evidence being closed, the counsel for the government moved that the jury be directed to find for the defendant upon the following grounds: 1, that the evidence does not show the duty exacted on any amount in excess of the invoice value; 2, nor in excess of the entered value; 3, nor does it make out a case of recovery for the plaintiff. The court having denied this motion, the counsel then made a request to charge fourteen separate propositions, the substance of which was that under section 2900 of the Revised Statutes, which declares that "the duty shall not, however, be assessed upon an amount less than the invoice or entered value," the collector was bound to assess the duty on the amount stated in the entry and in the invoice certified by the consul, and could not take notice of the uncertified invoice; and that if the plaintiff desired to have the invoice corrected, his remedy was to demand an appraisement under section 2926 of the Revised Statutes, which provides that merchandise, of which incomplete entry has been made, or an entry without specification of particulars, either for want of the original invoice or for any other cause, or which has received damage during the voyage, shall be conveyed to a warehouse and there remain until the particulars, cost or value, as the case may require, shall have been ascertained, either by the exhibition of the original invoice, or by appraisement, at the option of the owner, importer or consignee, and until the duties shall have been paid or secured to be paid.

The court declined to adopt the propositions of the counsel, but charged the jury that as the invoice certified by the consul purported to show the value of the goods "free on board at Antwerp," if the jury were satisfied by the evidence that this meant that the value so expressed included charges, the charges of transportation and placing on board ship, — charges from

the markets of the country to the ship — then it was not an invoice of the "dutiable value," but was an incomplete invoice; that if this was its character, the importer or consignee had a right to claim that it was incomplete, and to ask that the goods be appraised, or that he might amend his invoice. The charge then proceeded as follows: "You have heard Mr. Patterson testify as to what occurred when he presented this invoice to the entry clerk. . . . Now, if he was given to understand when he presented that invoice there and stated that he wanted to get the charges out in some way, and presented this additional paper — you heard his testimony about what he did — if he was given to understand that he must enter those goods at the value expressed: that is, the value including the charges, the value expressed in the invoices, and in no other way, and that they could not get along in any other way than that, then he was not bound to ask for an appraisement. If they gave him to understand that that was the only thing he could do, if they met him right there when he wanted to put in this additional invoice, and said the only thing you can do is to enter these goods at this value, and the importer was compelled to do it in order to proceed at all, and he yielded to that, then he was not bound to say anything about an appraisement. But if they did not do that, if they merely refused that and gave him a chance to ask for an appraisal if he wanted to, and he did not ask for it, he mistook his remedy, and the plaintiff cannot recover, and it was his fault that he did not enter them right. But if they cut him right off on that subject and said he must enter at this larger value, then it was their fault, and the plaintiff can recover if duties on charges were collected."

The court further charged, that if the examiner, who appraised the goods, appraised their value in the principal markets of the country whence they came, in the shape they were, (that is, in cakes,) at 34 marks 50 pfennigs, that was their dutiable value and the collector exacted a duty in excess for charges, whether he called them charges or not, and the plaintiff should recover what he paid for this duty on charges, because the law of 1883 took out charges as a part of the dutiable value; but

that, if this was not the value that the appraiser took, when he says he did appraise the goods, and the jury cannot tell what it was, then they cannot tell what duty was paid on charges, and the plaintiff has not made out his case.

As to the deficiency in weight, the counsel for the government contended, and asked the court to charge, that the plaintiff was not entitled to recover anything in respect to the difference between the weights stated in the invoices and entries and the weights stated in the official weigher's returns. The court declined so to charge, and instructed the jury that if the deficiency arose from the loss of goods on the passage, a proportionate reduction should be made; but not if it arose from mere shrinkage, and if all the goods that were sent arrived.

The counsel for the government excepted to each part of the charge as given, and to each refusal to charge as requested.

We do not think that the court below committed any error in its instructions or in its refusals.

First. In regard to the construction and effect of the consular invoice which expressed the value of the goods "free on board," it was perfectly proper and right to instruct the jury that if they were satisfied from the evidence that this form of valuation was understood to include charges of transportation from the place of production to the place of shipment, and other charges of shipment and transshipment, then the levy of duties on such valuation, since the passage of the act of 1883, was contrary to law, and that the plaintiff could recover back the duties levied on the amount of such charges, provided he took the proper course to avail himself of the error. This is so evident that it needs no discussion to make it plainer.

Secondly. As to the course which the plaintiff did pursue, we see no error in the position taken by the court, that although the statute prescribed a particular method to be followed under section 2926 of the Revised Statutes, in case of an incomplete entry of goods, or an entry without the specification of particulars, (namely, to convey the goods to a warehouse, there to remain until the particulars, cost or value should be ascertained either by the exhibition of the original

invoice, or by appraisement,) yet if, when the importer or consignee pointed out the imperfection, and desired to correct it, or have it corrected, he was met by a declaration of the officers that he must enter the goods at the value expressed in the invoice and in no other way, and was given to understand that that was the only thing he could do, and he was compelled to do that in order to proceed at all, then he was not bound to ask for an appraisement under the statute. The case was prejudged against him. The theory of the custom-house officers evidently was, that the valuation of the goods in the entry and invoice was binding on the importer, although in that valuation he had inadvertently included charges for transportation, and other charges, exempted from duty by the act of 1883; and that it was his own fault for having so included such charges, and that he was estopped from disputing the valuation thus made and sworn to, even though qualified by the words "free on board," which could have no effect to alter the valuation. It is not stated in these words, but that was the tendency of the evidence; and we think that the jury were properly instructed on the subject.

Thirdly. As to the deficiency in the weight of the goods, as the value was measured by the weight, both in the invoice and by the appraiser, namely — so much per 1000 kilograms, — we think the court was right in telling the jury that any deficiency arising from loss of goods, and not from mere shrinkage, was a proper subject of recovery. If goods are damaged or affected intrinsically, that is a matter for examination and appraisement under section 2927, Revised Statutes, but if any portion of them has never come to hand but has been actually lost, the case would seem to come within the spirit of section 2921, which says that "if, on the opening of any package, a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector in the invoice, and an allowance for the same be made in estimating the duties." The appraiser's certificate in the present case related merely to *pro rata* value, and not to quantity, — that was ascertained and certified by the weigher. If only half of the cargo was found on board the

ship, it could hardly be contended that the importer would be bound by his entry and invoice to pay duty on the entire cargo shipped at Antwerp.

As to the point that the payment of the duties was voluntary on the part of the plaintiff, it is obvious to remark, that the case as already considered involved this very question. The verdict of the jury in favor of the plaintiff, under the instructions given, was virtually a finding of the fact that the plaintiff was compelled to pay the illegal duties in order to get possession of his goods. The counsel for the government says that he ought to have asked for a reappraisal. The question whether he was bound to take that course or not was involved in the inquiry submitted to the jury under the second head of instructions.

We see no error in the record and the judgment is

Affirmed.

MULLER *v.* NORTON.

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

No. 91. Argued November 8, 11, 1889. — Decided December 9, 1889.

Cunningham v. *Norton*, 125 U. S. 77, affirmed to the point that the act of the legislature of Texas of March 24, 1879, in regard to assignments by insolvent debtors for the benefit of their creditors was intended to favor such assignments; and that a provision in such an assignment, void in itself, did not necessarily vitiate the assignment, or prevent its execution for the benefit of creditors.

A provision in an assignment for the benefit of creditors that the assignee shall at once take possession of all the assigned property "and convert the same into cash" as soon as and upon the best terms possible, can hardly be construed into a discretionary authority to sell on credit.

In Texas an assignment for the benefit of creditors, under the statute, may be made to more than one assignee.

THIS was an action of trespass brought in the court below by Frederick Muller and Adolph Jacobs, assignees of the firm of Louis Goldsal & Company, of Denison, Texas, against

Anthony B. Norton, the United States marshal for the Northern District of Texas, and the sureties on his official bond, for levying upon and seizing, under certain attachment suits in that court, the goods, wares and merchandise of said firm which had been assigned to the plaintiffs.

The plaintiffs in their petition set up the fact of the assignment by virtue of which they asserted title to the property, reciting the main portions of the deed at length; set out the details of the various levies under the attachment suits; and prayed judgment for the amount and value of the goods levied on, which were alleged to be something over $34,000. Upon demurrer to the petition, the court below held the deed of assignment null and void, and, accordingly, rendered a judgment in favor of the defendants. 19 Fed. Rep. 719. To reverse that judgment this writ of error was prosecuted.

The deed of assignment was as follows:

"Know all men by these presents that we, Louis Goldsal and Benjamin Hassberg, doing business as merchants in Denison, Grayson County, Texas, under the firm name and style of 'Louis Goldsal & Co.,' for and in consideration of the sum of one dollar, to us in hand paid by Fred. Muller and A. Jacobs, of same place, the receipt of which is hereby acknowledged, and for the further purposes and considerations hereinafter stated, have this day assigned, bargained, sold and conveyed, and by these presents do assign, bargain, sell and convey, unto the said Fred. Muller and A. Jacobs all the property of every kind owned by us, or either of us, individually or as a firm, either real, personal or mixed, said property consisting of our stock of merchandise situated in our place of business known as Nos. 204 & 206, south side, Main Street, in Denison, Texas, being composed of dry goods, clothing, boots, shoes, hats, caps, trunks, valises, gents' furnishing goods, show-cases, book accounts, etc., worth about twenty-seven thousand dollars, and all other property owned by us or either of us not herein mentioned, except such of our or either of our property as is exempt from execution by the laws of the State of Texas and no other; to have and to hold unto them, the said Fred. Muller and A. Jacobs, their assigns and successors, forever.

Argument for Defendants in Error.

This conveyance is made, however, for the following purposes, to wit: We, the said Louis Goldsal and Benjamin Hassberg, doing business as aforesaid under the firm name of 'Louis Goldsal & Co.,' are insolvent, being indebted beyond what we or either of us are able to pay, and desire to secure a just and proper distribution of our and each of our property among our creditors, and this assignment is made in trust to the said Fred. Muller and A. Jacobs for the benefit of such of our creditors only as will consent to accept their proportional share of our estate and discharge us from their respective claims; and for said purpose *the said Fred. Muller and A. Jacobs are hereby authorized and directed to take possession at once of all the property above conveyed and convert the same into cash as soon and upon the best terms possible* for the best interest of our creditors, and execute and deliver all necessary conveyances therefor to the purchasers, and to collect such of the claims due us or either of us as are collectible, and to bring and prosecute such suits therefor as may be necessary, and to execute and deliver all proper receipts, releases and discharges to our said debtors on the payment of said claims, and to do and perform each and every act and thing whatsoever requisite, necessary and proper for them to do in and about the premises for the proper and lawful administration of this trust in accordance with the law; and the said Fred. Muller and A. Jacobs shall pay the proceeds of our said property, according to law, to such of our creditors as shall legally consent to accept their proportional share of our estates, property and effects as aforesaid, and discharge us from their respective claims, and no others, he first paying the expenses of administering this trust, and a reasonable compensation to himself for his services."

Mr. W. Hallett Phillips for plaintiffs in error. *Mr. Sawnie Robertson* also filed a brief for same.

Mr. D. A. McKnight (with whom was *Mr. John Johns* on the brief) for defendants in error.

I. The deed of assignment is void, as against non-consenting creditors, for the reason that it authorizes the assignees to sell upon credit.

"To convert into cash" is obviously not the equivalent of "to sell for cash." The fair meaning of the clause, convert the same into "cash," is to convert the same into "money." It necessarily involves the authority to sell on credit, for if the clause is not a direction to sell *for cash*, it must be an authority to sell *on credit*. This view is enforced by the addition of the phrase "on the best *terms* possible." In the following cases, wherein the assignee had authority to fix the "terms" of sale, it was held that a sale on credit was implied. *Sumner* v. *Hicks*, 2 Black, 532; *Hutchinson* v. *Lord*, 1 Wisconsin, 286; *S. C.* 60 Am. Dec. 381; *Keep* v. *Sanderson*, 12 Wisconsin, 352; *Beus* v. *Shaughnessy*, 2 Utah, 492; *Moir* v. *Brown*, 14 Barb. 39; *Schufeldt* v. *Abernethy*, 2 Duer, 533.

In the case at bar, the court below held that the assignment authorized a sale on credit, and that for that reason it was void against non-consenting creditors. *Muller* v. *Norton*, 19 Fed. Rep. 719. In fact it appears to be a settled rule in most of the States that an authority to the assignor to sell upon credit renders the deed of assignment void on its face. In addition to the above cited cases see *McLeary* v. *Allen*, 7 Nebraska, 21; *Collier* v. *Davis*, 47 Arkansas, 367; *Bagley* v. *Bowe*, 105 N. Y. 171. The ground of the ruling is that an authority to sell on credit tends to hinder or delay creditors, and is obnoxious to the statute of 13 Eliz., which is substantially in force in most of the States. See *Jaffrey* v. *McGehee*, 107 U. S. 365; *Robinson* v. *Elliott*, 22 Wall. 513; *Means* v. *Dowd*, 128 U. S. 273.

Under the statutes of Texas, and the decisions of her courts, a deed of assignment authorizing a sale upon credit is voidable by non-consenting creditors. When the assignment in question was made, there were two statutes in force which governed it, namely, the statute against fraudulent conveyances, substantially the statute of 13 Eliz., in force from an early day (Rev. Stats. 1879, Art. 2465, p. 363) and the act regulating assignments for the benefit of creditors, approved March 24, 1879 (Id. App. p. 5). The act of 1879 is silent as to the time, terms and manner of sale; and where the statute is silent, the assignee must be governed by the deed of assign-

ment. *Ogden* v. *Peters*, 21 N. Y. 23; *S. C.* 78 Am. Dec. 122; *In re Lewis*, 81 N. Y. 421; *Adler* v. *Ecker*, 1 McCrary, 256; *Hopkins* v. *Ray*, 1 Met. (Mass.) 79; *Collier* v. *Davis*, 47 Arkansas, 367. *Wert* v. *Schneider*, 64 Texas, 327, arose under the act of 1879. On the authority of this case we contend that the court would have held the assignment void on its face if it had found there authority to sell on credit. See *Blum* v. *Welborne*, 58 Texas, 157; *Donoho* v. *Fish*, 58 Texas, 164; *Keating* v. *Vaughn*, 61 Texas, 518; *Keller* v. *Smalley*, 63 Texas, 512. See also *Bagley* v. *Bowe*, *ubi supra*; *Eicks* v. *Copeland*, 53 Texas, 581, 590; *Baldwin* v. *Peet*, 22 Texas, 708; *S. C.* 75 Am. Dec. 806; *Carlton* v. *Baldwin*, 22 Texas, 724; *Nave* v. *Britton*, 61 Texas, 572. These Texas rulings were made under the statute against fraudulent conveyances, which is in force as to deeds of assignment under the act of 1879. *La Belle Wagon Works* v. *Tidball*, 59 Texas, 291. In view of the state of the law in Texas and other States, a Federal Court may hold this assignment void on its face, where the rights of non-resident creditors are involved. *Schoolfield* v. *Johnson*, 11 Fed. Rep. 297; *Heelan* v. *Hoagland*, 10 Nebraska, 511; *Bonns* v. *Carter*, 20 Nebraska, 566; *Edwards* v. *Mitchell*, 1 Gray, 239; *Pike* v. *Bacon*, 21 Maine, 280; *S. C.* 38 Am. Dec. 259; *Raleigh* v. *Griffith*, 37 Arkansas, 150; *Churchill* v. *Whipple*, 41 Wisconsin, 611. This case is distinguishable from *Cunningham* v. *Norton*. The contention there related to paying over to the debtor the surplus remaining after paying consenting creditors.

II. The deed of assignment is void as against non-consenting creditors, for the reason that it is not made to one assignee as required by the statute.

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

The validity of the above deed in view of matters apparent on its face constitutes the only question for consideration. We think that question is determined by the principle laid down in *Cunningham* v. *Norton*, 125 U. S. 77, which reversed

the judgment on the authority of which the one now under review was rendered by the court below. That case involved, as does this, the validity of an assignment under the Texas statute just referred to, which was sought to be set aside on account of a provision in the deed alleged to be not in conformity with that statute. The assignments in the two cases are very similar; the main difference being, that the one in the Cunningham case contains two provisions, neither of which occurs in the instrument under consideration. The first of these provisions reserves to the assignor the surplus of the property assigned after the payment of all the debts of the consenting creditors. The second expressly authorizes the assignee to sell such property on credit, according to his discretion. This last provision, however, was not called to the attention of the court in that case. The main contention was, that the deed in controversy was rendered void by the clause directing the assignee to pay over to the assignor the surplus after paying in full all the creditors who should accede to the deed. This court decided that the said clause did not affect the validity of the assignment, but was itself alone invalidated by reason of its being in violation of the statute. The decision was based upon the general construction of the whole act taken together, in view of the main object designed to be subserved by it, and of the decisions of the Supreme Court of Texas upon many of its express provisions, in which line of decisions the court indicated its full concurrence. That policy the court declares to have been the appropriation of the entire estate of an insolvent debtor to the payment of his debts, and as a means thereto to favor assignments, and to give them such construction that they may stand rather than fall; that its manifest purpose was to provide a mode by which an insolvent debtor, desiring to do so, may make an assignment simple and yet effective to pass all his property to an assignee for the benefit of such of his creditors as will accept a proportionate share of the said property, and discharge him from their claims; that it further manifests the intention to transfer to the assignee all the property of the debtor for distribution among all the creditors; that no act of the assignee or of the

assignor after the assignment is made, or preceding it, but in contemplation of it, however fraudulent that act may be, shall divest the right of the creditors to have the trust administered for their benefit in accordance with the spirit of the statute; and that, therefore, the provision reserving the surplus to the debtor after payment of the debts to the consenting creditors, even though conceded to be not in conformity with the requirements of the statute, and therefore itself void, does not vitiate the assignment or prevent its execution for the benefit of the creditors, as provided in the statute.

These principles apply with controlling force to the assignment in the case at bar. The ingenious argument of the counsel has failed to point out any distinguishing features in the two cases.

The first ground upon which this deed is assailed is the following clause therein: "The said Fred. Muller and A. Jacobs are hereby authorized and directed to take possession at once of all the property above conveyed, and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors;" which language the court below and the counsel for the defendants claim is an authority to the assignee to sell upon credit. We do not think that such is a correct or fair interpretation of the clause, taking the whole instrument together and construing it with reference to the purpose manifest in all its other provisions. A positive direction to "convert" the property assigned "into cash as soon and upon the best terms possible for the best interest of our creditors," can hardly be construed into a discretionary authority to sell on credit, without doing violence to the well-established rule that the power to sell on credit will not be inferred from language susceptible of a different construction. Burrill on Assignments, § 224.

But even if we concede that the construction contended for be correct, and that the clause thus construed is in contravention of the statute, it will not, as this court has decided, operate to annul the assignment in which all the creditors may have an interest. In *Kellogg & Co.* v. *Muller*, 68 Texas, 182, 184, this very point we are now considering was presented and

decided by the court in the following language: "The first exception to the deed is that it authorized the assignee to sell the property assigned on a credit, and is, therefore, void. The provision to which we are cited in support of the exception is as follows: 'That so soon as said inventory is complete, the said Frederick Muller, as such trustee aforesaid, shall thereafter, with all reasonable dispatch, proceed to sell and dispose of said goods, wares and merchandise and furniture, and collect said book accounts and bills receivable, converting the same into cash or its equivalent.' It may be doubted if this can be construed to empower the assignee to sell for anything but money. . . . But, however this may be, even if a badge of fraud, it is not sufficient to authorize the court to hold the deed void upon its face;" citing *Baldwin* v. *Peet*, 22 Texas, 708.

In the assignment before us all the property conveyed by it is in terms devoted to the payment of the creditors of the insolvent debtor. The judgment of the court below adjudging it to be void upon its face, because it permitted a sale on credit, was erroneous.

The second objection, that the deed was not made to one assignee, does not require any extended comment. Under the common law an insolvent debtor was permitted to make an assignment to a single individual or to several. Burrill on Assignments, § 91. It is true the act of March 24, 1879, speaks only of an *assignee;* but the statutory rule of construction in force in Texas is: "The singular and plural number shall each include the other, unless otherwise expressly provided." Rev. Stat. of Texas (1879), Art. 3138, subdivision 4. Under this rule, and keeping in mind the policy of the statute of 1879, regulating assignments, we do not think the deed of assignment in this case void for the second reason assigned.

For the reasons given the decree of the court below is reversed and the case remanded, with directions to take such further proceedings as shall not be inconsistent with this opinion.

Counsel for Parties.

IDAHO AND OREGON LAND IMPROVEMENT COMPANY *v.* BRADBURY.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 105. Submitted November 13, 1889. — Decided December 23, 1889.

Where the certificate of authentication of a record transmitted to this court on appeal begins by setting out the name and office of the clerk of the court below as the maker of the certificate, and has appended to it the seal of the court, but lacks the signature of the clerk, this court has jurisdiction of the appeal; and, if no motion to dismiss is made until it is too late to take a new appeal, will permit the certificate to be amended by adding the clerk's signature.

Under the act of April 7, 1874, c. 80, § 2, an appeal, and not a writ of error, lies to this court from the decree of a territorial court in a proceeding in the nature of a suit in equity, although issues of fact have been submitted to a jury.

On appeal from the decree of a territorial court in a proceeding in the nature of a suit in equity, this court cannot consider the weight or sufficiency of evidence, but only whether the facts found by the court below support the decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence.

A suit to enforce a mechanic's lien under a territorial statute authorizing the court to order the real estate subject to the lien to be sold, and any deficiency to be paid by the owner, as in suits for the foreclosure of mortgages, is in the nature of a suit in equity.

A court of equity need not formally set aside the verdict of a jury upon issues submitted to it, before making a decree according to its own view of the evidence.

In a suit in the nature of a suit in equity, a territorial court, after a jury has found upon special issues submitted to it, and has also returned a general verdict, may set aside the general verdict, and substitute its own findings of fact for the special findings of the jury.

THE case is stated in the opinion.

Mr. C. W. Holcomb and *Mr. J. H. McGowan* for appellant.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for appellees.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This suit was commenced by Bradbury and Reinhart against the Idaho and Oregon Land Improvement Company by a complaint filed in a district court of the Territory of Idaho on September 24, 1883, alleging, in substance, that on April 13, 1883, the parties made an agreement in writing, by which the plaintiffs agreed to construct, upon the defendant's land, and on a line designated by the defendant's engineer in charge of the work, a ditch four miles long, eight feet wide and two feet deep, and of a certain grade and slope, at certain prices by the cubic yard for the material moved, and on other terms expressed in the agreement (a copy of which was annexed); that on May 17, 1883, the parties made a supplemental agreement (a copy of which was also annexed) increasing the rate of compensation in some respects; that on June 1, 1883, after the ditch had been completed by the plaintiffs and accepted by the defendant, the parties came to a settlement, upon which it was ascertained and agreed that there was due from the defendant to the plaintiffs the sum of $16,774.49, of which $10,000 was paid, and for the rest of which the defendant gave its acceptance for the sum of $6774.49, payable in fifteen days, which was duly presented at maturity, but in no part paid, and on June 27, 1883, was protested for nonpayment, and that sum, with interest at the rate of one and a half per cent a month, was now due from the defendant to the plaintiffs; and that the plaintiffs, in order to perfect a lien on the ditch and adjoining land as security for the payment of that sum, on July 12, 1883, filed with the recorder of the county, as required by chapter 48 of the Code of Civil Procedure of Idaho Territory, a claim (a copy of which was annexed to the complaint) stating the substance of the original and supplemental contracts, and the balance due as aforesaid.

The complaint prayed for judgment directing a sale of the premises, and the application of the proceeds to the payment of the plaintiffs' claim, with interest as aforesaid, and costs, and twenty per cent damages, as provided by the statutes of the Territory, and also to the payment of the holders of any

other liens who might come in; and that the plaintiffs might have judgment against the defendant for any deficiency in the proceeds of such sale to satisfy the amount due them, and for further relief.

The answer denied the completion of the ditch by the plaintiffs and its acceptance by the defendant, or that there was due from the defendant to the plaintiffs more than the sum of $500; and alleged that, if any settlement was made between the parties, it was under a misapprehension of facts caused by false and fraudulent statements of the plaintiffs that the ditch had been completed according to the contracts.

The court submitted several special issues to a jury, who found some of them in favor of the plaintiffs and failed to agree upon others, and returned a general verdict for the plaintiffs in the sum of $4274.49 and interest.

The court set aside the general verdict; and made and filed findings of fact, adopting as part thereof the findings of the jury as far as they went, and substantially supporting all the allegations of the complaint; and from the facts so found made the following conclusions of law:

"1st. That the plaintiffs are entitled to a judgment for the sum of $10,107.52, and for costs, which includes the sum found due, interest, and protest damages.

"2d. That the plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint, and it is so ordered."

By the final decree, rendered at a hearing upon the pleadings "and upon the proofs, records and evidence produced by the respective parties, and the court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court from the proofs herein that there is now due to the plaintiffs from the defendant the sum of $10,107.52, for principal, damages and interest upon the debt set forth in the complaint, and that all the allegations in the complaint are true," the court ordered a sale of the premises by public auction; the payment, out of the proceeds, to the plaintiffs, of the sum of $10,107.52, with costs, and interest at the rate of ten per cent from the date of the decree; and the amount of any deficiency to be paid by the defendant to the plaintiffs.

The defendant moved for a new trial for "insufficiency of the evidence to justify the verdict and findings," as well as for "errors in law, occurring at the trial, and excepted to."

Upon this motion, the defendant filed a statement, which was certified by the judge as "the statement of the case," and contained parts of the testimony given and offered at the trial, and exceptions of the defendant to its admission or exclusion; instructions given to the jury and excepted to by the defendant; and a specification of twenty-one errors, touching the rulings upon evidence and the instructions to the jury, and the sufficiency of the evidence in the case and the findings of the jury to support the court's findings of fact and conclusions of law.

The defendant's motion for a new trial was overruled; and the defendant excepted to the ruling, and appealed "from the judgment and decree of foreclosure and sale" to the Supreme Court of the Territory, which adjudged "that the judgment of the court below be affirmed, and that the decree for foreclosure of mechanic's lien be modified so as that the lien shall hold only for the judgment, less the protest damages." 10 Pacific Reporter, 620. The defendant claimed an appeal, and sued out a writ of error.

In order to give this court jurisdiction of an appeal or writ of error, "an authenticated transcript of the record" of the court below must doubtless be filed in this court at the return term. Rev. Stat. § 997; *Edmonson* v. *Bloomshire*, 7 Wall. 306.

In the case before us, a motion to dismiss is now made, on the ground that the record is not authenticated, because neither the clerk nor the deputy clerk made the return "under his hand," as well as under the seal of the court, as required by Rule 8 of this court.

In support of this motion, reliance is placed on *Blitz* v. *Brown*, 7 Wall. 693, in which the only certificate of authentication was a blank form, wanting both the seal of the court below and the signature of the clerk, so that there was really no authentication whatever; and this court therefore dismissed the writ of error, but permitted the plaintiff in error

to withdraw the record for the purpose of suing out a new writ.

But in the case at bar the certificate not only begins with setting out the name and office of the clerk as the maker of the certificate, but has appended to it the seal of the court, and lacks only the clerk's signature to make it conform to the best precedents. The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk.

In Idaho, as in other Territories, there is but one form of civil action, in which either legal or equitable remedies, or both, may be administered, through the intervention of a jury, or by the court itself, according to the nature of the relief sought, provided, however, that no party can be "deprived of the right of trial by jury in cases cognizable at common law." Rev. Stat. § 1868; Act of Congress of April 7, 1874, c. 80, § 1, 18 Stat. 27; Idaho Code of Civil Procedure of 1881, §§ 138, 139, 230, 309, 353; *Ely* v. *New Mexico Railroad*, 129 U. S. 291.

Congress has prescribed that the appellate jurisdiction of this court over "judgments and decrees" of the Territorial courts, "in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal;" and "on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below," and transmitted to this court with the transcript of the record. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28.

The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite, "We are not to consider the

testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us." *Hecht* v. *Boughton*, 105 U. S. 235, 236.

The provision of this act, permitting a writ of error "in cases of trial by jury" only, evidently has regard to a trial by jury, as in an action at common law, in which there is and must be a trial by jury, and the court is not authorized to try and determine the facts for itself, unless a jury is waived by the parties according to statute; and has no application to a trial of special issues submitted to a jury in a proceeding in the nature of a suit in equity, not as a matter of right, or to settle the issues of fact, but at the discretion of the court, and simply to inform its conscience, and to aid it in making up its own judgment upon the facts, and the real trial of the facts is by the court and not by a jury. In all proceedings in the Territorial courts in the nature of suits in equity, therefore, as well as in those proceedings in the nature of actions at common law in which no trial by jury is had, (either because a jury has been duly waived, or because the issues tried are issues of law only,) the appellate jurisdiction of this court must be invoked by appeal, and not by writ of error. *Davis* v. *Alvord*, 94 U. S. 545; *Davis* v. *Fredericks*, 104 U. S. 618; *Story* v. *Black*, 119 U. S. 235.

It must also be borne in mind that, as already seen, in either class of cases, whether equitable or legal, coming up by appeal from a Territorial court after a hearing or trial on the facts, the evidence at large cannot be brought up, (as it is in cases in equity from the Circuit Courts of the United States,) but only "a statement of facts in the nature of a special verdict," and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. Consequently the authority of this court, on appeal from a Territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings,

duly excepted to, on the admission or rejection of evidence; and does not extend to a consideration of the weight of evidence, or its sufficiency to support the conclusions of the court. *Stringfellow* v. *Cain*, 99 U. S. 610; *Cannon* v. *Pratt*, 99 U. S. 619; *Neslin* v. *Wells*, 104 U. S. 428; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Gray* v. *Howe*, 108 U. S. 12; *Eilers* v. *Boatman*, 111 U. S. 356; *Zeckendorf* v. *Johnson*, 123 U. S. 617.

The present suit was brought to enforce a mechanic's lien created by the statutes of the Territory, which authorize the court in such a suit to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, "in like manner and with like effect as in actions for the foreclosure of mortgages." Idaho Code of Civil Procedure, §§ 815, 826. The relief provided for in those statutes, sought by the complaint, and granted by the court, was purely equitable, and the proceeding was in the nature of a suit in equity. *Canal Co.* v. *Gordon*, 6 Wall. 561; *Davis* v. *Alvord*, 94 U. S. 545; *Brewster* v. *Wakefield*, 22 How. 118, 128; *Walker* v. *Dreville*, 12 Wall. 440; *Marin* v. *Lalley*, 17 Wall. 14; Rule 92 in Equity.

The district court so treated the case, as is evident from its having made its own findings of fact on some of the questions at issue, and having based its decree, not upon the findings of the jury, but upon the proofs produced at the final hearing — neither of which would it have been authorized to do, had the suit been in the nature of an action at common law, the parties not having waived a trial by jury. *Morgan* v. *Gay*, 19 Wall. 81; *Hodges* v. *Easton*, 106 U. S. 408; *Baylies* v. *Travellers' Ins. Co.*, 113 U. S. 316; Act of Congress of April 7, 1874, c. 80, § 1, 18 Stat. 27; Idaho Code of Civil Procedure, §§ 361, 389.

The writ of error must therefore be dismissed, and the case considered as pending upon the appeal alone. *Stringfellow* v. *Cain*, 99 U. S. 610, 612.

The case being one of equitable jurisdiction only, the court was not bound to submit any issue of fact to the jury, and, having done so, was at liberty to disregard the verdict and findings of the jury, either by setting them or any of them

aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. By the settled course of decision in this court, it is not necessary that a court of equity should formally set aside the verdict or finding of a jury, before proceeding to enter a decree which does not conform to it. *Prout* v. *Roby*, 15 Wall. 471, 475; *Basey* v. *Gallagher*, 20 Wall. 670; *Garsed* v. *Beall*, 92 U. S. 684, 695; *Johnson* v. *Harmon*, 94 U. S. 371, 372; *Watt* v. *Starke*, 101 U. S. 247, 252; *Quinby* v. *Conlan*, 104 U. S. 420, 424; *Wilson* v. *Riddle*, 123 U. S. 608, 615.

The case of *Basey* v. *Gallagher*, just cited, is quite analogous to the case at bar. In a suit brought in a district court of the Territory of Montana for an injunction against the diversion of a running stream in which the plaintiff asserted a right by prior appropriation for the purpose of irrigation, the court submitted specific issues to a jury, and afterwards heard the case upon the pleadings and proofs and the findings of the jury, and rendered a decree for the plaintiffs, in which it disregarded some of those findings and adopted others; and that decree was affirmed by the Supreme Court of the Territory, and by this court on appeal, notwithstanding a provision in the statutes of that Territory, (similar to § 361 of the Idaho Code of Civil Procedure,) that in civil actions "an issue of fact must be tried by a jury, unless a jury trial is waived."

The action of the district court of the Territory of Idaho, therefore, in setting aside the general verdict, and substituting its own findings of fact for the special findings of the jury, was a lawful exercise of its equitable jurisdiction, the propriety of which cannot be reviewed by this court; and it is quite immaterial whether the general verdict was consistent with the findings of the jury, or with the evidence introduced at the trial.

The only other matters specified or argued in the brief of the appellant are two exceptions to the admission or rejection of evidence.

The first exception was to the admission of evidence, offered by the plaintiffs, tending to show that by the direction and with the consent of one Case, the defendant's vice-president

and general manager, and under the supervision of the defendant's engineer, the ditch was made ten feet wide and three feet deep, whereas the original contract annexed to the complaint was for a ditch eight feet wide and two feet deep. But the supposed variance between the complaint and the proof did not exist. The complaint did not proceed upon the written contracts alone, but upon the defendant's acceptance of the ditch and the subsequent settlement between the parties. And the court found, as facts, that the changes in the dimensions of the ditch were made with the knowledge and consent of Case, and before the execution of the supplemental agreement; that the ditch, when completed, was accepted by the defendant through its general manager, and had ever since been appropriated and used by the defendant; that the settlement between the parties was based upon estimates and measurements made by the defendant's engineer in charge of the construction of the ditch; and that there was no fraud or misrepresentation on the part of the plaintiffs in or concerning that settlement.

The other exception was to the exclusion of testimony, offered by the defendant, of one Strahorn, its general manager at the time of the completion and acceptance of the ditch, and who had previously been its treasurer, tending to show that, at the time of the execution of the original contract, the plaintiffs were informed by him that Case had no authority from the defendant to contract for a ditch of larger dimensions than those specified in that contract. But it was a sufficient reason for excluding that testimony, that the offer was only to show that the plaintiffs were told that Case had no authority to vary the dimensions of the ditch, and was unaccompanied by any offer of evidence that Case had in fact no such authority, and at the time of the offer no evidence as to the actual authority of Case appears to have been introduced; and the offer to prove the information given to the plaintiffs was not renewed after the court had allowed Strahorn, against objection and exception by the plaintiffs, to testify that neither he nor Case had any authority from the defendant's board of directors to enlarge the dimensions of the ditch, and that the board had never ratified the enlargement of the ditch.

Statement of the Case.

It does not appear that the whole evidence at the trial is recited in the statement of the case; and if it had been, this court, as already shown, could have considered it for the single purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supported the findings of the court.

The result is that the appellant has not been prejudiced by the rulings and decree below in any particular within the appellate jurisdiction of this court.

Ordered, that the record may be withdrawn and amended by procuring the signature of the clerk of the Supreme Court of the Territory to the certificate of authentication, and that, upon the return of the record so amended, the decree of that court be affirmed.

SINGER MANUFACTURING COMPANY *v.* RAHN.

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

No. 122. Submitted November 20, 1889. — Decided December 23, 1889.

A person employed by a corporation under a written contract to sell sewing-machines, and to be paid for his services by commissions on sales and collections; the company furnishing a wagon, and he furnishing a horse and harness, to be used exclusively in canvassing for such sales and in the general prosecution of the business; and he agreeing to give his whole time and best energies to the business, and to employ himself under the direction of the company and under such rules and instructions as it or its manager shall prescribe; is a servant of the company, and the company is responsible to third persons injured by his negligence in the course of his employment.

THE original action was brought by Katie Rahn, a citizen of Minnesota, against the Singer Manufacturing Company, a corporation of New Jersey, for personal injuries done to the plaintiff by carelessly driving a horse and wagon against her, when crossing a street in Minneapolis. The complaint alleged

that the driver of the wagon was the defendant's servant and engaged in its business. The answer denied this, and alleged that the driver, one Corbett, was engaged in selling sewing-machines on commission, and not otherwise, for the defendant. The replication denied the allegations of the answer.

At the trial before a jury, after the plaintiff had introduced evidence to maintain the issues on her part, the defendant put in evidence the contract between itself and Corbett, headed "Canvasser's Salary and Commission Contract," the material provisions of which were as follows:

"1st. The party of the first part agrees to pay unto the party of the second part, for his services in selling and leasing the Singer sewing-machines, five dollars for each and every acceptable sale of a new machine sold by him; and in addition to said five dollars a further sum of ten per cent of the gross price realized for said sales so made shall be paid to said second party, which, in addition to the five dollars on each acceptable sale, shall be deemed a selling commission.

"2d. The party of the first part shall pay unto the second party, for his further services, a collecting commission of ten per cent on the amounts or balances due from customers having purchased machines from him, payable as the cash shall be collected and paid over to the said first party or its authorized representatives at Minneapolis; and the said per centum so paid shall be in full for the services of said second party in collecting or other service rendered to date thereof."

"7th. The said first party agrees to furnish a wagon, and any damage to said wagon through negligence shall be at the cost and expense of said second party; and the said second party agrees to furnish a horse and harness, to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business; and said second party agrees to give his exclusive time and best energies to said business, and pay all expenses attending same.

"8th. The said second party agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe, and in all respects to comport

himself to the best interests of the business of the said first party, and to neither sign nor to make use of the name of the said company in any manner whereby the public or any individual may be led to believe that the said company is responsible for his actions, said party's power being simply to make sales and turn over the proceeds to the said first party. If any special acts are required of said second party, the power to perform the same will be specially delegated."

"10th. It is further agreed that if said second party sells any other than the machines furnished to him by said first party, it shall work a forfeiture of any commissions that accrue under this agreement, if violated prior to the termination of the same."

"12th. This agreement may be terminated by the first party at any time, and by said second party by giving first party ten days' notice in writing."

The defendant requested the court to instruct the jury "that the contract under which Corbett, the driver of the horse causing the accident, was operating made him an independent contractor, and the defendant could not be liable for any damage done through his negligence, if he was negligent." The court declined to give the instruction requested, and instructed the jury that the contract established the relation of servant and master between Corbett and the defendant, and that the defendant was answerable for Corbett's negligence while engaged in its service.

The jury returned a verdict for the plaintiff in the sum of $10,000, upon which judgment was rendered; and the defendant tendered a bill of exceptions, and sued out this writ of error.

Mr. Grosvenor Lowrey and *Mr. Joseph S. Auerbach*, for plaintiff in error, submitted on their brief.

The plaintiff in error never employed or contracted with Corbett to drive a horse; his sole relation to the company was that of an independent contractor to canvass for sales, furnishing his own means.

The seventh section of the contract binds the company to

furnish a wagon, and Corbett to furnish a horse and harness to be used exclusively in canvassing for the sale of machines and the general prosecution of that business. Corbett agreed to give his best energies to the business, and to pay all expenses. Under these circumstances the loan of the wagon takes classification in the law only as a bailment. Such bailments taken alone do not create a relation of master and servant between bailor and bailee. *Quarman* v. *Burnett*, 6 M. & W. 499; *Stevens* v. *Armstrong*, 2 Selden, 435; *Rapson* v. *Cubitt*, 9 M. & W. 710; *Carter* v. *Berlin Mills*, 58 N. H. 52; *Sproul* v. *Hemmingway*, 14 Pick. 1; *S. C.* 25 Am. Dec. 350; *Powles* v. *Hider*, 6 El. & Bl. 207; *Venables* v. *Smith*, 2 Q. B. D. 279; *King* v. *Spurr*, 8 Q. B. D. 104; *Schular* v. *Hudson River Railroad*, 38 Barb. 653.

The effect of stipulations similar to those contained in the eighth section, subjecting a contractor to the direction, regulation and control of a co-contractor, has been often considered by the courts. Such control as is here reserved is not regarded as indicating the relation of master and servant, but, on the contrary, as being entirely consistent with the relation of principal and agent, or of contractor and co-contractor. The general distinction appears to be that he is a master (and subject to the doctrine of *respondeat superior*) who retains — and he is a servant (and capable to plead that maxim in defence) who surrenders — the right to determine the means or manner of accomplishing the object of the contract. He is a *principal* and not a *master* who retains the right to direct what *ends* shall be attempted, leaving the *means* to the management of the agent. *Blake* v. *Ferris*, 1 Selden (5 N. Y.) 48; *S. C.* 55 Am. Dec. 304; *Pack* v. *New York City*, 4 Selden, 222; *Kelly* v. *Mayor of New York*, 1 Kernan, 432; *Allan* v. *Willard*, 57 Penn. St. 374; *Painter* v. *Mayor of Pittsburgh*, 46 Penn. St. 213; *Reed* v. *Allegheny City*, 79 Penn. St. 300; *Erie* v. *Caulkins*, 85 Penn. St. 247; *Edmundson* v. *Pittsburgh &c. Railroad*, 111 Penn. St. 316; *Cuff* v. *Newark & New York Railroad*, 6 Vroom (35 N. J. Law) 17; *Conners* v. *Hennessey*, 112 Mass. 96; *Wood* v. *Cobb*, 13 Allen, 58; *Samuelson* v. *Cleveland Iron Mining Co.*, 49 Michigan, 164; *Reedie* v. *London & North-*

western Railway, 4 Exch. 243; *Steele* v. *Southeastern Railway*, 16 C. B. 550; *Jones* v. *Liverpool*, 14 Q. B. D. 890.

Mr. W. P. Clough, *Mr. John W. Willis* and *Mr. Charles A. Ebert*, for defendant in error, submitted on their brief, citing: *Pawlet* v. *Rutland &c. Railroad*, 28 Vermont, 297; *Michael* v. *Stanton*, 3 Hun, 462; *Dalyell* v. *Tyrer*, El. Bl. & El. 899; *Blake* v. *Ferris*, 5 N. Y. (1 Selden) 48; *S. C.* 55 Am. Dec. 304; *Regina* v. *Turner*, 11 Cox Crim. Cas. 551; *Fenton* v. *Dublin Steam Packet Co.*, 8 Ad. & El. 835; *Burgess* v. *Gray*, 1 C. B. 578; *Schwartz* v. *Gilmore*, 45 Illinois, 455; *S. C.* 92 Am. Dec. 227; *Fink* v. *Missouri Furnace Co.*, 10 Missouri App. 61; *S. C.* 82 Missouri, 276; *Speed* v. *Atlantic & Pacific Railroad*, 71 Missouri, 303; *Huff* v. *Ford*, 126 Mass. 24; *Carter* v. *Berlin Mills*, 58 N. H. 52; *Forsyth* v. *Hooper*, 11 Allen, 419; *City of St. Paul* v. *Seitz*, 3 Minnesota, 297; *S. C.* 74 Am. Dec. 753; *McGuire* v. *Grant*, 1 Dutcher (25 N. J. Law) 356; *S. C.* 67 Am. Dec. 49; *Quarman* v. *Burnett*, 6 M. & W. 499; *Brackett* v. *Lubke*, 4 Allen, 138; *S. C.* 81 Am. Dec. 694; *Campbell* v. *Lunsford*, 88 Alabama, 512; *Sadler* v. *Henlock*, 4 El. & Bl. 570; *Blake* v. *Thirst*, 2 H. & C. 20; *Railroad Co.* v. *Hanning*, 15 Wall. 649; *Faren* v. *Sellers*, 39 La. Ann. 1011; *Linnehan* v. *Rollins*, 137 Mass. 123; *Cincinnati* v. *Stone*, 5 Ohio St. 38; *Erie* v. *Caulkins*, 85 Penn. St. 247; *Edmundson* v. *Pittsburgh &c. Railroad*, 111 Penn. St. 316; *Allen* v. *Willard*, 57 Penn. St. 374; *Patten* v. *Rea*, 2 C. B. (N. S.) 606; *Venables* v. *Smith*, 2 Q. B. D. 279; *Joslin* v. *Grand Rapids Ice Co.*, 50 Michigan, 516; *Mulvehill* v. *Bates*, 31 Minnesota, 364.

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

The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or

neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished to him by the company; and he further "agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for

his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The Circuit Court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. *Railroad Co.* v. *Hanning*, above cited; *Linnehan* v. *Rollins*, 137 Mass. 123; *Regina* v. *Turner*, 11 Cox Crim. Cas. 551.

Judgment affirmed.

SUGG *v.* THORNTON.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 1141. Submitted December 9, 1889. — Decided December 23, 1889.

There is color for a motion to dismiss a writ of error to a state court for want of jurisdiction if it appear that no Federal question was raised on the trial of the case, but that it was made for the first time in the highest appellate court of the State sitting to review the decision of the case in the trial court.

The provision in the Revised Statutes of Texas that when service is made in an action against a partnership upon one of the firm the judgment may be rendered against the partnership and against the member actually served, (§ 1224,) and the provision directing the manner of the service of process upon a non-resident or an absent defendant (§ 1230) are not repugnant to the Constitution of the United States.

A judgment in Texas against a partnership, and against one member of it upon whom process has been served, no process having been served upon another member who is non-resident and absent, binds the firm assets so far as the latter is concerned, but not his individual property.

MOTIONS TO DISMISS OR AFFIRM. The case is stated in the opinion.

Mr. William Warner, *Mr. O. H. Dean* and *Mr. James Hagerman* for the motions.

Mr. Sawnie Robertson and *Mr. W. O. Davis* opposing.

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

Opinion of the Court.

James T. Thornton filed his petition in the District Court of Cooke County, Texas, against J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro., averring the latter to be a copartnership composed of E. C. Sugg and Iker Sugg, and that E. C. Sugg resided in Tarrant County, Texas, and Iker Sugg in Johnson County, Wyoming Territory, to recover on a promissory note for $26,964.05, purporting to have been signed by Sacra, Wilson, Cloud and E. C. Sugg & Bro. The petition prayed for a citation to the defendants and a notice to the defendant Iker Sugg, as provided by section 1230 of the Revised Statutes of Texas, and for judgment for the amount of the note, and for costs, and for general and special relief. All of the defendants were served in Texas except Iker Sugg, to whom notice and a certified copy of the petition were delivered under the statute, in Wyoming Territory.

Sections 1224, 1230 and 1346 of the Revised Statutes of Texas are as follows:

"Art. 1224. In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

"Art. 1230. Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon, and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

"Art. 1346. Where the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners, but not upon all, judgment may be ren-

dered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served." 1 Sayles' Texas Civil Statutes, 417, 418, 448.

Judgment was rendered by the District Court in these words:

"This day came the plaintiff by his attorney, and the defendants having failed to appear and answer in this behalf, but wholly made default, wherefore, the said James T. Thornton, plaintiff, ought to recover against the said J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro., a copartnership composed of E. C. Sugg and 'Iker,' or J. D. Sugg, the said 'Iker' Sugg and J. D. Sugg being one and the same person, and E. C. Sugg the partner served, defendants, his damages by occasion of the premises, and it appearing to the court that the cause of action is liquidated and proved by an instrument of writing, it is ordered that the clerk do assess the damages sustained by said plaintiff; and the said clerk now here having assessed the damages aforesaid at the sum of twenty-eight thousand one hundred and thirty-four dollars and ninety-nine cents; it is adjudged by the court, that the said plaintiff do have and recover of the said defendants, the sum of twenty-eight thousand one hundred and thirty-four dollars and ninety-nine cents, with interest thereon at the rate of ten per cent per annum, together with his costs in this behalf expended and that he have his execution.

"It is further ordered by the court that execution issue for the use of officers of court, against each party respectively for the costs by him in this behalf incurred."

On December 5, 1885, J. D. Sugg filed a petition to vacate the judgment so far as it affected him, and his individual property, and so far as it affected the property of the partnership of E. C. Sugg & Bro., upon the grounds: That the note was not given for a partnership liability of his firm, but that the firm name was signed thereto as surety for Sacra, and without authority, it being outside the scope of the partnership; that the judgment did not dispose of the case as to him; that his name was not "Iker" or I. D. Sugg, but J. D. Sugg,

sometimes called "Ikard Sugg;" that the partnership of E. C. Sugg & Bro. owned property in the State of Texas, and was largely indebted; and that the assets of the firm would be required to pay its debts. The petition was sworn to, and sustained by the affidavits of E. C. Sugg and others.

In reply, Thornton filed an answer asking that the judgment be corrected as to the name of J. D. Sugg, and alleging that J. D. Sugg and Iker Sugg were one and the same person, who, with E. C. Sugg, composed the partnership of E. C. Sugg & Bro.; that E. C. Sugg & Bro. owned property in Texas, Wyoming and the Indian Territory, of the value of about a million dollars, and were attempting to dispose of their property with intent to defraud their creditors; that plaintiff had obtained a judgment lien against their property in Texas; and various facts tending to show that the note was properly signed "E. C. Sugg & Bro.;" and affidavits were filed in support of this answer.

The District Court proceeded to determine the issues thus raised, upon the affidavits, without objection, and overruled the motion to vacate and set aside the judgment, and entered an order directing the clerk to correct the judgment as asked by Thornton, so as to give J. D. Sugg's name correctly. To this action J. D. Sugg and E. C. Sugg & Bro. excepted, and gave notice of an appeal to the Supreme Court.

Article 1037 of the Revised Statutes of Texas provides:

"The appellant or plaintiff in error shall in all cases file with the clerk of the court below an assignment of errors, distinctly specifying the grounds on which he relies before he takes the transcript of the record from the clerk's office, and a copy of such assignment of errors shall be attached to and form a part of the record; and all errors not so distinctly specified shall be considered by the Supreme Court or Court of Appeals as waived." 1 Sayles' Texas Civil Statutes, 339.

The defendants J. D. Sugg and E. C. Sugg & Bro. filed such assignment of errors in these words:

"Now come the defendants J. D. Sugg and E. C. Sugg & Bro., and assign errors as follows; 1. The court erred in overruling the motion of defendant J. D. Sugg to vacate the

judgment herein. 2. The judgment is erroneous in not showing any disposition of the case as to defendant J. D. Sugg, otherwise called 'Iker Sugg.' 3. Though defendant J. D. Sugg was a party to this suit there was no discontinuance as to him, or any disposition of the case as to him in said judgment. 4. The record shows that the court had no jurisdiction of defendant J. D. Sugg. 5. The pretended notice served upon defendant J. D. Sugg was without authority, and a nullity. 6. The court erred in permitting the judgment herein to be corrected."

The case was then taken by appeal to the Supreme Court of Texas, and on the eighth day of May, 1888, that court adopted the opinion of the Commission of Appeals, which is certified as part of the record, and affirmed the judgment of the District Court.

The opinion, after stating the facts, points out that J. D. Sugg having submitted to a trial of the issues raised upon his petition and upon affidavits, could not then be heard to complain of the result; and, as the affidavits were conflicting in regard to the want of authority to sign the firm name to the note, holds that the judgment should not be disturbed; and thus concludes:

"It is contended that the judgment is erroneous, because it makes no disposition of the case as to appellant. The judgment is not against him, does not discontinue the case as to him, nor does it contain any allusion to him, except in the use of his name as descriptive of the partnership of E. C. Sugg & Bro. If the judgment does not in terms or legal effect dispose of the case as to all defendants, it is not a final judgment, and this appeal could not be entertained. Appellant was a non-resident of this State, and the court could acquire no jurisdiction of his person, except by his appearance and voluntary submission to the jurisdiction. This he might have done and made any defence to the suit that any citizen of this State would have been entitled to make. The judgment rendered was the only judgment that could have been rendered, and we think it a final judgment. The court retained complete control of the judgment during the term at which it was ren-

dered, and did not err in permitting it to be amended as to the name of appellant, so as to correctly describe the partnership against which the judgment was rendered.

"We find no error in the record requiring reversal, and are of the opinion that the judgment of the court below should be affirmed."

The cause was thereupon brought to this court by writ of error, allowed by the Chief Justice of the Supreme Court of Texas, by endorsement upon the application therefor, in which it is stated that the allowance is made without assent being given to all the statements contained in the application. The case now comes before us on a motion to dismiss or affirm.

Plaintiffs in error contend that the judgment against the firm of E. C. Sugg & Bro., under which the property of the partnership might be seized and sold, was not due process of law under the Fourteenth Amendment to the Constitution of the United States, and that articles 1224 and 1230 of the Revised Statutes of Texas, under which the judgment was sought to be sustained, were repugnant to that amendment. It does not appear that any such question was raised in the state courts. It is stated in the assignment of errors in the Supreme Court that "the record shows that the court had no jurisdiction of the defendant J. D. Sugg," and that "the pretended notice served upon defendant J. D. Sugg was without authority and a nullity," but there was no error assigned that the District Court had no jurisdiction of the copartnership of E. C. Sugg & Bro.

As the Supreme Court of the State was only authorized to review the decision of the trial court, for errors committed there, and as J. D. Sugg challenged the judgment on the merits, and the decision was against him, it is clear that there is color for the motion to dismiss predicated upon a denial of the existence of a Federal question so presented as to be available.

The rule applied by the Supreme Court in respect to the action of the District Court on the motion to vacate is thus expressed by Judge Brewer in *Burdette* v. *Corgan*, 26 Kansas, 102, 104:

"The motion challenged the judgment not merely on jurisdictional but also on non-jurisdictional grounds, and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion. *Cohen* v. *Trowbridge*, 6 Kansas, 385; *Fee* v. *Big Sand Iron Co.*, 13 Ohio St. 563; *Grantier* v. *Rosecrance*, 27 Wisconsin, 489, 491; *Alderson* v. *White*, 32 Wisconsin, 308, 309. Such a general appearance to contest a judgment on account of irregularities will, if the grounds therefor are not sustained, conclude the parties as to any further questioning of the judgment. A party cannot come into court, challenge its proceedings on account of irregularities, and after being overruled be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground."

The record shows that there was a conflict of testimony in the District Court upon the question whether the signature of E. C. Sugg & Bro. to the note sued upon was an authorized partnership act. This was a question of fact simply, determined against the plaintiffs in error in the District Court, and that determination affirmed by the Supreme Court of the State. And with its judgment in that regard we have nothing to do.

If, however, the validity of the Texas statute and the judgment rendered thereunder was necessarily drawn in question, and must have been passed on in order to a decision we find no ground to question the conclusion reached because of repugnancy to the Constitution. The notice authorized by article 1230 cannot, of course, have any binding effect personally on the party served therewith; but if the suit or proceeding is intended to affect property in Texas belonging to him, or in which he is interested, the notice may be very proper to apprise him of it and give him an opportunity to look after his interests if he chooses. For this purpose it might be to his advantage to receive it. It cannot legitimately serve any other purpose; and it does not appear to have been used for any other purpose in this case.

Syllabus.

The judgment was not a personal judgment against J. D. Sugg, but a judgment against E. C. Sugg individually, and against E. C. Sugg & Bro., treating the partnership as a distinct legal entity. So far as J. D. Sugg was concerned, it bound the firm assets only, and could not be proceeded on by execution against his individual property. *Burnett* v. *Sullivan*, 58 Texas, 535; *Texas & St. Louis Railroad* v. *McCaughey*, 62 Texas, 271; *Alexander* v. *Stern*, 41 Texas, 193; *Sanger* v. *Overmier*, 64 Texas, 57.

The position taken by plaintiffs in error is not tenable, (*Pennoyer* v. *Neff*, 95 U. S. 714,) and the judgment is

Affirmed.

PACIFIC EXPRESS COMPANY *v.* MALIN.

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

No. 1301. Submitted December 2, 1889. — Decided December 23, 1889.

Plaintiffs sued defendant in a state court in Texas to recover $5970, the alleged value of goods destroyed by a fire charged to have been caused by defendant's negligence. Defendant pleaded and excepted to the petition. The cause was then removed to the Circuit Court of the United States on defendant's motion, who there answered further, pleading the general issue, excepting to the petition among other things for insufficiency and vagueness in the description of the goods, and charging contributory negligence on plaintiffs' part. Plaintiffs filed an amended petition more precise in statement and reducing the damage claimed to $4656.71. To this defendant answered, again charging contributory negligence and setting up, "by way of set-off, counterclaim and reconvention," injuries to himself to the extent of $8000, resulting from plaintiffs' negligence, for which he asked judgment. Plaintiffs excepted to the cross-demand. On the 6th October, 1888, the cause coming to trial, defendant's exceptions were overruled, except the one for vagueness, and as to that plaintiffs were allowed to amend; plaintiffs' exceptions to the counterclaim were sustained; and the jury rendered a verdict for $4300 principal, and $792.15 interest. It appeared by the record that plaintiffs on the same day remitted $435.50, and judgment was entered for $4656.65; but it further appeared that on the 8th October, plaintiffs moved for leave to remit that amount of the judgment and leave was granted the remittitur to be as of the day of the rendition of the judgment, and the judgment

to be for $4656.65 and costs. On the same 8th of October, defendant filed a bill of exceptions in the cause "signed and filed herein and made a part of the record in this cause this 8th day of October, 1888." On the 9th October, a motion for a new trial was overruled. On a motion to dismiss the writ of error or to affirm the judgment, *Held:*

(1) That the remittitur was properly made, and that it was within the power of the Circuit Court to order it as it was ordered;

(2) That if no other question were raised in the case, the motion to dismiss would be granted;

(3) That the counterclaim, being founded on a "cause of action arising out of, or incident to, or connected with the plaintiffs' cause of action," was properly set up, and conferred upon this court jurisdiction to examine further into the case;

(4) That the plaintiffs' exception to the counterclaim was properly sustained;

(5) That if the counterclaim could be maintained, a recovery could be had only for damages which were the natural and proximate consequences of the act complained of;

(6) That the defendant's exceptions to the charge of the court, having been taken two days after the return of the verdict, were taken too late;

(7) That the facts furnished ground for maintaining that the counterclaim was set up only for the purpose of giving jurisdiction to this court;

(8) But whether that were so or not, the judgment ought to be affirmed on the case made.

MOTIONS TO DISMISS OR AFFIRM. The case is stated in the opinion.

Mr. W. Hallett Phillips for the motions.

Mr. John Johns and *Mr. D. A. McKnight* opposing.

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

This action was commenced by Sam. Malin and George Colvin, partners doing business under the firm name and style of Malin & Colvin, in the District Court of Mitchell County, Texas, to recover of the defendant the sum of five thousand nine hundred and seventy dollars, the alleged value of certain goods and chattels destroyed by a fire, occasioned, as averred, by the negligence of the defendant. The defendant filed various pleas and exceptions to the plaintiffs' petition, including the general

issue. The cause was then removed from the state court to the United States Circuit Court for the Western District of Texas, and the defendant filed an amended original answer, and as special exceptions stated various grounds upon which it alleged the plaintiffs' original petition was insufficient, and, among other things, that all the items of the property charged to have been destroyed were not sufficiently described, and again pleaded the general issue; and also set up, with particularity, contributory negligence on the part of the plaintiffs.

Plaintiffs thereupon filed an amended petition, recapitulating with greater precision the items of the property alleged to have been consumed, which reduced the aggregate of the claim from $5970 to $4656.71, and prayed judgment for the latter amount and costs, "and for all such other and further relief as the said plaintiffs may be entitled to in the premises in law or equity."

To this amended petition the defendant interposed, on the 5th day of October, 1888, a second amended original answer and exceptions, reiterating the exceptions formerly taken, and, further answering, "by way of counterclaim and reconvention," charged that the plaintiffs were themselves guilty of negligence in keeping a dangerous lamp in a careless manner, by reason of which the fire was occasioned; and that thereupon the plaintiffs, "without probable or adequate cause," instituted this suit, and divers other parties have instituted and maintain suit against the defendant, by reason whereof the defendant has been compelled to pay out a large sum of money, to wit, three thousand dollars, for attorneys' fees and expenses in defending this and said other suits; and further, that by reason of said fire and the institution of said suits, the reputation of the defendant had become "damaged and bad, and defendant has thereby lost custom and business upon which it would have realized a net revenue of, to wit, five thousand dollars. Wherefore defendant says that it has been damaged by reason of the premises in the sum of eight thousand dollars, actual damages, and defendant pleads said damages herein by way of set-off, counterclaim and reconvention, and asks for judgment, etc."

On the same day, October 5th, plaintiffs filed an exception to the cross-demand. The case came on for trial on the 6th day of October, when the defendant's exceptions to the plaintiffs' petition were overruled, except the fourth special exception objecting that the bill of particulars was too vague, in respect to which the plaintiffs were allowed to amend at once, so as to meet such exception. The plaintiffs' exception to defendant's plea in reconvention and counterclaim was also sustained by the court, and the defendant excepted. A jury was called and trial had, resulting in the return of a verdict on said 6th of October in favor of the plaintiffs for the sum of $4300, "with interest from the 17th day of June, A.D. 1886," and judgment was thereupon rendered for the sum of $4300, and the further sum of $792.15, interest since the 17th day of June, 1886, making in all the sum of $5092.15 with costs; and the judgment record then proceeds thus: "And then come the plaintiffs and remit of and from the foregoing judgment the sum of four hundred and thirty-five dollars and fifty cents, leaving said judgment, as above rendered, to stand for the sum of four thousand six hundred and fifty-six dollars and sixty-five cents in favor of the said plaintiffs and against the said defendant; for which execution may issue." The charge of the court at length was filed the same day.

On the 8th day of October, 1888, a paper entitled "Defendant's Bill of Exceptions to the Charge of the Court" was filed, which commenced: "Now comes the defendant and excepts to the charge of the court to the jury, wherein and whereby the jury are instructed to find for plaintiffs, if at all, the value of the goods and property, together with eight per cent interest thereon from the time and date of such said destruction;" and after stating the reasons for objection to that part of the charge, thus concludes: "And for said reasons defendant objects and excepts to that portion of the charge of the court, and tenders herewith its bill of exception thereto and thereof, and asks that the same be signed and filed herein and made a part of the record in this cause, this 8th day of Oct., 1888."

And also another paper entitled "Bill of Exceptions tendered

by the Defendant," commencing: "Now comes the defendant in said above cause and excepts to that portion of the charge of the court to the jury relative and appertaining to defendant's interposition and allegation of contributory negligence, etc., etc.," stating the words excepted to, and concluding thus: "And defendant tenders this its bill of exception to such said charge so given by the court to the jury, and asks that same be signed and filed herein and made a part of the record in this said cause this 8th day of Oct., 1888." Both these papers were signed by the judge presiding.

There appears on the same 8th of October, a motion by the plaintiffs for leave to enter a remittitur for the sum of four hundred and thirty-five dollars and fifty cents, and an order of court allowing said remittitur as of the 6th day of October, 1888, and stating that the plaintiffs had on that day voluntarily remitted said amount of and from said judgment, but it not appearing to have been done in open court or with leave of the court, the plaintiff is now permitted, as of the 6th of October, to remit the amount in question; and it is ordered that the judgment of the 6th day of October, 1888, be corrected and reformed, so that upon the verdict and the remittitur the plaintiffs recover of the defendant the sum of four thousand six hundred and fifty-six dollars and sixty-five cents and costs, "and that this judgment take effect and be of force of and from the 6th day of October, 1888."

On the 9th of October, 1888, a motion for a new trial was overruled by the court, and the defendant excepted. To review the judgment the defendant sued out November 23, 1888, a writ of error from this court, and a motion is now made to dismiss the writ because the matter in dispute is less than five thousand dollars, with which is united a motion to affirm, "on the ground that, even if this court has jurisdiction, it is apparent that the questions involved are so frivolous as not to need further argument, and that the writ of error is sued out for delay only."

Sections 1351, 1352, 1354, 1355 and 1357 of the Revised Statutes of Texas are as follows:

"Art. 1351. Any party in whose favor a verdict has been

rendered may in open court remit any part of such verdict, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted.

"Art. 1352. Any person in whose favor a judgment has been rendered may, in open court, remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted."

"Art. 1354. Where there shall be a mistake in the record of any judgment or decree, the judge may, in open court, and after notice of the application therefor has been given to the parties interested in such judgment or decree, amend the same according to the truth and justice of the case, and thereafter the execution shall conform to the judgment as amended.

"Art. 1355. Where, in the record of any judgment or decree of any court, there shall be any mistake, miscalculation or misrecital of any sum or sums of money, or of any name or names, and there shall be among the records of the cause any verdict or instrument of writing, whereby such judgment or decree may be safely amended, it shall be the duty of the court in which such judgment or decree shall be rendered, and the judge thereof, in vacation, on application of either party, to amend such judgment or decree thereby, according to the truth and justice of the case; but the opposite party shall have reasonable notice of the application for such amendment."

"Art. 1357. A remitter or correction made as provided in any of the six preceding articles shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess." 1 Sayles' Texas Civil Statutes, 450, 451.

The record of the 6th of October states the remittitur in proper form and the judgment for $4656.65 thereupon, but if we are to understand that the remittitur of that date was believed to be ineffective because it did not appear to have been made in open court or with leave of court, it was entirely within the power of the Circuit Court, on the 8th of October,

at the same term and before any writ of error had been sued out, to correct the record according to the fact. As the judgment as it stands is for less than $5000, if there were nothing else in the case, we should grant the motion to dismiss. *Pacific Postal Tel. Cable Co.* v. *O'Connor*, 128 U. S. 394.

But it is contended that the plea or answer by way of reconvention or counterclaim affords sufficient ground for jurisdiction, and that the questions arising thereon cannot be disposed of on a motion to affirm.

Reconvention, as the term is used in practice in Texas, means a cross-demand, and the title of "Counterclaim," in the Revised Statutes of that State, is referred to by counsel as descriptive of such cross-action, which is more extensive than set-off, or recoupment.

Under this title, section 645 of the Revised Statutes of Texas provides:

"Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counterclaim which he may have against the plaintiff, subject to such limitations as may be prescribed by law."

By section 649, if plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant is not permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant is not permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the plaintiff's part.

Section 650 is in these words:

"Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of, or incident to, or connected with the plaintiff's cause of action." 1 Sayles' Texas Civil Statutes, 236, 237.

The present alleged counterclaim is founded on the converse of the same cause of action as that counted on by the plaintiffs, and inasmuch as the verdict and judgment determined that the defendant had been guilty of negligence, and that the

plaintiffs had not, it may be assumed that the defendant suffered no injury through the action of the court in sustaining the exception to it. Had the verdict been otherwise, the defendant might perhaps have complained that it had not been allowed to recover such damages on its cross-demand as could have been properly thereby claimed. A denial of the right of recovery over did not cut the defendant off from establishing plaintiffs' negligence, if it could. As that question was settled in plaintiffs' favor, the particular ruling became immaterial; but it may be added that the exception was properly sustained, because the recovery by the defendant, if successful on such a cross-action, would have been confined to the natural and proximate consequences of the act complained of, and would not have included such damages as are referred to in its pleading, and as therein claimed. *Plumb* v. *Woodmansee*, 34 Iowa, 116, approved in *Pinson* v. *Kirsh*, 46 Texas, 26.

It may be further remarked that the alleged bills of exception do not show that the exceptions were taken on the trial. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar. *United States* v. *Carey*, 110 U. S. 51, and cases cited.

Here it is expressly stated that the exceptions were taken on the 8th day of October, two days after the return of the verdict. This was too late, and as to the motion for a new trial, the action of the Circuit Court thereon was in the exercise of its discretion and cannot be reviewed here.

As the cross-demand was not set up until after the plaintiffs had been compelled by the defendant to make their items of loss more specific, and had thus reduced the amount claimed below the jurisdiction of this court, there is color for the contention on the part of the defendants in error that it was put forward for the purpose of giving this court jurisdiction. But assuming this not to have been so, and that the writ of error should not be dismissed, we are of opinion that

The motion to affirm must be sustained under the circumstances, and it is so ordered.

PAUL *v.* CULLUM.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 107. Argued November 13, 14, 1889. — Decided December 16, 1889.

In the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses; but it is competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience to the common stock.

L. and W., the owners of a stock of goods, made a written agreement with H. reciting that the latter was "taken into partnership," that the stock should be inventoried and delivered to H. "as a capital stock" "to be sold with his entire direction and supervision under the name" of the L. and W. Company; that a new set of books should be opened, showing the business of the new firm; that the profits and losses should be shared in the proportion of eight-tenths for L. and W. and of two-tenths for H.; and that the "partnership" should pertain only to merchandising and have no connection with any outside business L. and W. might have jointly or separately. After this agreement was made, L. constituted H. his attorney in fact, with power "to bargain, and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession, or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases, and satisfactions of mortgage, judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises;" *Held:*

(1) That by this agreement L., W. and H. became partners and as between themselves established a community of property as well as of profits and losses in respect to said goods and the business of the L. and W. Company;

(2) That in the absence of L. this power of attorney authorized H. to represent him in a general assignment of the property of the L. and W. Company for the benefit of its creditors.

REPLEVIN to recover possession of goods of the value of $35,000, taken by the defendant Paul from "the storerooms

on Congress Street in Tucson, Arizona," "formerly occupied by Messrs. Lord & Williams Company;" "or for the sum of thirty-five thousand dollars, the value thereof, in case delivery cannot be had."

The defendant demurred, and also answered with a general denial, and further pleaded that the seizure of the property in dispute was made by him as the "duly elected, qualified and acting sheriff of the county of Pima, Arizona Territory," under a writ of attachment duly issued in a case in which one Thompson was plaintiff, and Lord and Williams were defendants, "by virtue of which he levied upon and took possession of the goods, wares and merchandise mentioned in the complaint herein as the property of said defendants, Lord and Williams, in whose possession it was and to whom it belonged, and held the same as said sheriff, and by virtue of said writ, at the time of the commencement of this action."

The cause was tried by the court, without a jury, and resulted in a finding of facts which is set forth in the opinion of the court, *post*, 545. The power of attorney referred to in the first of those findings is printed in the margin.[1] The agree-

[1] Know all men by these presents that I, Charles H. Lord, of the county of Pima, Territory of Arizona, have made, constituted and appointed, and by these presents do make, constitute and appoint C. E. Harlow, of the county and Territory aforesaid, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now, or shall hereafter become due, owing, payable, or belonging to me, and have, use and take all lawful ways and means, in my name or otherwise, for the recovery thereof by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances, or other sufficient discharges for the same for me, and in my name to make, seal and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds, and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession, or in action, and to make, do and

ment between Lord, Williams and Harlow by which they formed the copartnership of the Lord & Williams Company referred to in Finding I. will be found in the opinion of the court, *post*, 547.

The court found as conclusions of law, on its findings of fact: "I. That the property in the complaint mentioned and described was wrongfully taken and detained by the defendant from the possession of the plaintiff. II. That the plaintiff is entitled to a judgment for the return of said property, and if the same cannot be made, for the sum of $35,000 against the defendant."

And thereupon the following judgment was entered:

"The court having this day signed and filed its findings of fact and conclusions of law in this case, and the value of the property claimed having been found by the court to be the sum of thirty-nine [five?] thousand dollars, and the property claimed having been taken into possession of the plaintiff: Therefore —

"It is adjudged that the plaintiff have and retain possession of the personal property described in the complaint, together with the costs of this action, amounting to the sum of five hundred and thirty-nine dollars."

---

transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done, by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal the sixth day of April, one thousand eight hundred and eighty-one.

CHARLES H. LORD. [SEAL.]

Signed, sealed and delivered in the presence of —
CLAUDE ANDERSON.

Argument for Appellant.

This judgment was affirmed by the Supreme Court of the Territory on appeal; and from that judgment this appeal was taken.

Mr. William Hallett Phillips (with whom was *Mr. Benjamin Morgan* on the brief) for appellant.

I. This court is called upon as matter of law to review the judgment based on the findings. *Kerr* v. *Clampitt*, 95 U. S. 188; *Stringfellow* v. *Cain*, 99 U. S. 610; *Hargrave* v. *Head*, 105 U. S. 45. It is a well-settled rule that where a court finds a material fact which is not supported by any evidence, a bill of exceptions may be taken to bring up for review the ruling in that particular, and, if necessary, the whole of the testimony should be sent up. *The Francis Wright*, 105 U. S. 381; *United States* v. *Pugh*, 99 U. S. 265. This rule is subject to the limitation that the facts are material and ultimate facts.

When all the evidence is properly presented in the record, this court can examine the same to see whether it was competent evidence to establish the facts found. *United States* v. *Clark*, 96 U. S. 37.

The sole issue in the case is whether the property in question, at the time of the attachment, belonged to the plaintiff or belonged to Lord & Williams. If the plaintiff established ownership, the goods were not subject to attachment by the creditors of Lord & Williams, and the plaintiff must recover. The court finds that issue of title in favor of the plaintiff, by virtue of an assignment alleged to have been made to plaintiff prior to the attachment by the Lord & Williams Company. It finds that the goods were, at the date of the assignment, the property of the Lord & Williams Company.

The second finding is, that the firm of Lord & Williams, on October 25, 1881, made an assignment to plaintiff. This finding is entirely unsupported by any evidence. No such assignment, as shown by the record, was ever made. The only assignment was that by the Lord & Williams Company, a different firm, and, as indicated in the first finding, was made on October 25, 1881, and is undoubtedly the one referred to by

the court in the second finding. It is through this assignment of the Lord & Williams Company that the plaintiff claims title. Whether the Lord & Williams Company had any title themselves depends upon the construction of the agreement between Lord & Williams and C. E. Harlow, by which the Lord & Williams Company was organized, which agreement was admitted in evidence against the objection of the defendant.

The question for decision is whether the firm of Lord & Williams divested themselves of ownership of the goods by the arrangement contained in the agreement of March 1, 1881.

It is apparent that this agreement was only an arrangement for selling the goods. By its "terms the said Lord & Williams have this day taken into partnership the said C. E. Harlow under the following conditions: They agree that an inventory of their stock of merchandise shall be taken under the supervision of said Harlow, and after its value shall be agreed upon by the parties interested *the same shall be turned over and delivered to the said Harlow as a capital stock, to be sold with his entire direction and supervision under the name and style of the Lord & Williams Company for the term of one year from the date of this agreement.*"

It is submitted that this agreement did not work such a devolution of the *title* to the goods, as to exempt them after its execution, from attachment as the goods of Lord & Williams. It was an arrangement by the owners to put the goods on the market, with an agreement to pay the managing agent a certain per cent of the profits. The only interest of Harlow was in any profits that might have resulted. Though termed a partnership, the real contract as between the parties was one of employment.

But whether Harlow was liable as a partner or not is not a controlling question. Admitting that he was so liable, it does not follow that he acquired any interest in the stock so as to exempt it from attachment for debts contracted by Lord & Williams before his connection with the business. No such interest follows from the fact that he was to share profits and losses; it is not pretended there were any profits to share and

the business was terminated by the assignment. *Blanchard* v. *Coolidge*, 22 Pick. 151. All that Harlow acquired was a personal right of action against Lord & Williams, or a right to an account; the arrangement did not change the property. Jessel, M. R., *Alfaro* v. *De La Torre*, 24 Weekly Rep. 510.

Sharing profit and loss is no proof of partnership in the stock. *Donnell* v. *Harshe*, 67 Missouri, 170; *Clifton* v. *Howard*, 89 Missouri, 192. Parties in a mercantile partnership may so stipulate, as between themselves, that the ownership of the stock shall remain with the original proprietors, and that one of the associates shall have only an interest in the profits. Each case must be judged on its own facts. A good illustration of this is afforded by the case of *Drennen* v. *London Assurance Co.*, twice decided by this court. 113 U. S. 51; 116 U. S. 461.

II. The power of attorney to C. E. Harlow, the admission in evidence of which was also objected to, conferred no authority on him to sign the name of Lord to the assignment; it was simply a general power of attorney, authorizing Harlow to attend to the personal affairs of Lord, in his absence.

It does not purport to empower Harlow to perform any partnership act for Lord, much less such an act as the assignment in question. For this a special authorization was necessary. *Wooldridge* v. *Irving*, 23 Fed. Rep. 676; *Hook* v. *Stone*, 34 Missouri, 329. If Harlow possessed no authority, by virtue of the power of attorney, to sign Lord's name to the assignment, the latter is void for want of the assent of one of the partners. All the partners must unite in such a disposition of the partnership property. *Welles* v. *March*, 30 N. Y. 344; *Palmer* v. *Myers*, 43 Barb. 509; Burrill on Assignments, 5th ed. 126, 127.

While it is true that the partner who did not join in the assignment may ratify it, such ratification cannot relate back so as to invalidate intervening attachments. *Holland* v. *Drake*, 29 Ohio St. 441; *Stein* v. *La Dow*, 13 Minnesota, 412. It was on this ground that defendant objected to the introduction of any evidence, showing an attempted ratification of the assignment by Lord, the non-concurring partner.

Opinion of the Court.

Mr. Lucien Birdseye for appellee.

Mr. Justice Harlan delivered the opinion of the court.

In an action brought in a District Court of the Territory of Arizona, by G. H. Thompson against C. H. Lord and W. W. Williams, partners under the name of Lord & Williams, an attachment was sued out, October 28, 1881, and levied by the sheriff, the present appellant, upon "certain goods, wares and merchandise, being the entire stock of Lord and Williams." H. B. Cullum, claiming to be the owner of the property at the time the attachment was levied, brought this action against the sheriff to recover possession thereof, or its value, in case delivery could not be had. The answer put in issue the plaintiff's ownership of the goods, and averred that, when taken under the attachment they were owned by and in possession of Lord and Williams. The pleadings, therefore, raised the question of the ownership of the goods attached.

The District Court made the following finding of facts:

"1. That on the 25th day of October, A.D. 1881, at the city of Tucson, Charles H. Lord, W. W. Williams and C. E. Harlow, then, and for several months before that time, composing the mercantile firm of Lord & Williams Company, and exclusively engaged in general commercial business, viz., buying and selling goods, being insolvent, made and executed as such firm a general assignment of all their property, not exempt from execution, for the equal benefit of all their creditors, to Henry B. Cullum, the plaintiff, and that the plaintiff immediately accepted said assignment and took possession of the property conveyed by it, including the property mentioned in the complaint, which property was a portion of the property of the said Lord & Williams Company at the time of the assignment. The assignment was executed in the firm name by W. W. Williams, and also signed by said Williams and said Harlow individually, and by the said Lord by his attorney the said C. E. Harlow, the said Harlow then holding a general power of attorney from him, and the said Lord being then absent from the Territory, and sick, and his whereabouts

being entirely unknown at that time to his partners and family, though every reasonable effort had been made to discover it, and that said assignment was ratified and approved by said Lord at the earliest opportunity.

"2. That on the said 25th day of October, A.D. 1881, and for a long time previous thereto, at said city, the said Charles H. Lord and W. W. Williams were copartners in the banking business and in dealing in live stock, under the firm name of Lord & Williams; that on said last mentioned day the said firm of Lord & Williams, being then insolvent, made and executed a general assignment of all its property, not exempt from execution, for the general benefit of all its creditors, to the said Henry B. Cullum, who thereupon immediately entered upon the possession of the same and accepted the trust. Said assignment was executed in the firm name by said Williams, and also signed by him, individually, and by said Harlow, as Lord's attorney in fact.

"3. That said assignments were made in good faith by the said firms respectively, and that at the time of making the same the assignors had full confidence in the ability and integrity of said Henry B. Cullum.

"4. That on the 28th day of October, A.D. 1881, one G. Howard Thompson commenced a suit in this court against the said Lord & Williams, and sued out an attachment therein against the property of the said Lord & Williams, and placed the same in the hands of the defendant, Robert H. Paul, who was then the sheriff of Pima County, aforesaid; and the said Paul, claiming that the said goods and property in the complaint mentioned and described were then the property of the said Lord & Williams, and not the property of Cullum, the plaintiff, seized and attached the same on October 28, 1881, and held the same until replevied in this suit.

"5. That at the time the property was so seized and attached it was the property of the plaintiff, and not subject to such seizure or attachment.

"6. That its value was $35,000."

The plaintiff, having taken the property into possession, the judgment was that he retain possession and recover his costs.

That judgment was affirmed by the Supreme Court of the Territory, the record in that case containing an agreed "statement on appeal," upon which, in connection with the finding of facts, the case was heard and determined in that court.

The appellant contends that there was no evidence in the record of an assignment by Lord & Williams, and insists that the second paragraph of the finding of facts could only have reference to the assignment made, on the 25th of October, 1881, by the Lord & Williams Company. But the finding plainly imports that there were two assignments to Cullum on the same day, one by the Lord & Williams Company, and the other by Lord & Williams. The absence from the record, as prepared for the Supreme Court of the Territory, of the deed of assignment by Lord & Williams — if any such deed was executed — is explained by the fact that the real contest between the parties was in respect to the assignment in the name of the Lord & Williams Company for the benefit of its creditors. But it is not essential in this case to inquire whether an assignment was made by the firm of Lord & Williams as distinguished from the Lord & Williams Company; for it is not claimed that the goods seized under the attachment were embraced by any other assignment than the one made by the latter firm.

It appears that prior to March 1, 1881, C. H. Lord and W. W. Williams were engaged as partners, under the style of Lord & Williams, in the buying and selling of goods, as well as in the business of banking. The latter business was kept distinct from the former, although both were carried on in the same building.

On the day last named the following written agreement was entered into between the parties signing it:

"Tucson, A. T., March 1st, 1881.

"This agreement, entered into by and between Lord and Williams and C. E. Harlow, all of Tucson, Arizona Territory, witnesseth: That the said Lord and Williams have this day and date taken into partnership the said C. E. Harlow under the following conditions: They agree that an inventory of their

stock of merchandise shall be taken under the supervision of said Harlow, and after its value shall be agreed upon by the parties interested the same shall be turned over and delivered to the said Harlow as a capital stock, to be sold with his entire direction and supervision under the name and style of Lord and Williams Company for the term of one year from the date of this agreement. The said Harlow shall attend to all the business of the new concern, such as the payment of debts, employment of help, purchase of goods, payment of same, and all expenses attending the proper and legitimate carrying on of the business; shall open a new set of books, in which a complete and true exhibit of the business shall be kept, and always open to the parties interested for inspection; shall, as far as possible, do a cash business; shall remit money to pay debts incurred as fast as the same may be realized from sales; shall not sign, endorse, or negotiate any notes, bonds, or agreements using the new firm name unless strictly in connection with the business of the house, and only then after consultation with one or both the other members of the firm; shall cause, at the end of each month, an exhibit to be made of the condition of the firm in the shape of a balance-sheet; and, finally, every six months shall cause an inventory to be taken of all the property and the books balanced, after which any profit there may be shall be divided as follows: The said Lord and Williams shall have eight-tenths of the same, and the said Harlow two-tenths of the same. In case of loss, the same ratio shall prevail in sharing the same. In this contract it is distinctly understood by the parties interested that the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside. Any trade or business they may be able to direct to the new concern they shall do so, any profits to be derived from same to be considered identical with those arising from business with other parties. They, however, shall have at cost price any merchandise they may need or require for their own individual account. In case said Harlow shall add any cash to the capital stock he shall receive for same ten per cent interest per

year which amount shall be charged to the general exchange and interest account.

"C. H. Lord.
"W. W. Williams.
"C. E. Harlow."

The goods whose ownership is here involved constituted a part of the stock of merchandise referred to in the above agreement. Nevertheless, appellant contends they were liable to be taken under the attachment sued out by Thompson against the property of Lord & Williams.

This contention rests, in part, upon the assumption that the agreement of March 1, 1881, did not work a change in the ownership of the goods, or establish a partnership between Lord and Williams and Harlow, or pass any interest whatever in the property to Harlow; but constituted the latter simply an agent for the other parties in respect to their mercantile business, thereafter to be carried on under the name of the Lord & Williams Company, as distinguished from their banking business, to be carried on, as before, under the name of Lord & Williams. It is, consequently, insisted that the goods levied upon belonged to the firm of Lord & Williams at the time the attachment was levied.

The words of the agreement forbid such an interpretation of its provisions. The only fact tending to support the position of appellant is, that Harlow did not put any goods into the new concern, nor pay any money for an interest in the property, or for the privilege of becoming a partner with Lord and Williams in their mercantile business to be conducted under his direction and supervision. But that is not a controlling fact in view of all that is disclosed by the agreement. The contribution by Harlow of money or property was not essential to the creation of the partnership. It was competent for Lord & Williams, in consideration of his undertaking the entire charge and control of the business of the Lord & Williams Company, to give him an interest — though not necessarily an equal interest — in the property, which was to constitute, at the outset, the whole capital of the partner-

ship. And that is what they did. The agreement, it will be observed, prescribes the conditions upon which Harlow was "taken into partnership" by Lord and Williams in respect to the property placed in his hands "as a capital stock" for the Lord & Williams Company. He was to open "a new set of books," exhibiting therein the business of the "new concern" or the "new firm," the profits of such business to be divided, at stated periods, upon the basis of eight-tenths to Lord & Williams and two-tenths to Harlow, and the losses to be borne in the same ratio. That which Harlow was to receive when the books were balanced cannot be regarded merely as compensation for services rendered as agent or manager for Lord and Williams, but as the stipulated part of the profits, as profits, accruing to him as a partner in the new firm of the Lord & Williams Company, the owner of the partnership property. He became, by the agreement, one of the joint owners and possessors of that property. That instrument does not so declare, in terms, but such is the necessary implication of its words.

While, in the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses, it is entirely competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience, to the common stock. Story on Partnership, §§ 23, 24. Such matters are entirely within the discretion of parties about to assume the relation of partners. If anything further was needed to prove that Harlow became a partner with, and not a mere agent or employé for, Lord & Williams in their mercantile business, it is found in that clause of the agreement providing that "the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside."

A different conclusion, it is contended, is required by the decisions of this court in *Drennen* v. *London Assurance Co.*, 113 U. S. 51, and 116 U. S. 461, 472. The principal question in that case was whether one Arndt became, by virtue of a certain

written agreement a member of an existing partnership, so as to give him an interest in its property, within the meaning of a contract of fire insurance, which provided that the policy should be void if the property insured "be sold or transferred, or any change takes place in title or possession, (except by succession by reason of the death of the insured,) whether by legal process or judicial decree, or voluntary transfer or conveyance."

When the case was first before this court it was held that the agreement there in question did not make Arndt a member of the existing partnership, but only contemplated his becoming a member of the firm at a future time and after the performance of certain conditions, one of which was the creation of an incorporated company. It was observed in the same case that the parties *ex industria* excluded the possibility of Arndt's acquiring an interest in or control over the property insured in advance of the formation of such corporation.

When that case was brought here a second time, the court, after stating that mere participation in profits would not give an interest in the property contrary to the real intention of the parties, said: "Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

The case now before us is altogether different. It cannot be said that the parties excluded the possibility of Harlow's acquiring an interest in the property. They did not form a partnership in which, as between themselves, there was to be a community of interest only in profits and losses, leaving the property in the goods to remain in Lord and Williams. On the contrary, the written agreement shows a purpose to put the goods themselves into partnership, and to establish a community of property, as well as a community of profit and loss among its several members.

For the reasons stated we are of opinion that the agreement of March 1, 1881, created between the parties signing it a partnership by the name of the Lord & Williams Company, and that the stock of merchandise therein mentioned became the property of such partnership. It results that, if the deed of assignment of October 25, 1881, was not invalid upon the ground urged by the defendant and to be presently adverted to, the right of property passed by that instrument to the appellee, for the benefit of the creditors of the Lord & Williams Company, before the goods were seized under the attachment against the property of Lord & Williams.

Thus far we have assumed that the deed of assignment in question was executed by Lord. But the appellant contends that it was void, as against Thompson, the plaintiff in the attachment, because not so executed as to become a valid assignment of the property described in it. The deed was signed by Williams and Harlow and by the Lord & Williams Company. It was executed for Lord by Harlow, as his attorney in fact. Harlow acted for him under a written authority, dated April 6, 1881, which, among other things, constituted Harlow attorney in fact for Lord, with power "to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises."

The argument of the appellant upon this branch of the case is, that the authority of one partner to make a general assignment of the partnership effects to a trustee for the benefit of creditors cannot be implied from the partnership relation merely; that Lord's general power of attorney did not author-

ize Harlow to act for him in a general assignment either of the property of the Lord & Williams Company or that of Lord & Williams; and that a special authorization was necessary to enable him to represent Lord in such a matter; further, that while Lord might subsequently ratify, as he did, the act of Harlow, such ratification occurred after the levy of Thompson's attachment, and could not relate back so as to invalidate that intervening attachment.

It is not necessary to consider all of these propositions; for, we are of opinion that the above power of attorney, interpreted in the light of the relations in business of the parties to it, gave Harlow ample authority to represent Lord in any general assignment, made in good faith, of the property of the Lord & Williams Company for the benefit of its creditors. In respect to goods, wares, merchandise, choses in action and other property in possession or in action, and in respect to all business of whatever nature and kind, Harlow, for Lord, and in his name, was expressly authorized to bargain, agree for, buy, sell, mortgage and hypothecate the same, and in any and every way and manner to deal in and with such property and rights. And this authority was conferred, while Harlow had, by another written agreement, to which Lord was a party, the entire direction and supervision of the property and business of the Lord & Williams Company. It would be extraordinary if a partner to whom was committed such direction and supervision of partnership property, could not, in the matter of a general assignment of the partnership effects for the benefit of firm creditors, represent an absent partner who had given him the broad authority expressed in the above power of attorney.

Judgment affirmed.

HALE *v.* AKERS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 270. Submitted December 6, 1889. — Decided December 23, 1889.

Where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the Federal question.

THE case is stated in the opinion.

Mr. W. W. Cope, for plaintiffs in error, submitted on his brief.

Mr. Frank W. Hackett, for defendants in error, submitted on his brief. *Mr. Barclay Henley* also filed a brief for same.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought August 22, 1879, in the Superior Court in and for the county of Sonoma, in the State of California, by Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, deceased, against Stephen Akers and Montgomery Akers, to recover the possession of a piece of land in Sonoma County, being a portion of the Huichica rancho, and described as follows: "Beginning at a point on the northerly line of the lane which runs from the dwelling-house of said Schell, westerly to the road leading from the Sonoma Plaza to the Embarcadero called 'Montgomery Street,' or 'Broadway,' which place of beginning is distant 23.24 chains from the point of intersection of said lane and said road; thence north 50 deg. and 45 min. west along a fence 18.98 chains; thence south 37 deg. 15 min. west about 25 chains to a point on the northerly line of said lane, distant 3.63 chains easterly from the point of intersection aforesaid; thence north 78 deg. 30 min. east along said northerly line

19.61 chains to the place of beginning, containing eighteen and a half acres."

The answer of the defendants set up, among other defences, that Stephen Akers entered into possession of the premises more than twenty-five years before the suit was brought, under a claim of title by a written conveyance made in 1858 by the city of Sonoma, in Sonoma County, which city was then in the possession of, and claimed title to, the premises, under a decree of confirmation by the board of land commissioners, dated January 22, 1856, and by the judgment and decree of the Circuit Court of the United States for the Northern District of California, made November 16, 1864; that he was the owner in fee of the premises; that on the 11th of October, 1860, he entered into a written agreement with Schell, the testator of the plaintiffs, whereby he released to Schell one-half of a piece of land then in the possession of Akers, and containing 111 acres and 2 rods of land, and Schell agreed thereby that, in the event the city of Sonoma should establish its claim to any part of such released tract of land, he would deliver the possession of the same, or such portions thereof as might be so established, together with a yearly rent of $5 per acre for the land so to be delivered, and that Akers thereby agreed that, in the event of the city of Sonoma not being able to establish its claim beyond the present line of the Huichica patent, he would deliver possession to Schell of all or such portion of the remainder of such tract of land as might be within the line of the Huichica patent, and would pay a yearly rent for the same, at the rate of $5 per acre, to Schell; that by that agreement Schell relinquished all claim to the premises in question, and acquiesced in Akers's title and right of possession; that previous to October 11, 1860, and then and ever since, the city of Sonoma claimed the said lands as its pueblo lands, adversely to Schell, and was then, and ever since had been, prosecuting its claim before the land department of the government; that, before that time, the said city conveyed by deed to Akers the premises for which the suit was brought, and by virtue thereof he was, on the 11th of October, 1860, in possession of the premises and claiming the

same adversely to Schell; that at that time Akers claimed that the premises were within the pueblo lands of the city of Sonoma, and that that city would establish before the land department of the United States and the Commissioner of the General Land Office its claim thereto; that the defendants and the said city then and ever since claimed that the pueblo extended on the southeast to the Arroyo Seco, and that the Arroyo Seco formed the boundary line between the pueblo lands of the city and the lands of Schell, whilst Schell then claimed that the Arroyo Seco did not form such boundary line, but extended beyond it on the north and included the lands of Akers; that, to settle the difficulties and avoid litigation, Akers and Schell made said agreement to await and abide the decision of the land department of the United States on the application of the city to have its title to its lands confirmed; that Schell then agreed with Akers that Schell should never claim any title to the lands described in the complaint, until it was determined by a decree of the land department of the United States that the city could not establish its title thereto; that Akers, for the purpose of avoiding litigation and to await and abide the decision of said land department, delivered over to Schell other land within the pueblo, to await such decision, and Schell then agreed that, in the event the city established its claim to any of the land, he would forever release all claim of title or possession thereto, deliver up to Akers all the lands claimed by Akers within the pueblo, and pay to Akers $5 per acre per year for the use thereof; that Akers was to hold the land until the city should so fail to establish its title thereto; that the city had not failed to do so, but had established its claim; that on the 31st of March, 1880, and since the suit was commenced, the United States issued and delivered to the city and the trustees thereof a patent for the land described in the complaint; that the plaintiffs claimed the land by virtue of a patent issued by the United States to one Leese, and known as the Huichica patent; that said patent does not include the premises; that if it does, the same was made without authority of law; that the only authority on which the Huichica patent issued was a

decree of the said Circuit Court of the United States, made December 24, 1856; and that said decree did not authorize the issuing of a patent by the United States for the land described in the complaint, or for any land on the west side of the Arroyo Seco, but made the Arroyo Seco the boundary between the pueblo and the Huichica rancho.

The cause was tried by the court without a jury, and it made a finding of facts, comprising the facts set forth in the answer, with additional matters, the only material ones being as follows: A grant to one Leese of the place called Huichica was made by the Mexican governor of California, in 1841, and embraced all the land between the Arroyo Seco, the Arroyo de los Carneros, and the swamp land, containing two square leagues, the western boundary being the Arroyo Seco. Subsequently, the governor adjudged this grant to be void, because the land of which judicial possession was attempted to be given under it was much more than the quantity granted. Under a subsequent petition by Leese, and on July 6th, 1844, the then governor of California made to Leese a second grant of three and one-half leagues of the land called Huichica, bounded on the north by the crossing of the upper road to Napa, on the east by the Arroyo de los Carneros, on the south by the swampy lands on the bay, on the west by Estero de Sonoma as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica. This grant was made subject to approval by the departmental assembly, but was never placed before it for approval, although the first grant was approved by it after the second grant had been made. A claim of Leese to the whole Huichica t[illegible] of five and one-half leagues was confirmed by the board of land commissioners April 18th, 1853, and by the District Court of the United States April 22d, 1856. An appeal to the Supreme Court of the United States was dismissed in December, 1856, no decree respecting the claim having ever been made by the Circuit Court of the United States. The decree of confirmation contained this clause: "The land of which confirmation is hereby made is known by the name of 'Huichica,' containing five and one-half square leagues, and no more, and is bounded and described

as follows, to wit: Bounded on the north by the upper road which goes to Napa, on the east by the Arroyo de los Carneros, on the south by the marshy land adjoining the bay of San Francisco, and on the west by the Estero of Sonoma, as far as the Trancas, taking the direction (*el rumbo* — direction or course) of the Arroyo Seco." A survey of the Huichica grant was made in December, 1858, and approved by the surveyor general in June, 1859; and, in accordance therewith, a patent for the Huichica rancho, containing 18,704 acres, was issued by the United States to Leese August 3d, 1859, reciting the second grant, the confirmation and the survey. The westerly boundary, as shown on the plat in that patent, is "the Sonoma Creek, from a post marked L at the lower landing as far as a post marked L at the Trancas; thence a straight line running north 37 degrees east 156 chains to a post marked L on the Arroyo Seco, at the Huichica Hills. This last line is known as the 'Trancas line.'" By quitclaim deeds under Leese, Schell claimed title to 470 acres of the Huichica rancho.

The title of Akers was derived as follows: In 1835, General Vallejo, director of colonization, under previous instructions from the Mexican governor of California, established the pueblo of Sonoma, and made a survey thereof, with the following boundaries: "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma Creek; thence up said creek to the Agua Caliente Creek; thence easterly by the hills north of the city to place of beginning." He laid out the tract into lots and blocks, and established families on it, occupying the tract along the Arroyo Seco, in 1835, down to the point where it entered the said salt marsh. On a report of his acts, made by him to the governor, they were approved by the latter. In May, 1852, the authorities of the city of Sonoma presented to the board of land commissioners their claim, as successors of the pueblo, for all of its land, as established by Vallejo. The claim was confirmed by the board, and afterwards, on appeal, by the Circuit Court of the United States for the Northern District of California, November 2d, 1864. These decrees fixed the Arroyo Seco, from the vineyard afore-

said to the salt marsh, as the eastern boundary of the pueblo. A survey of the land was made in September, 1868, and reported to the land department of the United States for approval, in August, 1872. In March, 1876, the Commissioner of the General Land Office, on a conflict before him on the approval of the survey as to the location of the southeasterly line, being the boundary common to the land confirmed to the city of Sonoma and the land known as the Huichica grant, adjudged and determined that such boundary should be established as follows: "A direct line running from the point marked 'Trancas,' on Sonoma Creek, to the point where the Arroyo Seco enters the salt marsh, (Station No. 43 in the amended survey of Rancho Huichica,) and thence following the direction of the Arroyo Seco to the Little Huichica Hills, should constitute the southeasterly boundary of the pueblo of Sonoma;" and directed the surveyor general to make survey of the confirmed claim of the city of Sonoma in accordance with such decision. A resurvey was made, and the commissioner approved it and his former decision of March, 1876, fixing the Arroyo Seco as the boundary between the pueblo of Sonoma and the Huichica grant. No appeal having been taken from that decision, the same became final, and a patent for the pueblo lands was issued by the United States, March 31, 1880, to the mayor and common council of the city of Sonoma, in accordance with the decrees of confirmation and the survey, containing 6063.95 acres. The plat in the patent showed that it covered 423 acres of land embraced in the Huichica patent, being the tract bounded by the "Trancas line," so called, running from post L at the Trancas north 37 deg. east 156 chains to post L, on the Arroyo Seco, by the Arroyo Seco from said post to where it enters the marsh at station 43 aforesaid, and by a line from said station south 70 deg. 45 min. west 81.50 chains to post L at the Trancas. Akers entered into possession of the land described in the complaint, under a contract with the city of Sonoma to purchase it, in 1851, and had occupied it ever since. On the 13th of May, 1858, the city conveyed to him by deed 111 acres of land within the limits of the city as so confirmed and patented, the land sued for being part of such 111 acres. He con-

tinued to reside upon, cultivate and improve the whole of the same up to October 11, 1860, and resided upon, cultivated and improved the west part of the tract so conveyed to him, including the portion sued for by the plaintiffs, ever since 1851. In September, 1860, Schell sued Akers in the Seventh District Court of the State of California, for the county of Sonoma, to recover all of the said tract of land, claiming title thereto under the Huichica patent; and Akers, by his answer in that action, claimed title to the whole thereof under his deed from the city of Sonoma. Whilst the action was pending, and on the 11th of October, 1860, the agreement in writing, before mentioned, was made. On the execution of that agreement, Schell dismissed his action, and a fence was built by the parties, from the lane mentioned in the complaint, extending northerly across the said 111-acre tract and dividing it into two fields of nearly equal size, and Akers surrendered to Schell the possession of all that portion of the 111-acre tract lying east of said fence and embracing about fifty acres, and retained the possession of all the land on the west side of said fence. The Trancas line, being the western boundary of the line patented to Leese, divides the 111-acre tract into two three-cornered pieces, the line running from the southwest to the northeast and crossing the said fence, leaving a portion within the Huichica patent on the west side of the fence in the possession of Akers, and also leaving a portion on the east side of the fence, not embraced within the patent of the Huichica, in the possession of Schell, held by him under the said contract.

Finding 25 was as follows: A piece of land described as follows: Beginning at a point on the northerly line of the lane leading from the house of Theodore L. Schell, deceased, westerly to the road commonly called "Broadway," 7.63 chains easterly from the intersection of said lane and road, the point where the Trancas line crosses said lane; thence north 37 deg. east along the Trancas line to a point where the said Trancas line crosses the fence heretofore constituting the division fence between Akers and Schell; thence south 5 deg. 45 min. east along said fence to the said lane; thence westerly along the northerly side of said lane 15.61 chains to the place

of beginning — is included within the land described in the complaint. Said piece of land is situated between Arroyo Seco and the Trancas line, and is within the boundaries described in the grant of the Huichica rancho of July, 1844; the decrees of confirmation, the surveys and the patent thereof of August 3d, 1859; also the three deeds under which Schell claimed title to the 470 acres; and is not within the exceptions mentioned in the first of said deeds. Said piece of land is also within the boundaries of the pueblo of Sonoma, established by Vallejo; the decrees of confirmation, the final survey, and the patent of said pueblo, issued March 31, 1880; also the 111-acre tract; and is on the west side of the fence built by the parties.

The court found as follows, as matter of law: That the city of Sonoma has established its claim to the land in controversy, within the meaning of the said contract between Schell and Akers. That, by the terms of said contract, each agreed with the other to abide by the decision of the United States on the said claim of the city of Sonoma for said lands, as then pending before the United States courts, and to abide by the boundary line between them as established on the final confirmation of pueblo lands to the city of Sonoma. That the defendant Stephen Akers is entitled to the possession of all the lands and premises described in the complaint. That all the right, title and interest of Leese in and to all the piece of land described in finding 25, derived to him under the patent of the Huichica rancho, passed to and became vested in Schell on the 18th of January, 1859. That all the title of the city of Sonoma passed to and became vested in Stephen Akers, by deed dated May 13th, 1858, in and to the said tract described in said finding 25. That defendants are entitled to judgment for the possession of all the land described in the plaintiff's complaint, with costs of suit.

The judge of the Superior Court of Sonoma County, in a short opinion given in the case, said: "The court is of the opinion that the contract of the 11th of October, 1860, is conclusive of this controversy. The Huichica patent had issued when that agreement was made, and covered the land in dis-

pute. Plaintiffs' testator had then all the title which he ever could acquire. The parties must have referred to the final location of the patent of the pueblo of Sonoma, when they, in their agreement, used the phrase 'in the event the city of Sonoma establishes her claim to any portion' of said land. That patent has been finally located, and embraces the land which is the subject of this suit. It follows that the defendants should prevail."

The judgment of the Superior Court was that the defendants recover costs from the plaintiffs. The latter took an appeal to the Supreme Court of the State, which affirmed the judgment of the Superior Court, by a judgment to review which the plaintiffs have brought a writ of error.

The opinion of the Supreme Court, found in the record, and also reported as *Hale* v. *Akers*, 69 Cal. 160, recites the facts as found by the Superior Court, and then states that there are two sufficient answers to the claims made by the plaintiffs. In its first answer, the court considered the meaning of the words, "taking the direction of the Arroyo Seco," found in the second grant, of July 6, 1844, and in the decree of confirmation, and stated that it seemed to it, as it did to the Commissioner of the General Land Office, that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek or gulch; that, if that were so, then it is clear that the line as run by the surveyor did not conform to the decree, but took in lands not covered by the decree; and that it must follow that to the lands so taken in, the original concession to the pueblo, and the patent issued upon confirmation thereof, carried the better right.

The second answer which the Supreme Court made to the claims of the plaintiffs was that the written agreement, before mentioned, was intended to be, and was, binding upon the parties, and was decisive of their rights, when it was executed. The view taken by the court was that when Schell and Akers executed the agreement, in October, 1860, the Huichica patent had been issued to Leese, in August, 1859, and Schell had his deed of January, 1859; that the Sonoma claim had been confirmed by the board of land commissioners, in January, 1856,

and took in the land lying between the Trancas line and the Arroyo Seco; that the city was asserting a right to that land, and the case was pending before the courts; that Akers had a deed, given by the city in May, 1858, of 111 acres of the land, and was in possession of them; that under these circumstances the parties compromised the pending suit, by dividing the 111 acres about equally between them, Akers releasing to Schell the eastern half and retaining the western half; that, under the terms of the agreement, the only establishment of the Sonoma claim which the parties contemplated was such as would result from the action of the courts upon it, and the issuing of a patent by the government in pursuance of their decrees; that the parties evidently thought that if the city should finally succeed in establishing its claim, and receive a patent for any of the land within the lines of the Huichica patent, it would have the better title to the land, and that they could, therefore, avoid litigation and expense, and safely await the issue of the city's contest; that they rightly interpreted the law; and that Schell, so long as he lived, acquiesced in the arrangement.

It is contended for the defendants that this court has no jurisdiction of this case. For the plaintiffs it is contended that not only was a Federal question raised in the Supreme Court of the State, but it was decided adversely to the plaintiffs; and that both parties claimed under titles acquired from the Mexican government prior to the cession of California to the United States.

The errors assigned by the plaintiffs are that the Supreme Court of the State erred in adjudging that the Trancas line did not conform to the decree of confirmation of the claim of Leese to the Huichica rancho, made April 22, 1856, by the District Court of the United States; in adjudging that the patent of March 31, 1880, to the mayor and common council of the city of Sonoma, established that the title to the land in controversy was in the defendants, and gave to them a title superior to the title of the plaintiffs under the patent of August 3, 1859, issued to Leese; and in adjudging that Schell and Akers, by their written agreement of October 11, 1860, intended that any

patent which should be thereafter issued to the city of Sonoma, conveying any portion of the land to which Schell then had title under the Huichica patent of August 3, 1859, would or could divest Schell of his title to the land under the Huichica patent, or establish a superior title thereto in the city of Sonoma.

After contending that the court below erred in its decision of the Federal question; that such decision was based upon the facts (1) that the land in dispute was a portion of the pueblo land, and (2) that the lines of the survey of the Huichica grant did not conform to the decree of confirmation; and that, in so doing, the court ignored (1) the power of the Mexican government to divest the pueblo title, and (2) the findings of the lower court that the survey did conform to the decree; the plaintiffs urge that the interpretation by that court of the agreement between Schell and Akers was incorrect, and that it would not have so interpreted the agreement had it not been for its erroneous deduction of law regarding the Federal question, and, therefore, that the decision of the Federal question was the controlling decision of the case.

But we cannot take this view. Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

In *Murdock* v. *City of Memphis*, 20 Wall. 590, 636, this court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5, 1867, 14 Stat. 386, embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

Syllabus.

This principle has since been repeatedly applied. In *Jenkins* v. *Loewenthal*, 110 U. S. 222, where two defences were made in the state court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the state court in its decree sustained them both, this court said that, as the finding by the state court of the fact which sustained the defence which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdoch* v. *City of Memphis*, *supra*. See, also, *McManus* v. *O'Sullivan*, 91 U. S. 578; *Brown* v. *Atwell*, 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140; *Chouteau* v. *Gibson*, 111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway* v. *Guthard*, 114 U. S. 133; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234.

It appears clearly from the opinion of the Supreme Court that it was not necessary to the judgment it gave that the words "taking the direction of the Arroyo Seco" should be construed at all. It is, therefore, of no consequence whether or not that court was wrong in its conclusions as to the meaning of the Huichica grant.

The writ of error is

Dismissed.

RIO GRANDE RAILROAD COMPANY *v.* VINET.

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

No. 114. Argued November 15, 1889. — Decided December 23, 1889.

The evidence in this case fails to establish any fraud in the making of the notes and mortgage which are the subject of controversy, or in the use afterwards made of the notes.

In equity. The case is stated in the opinion.

Mr. George L. Bright for appellant.

Mr. J. D. Rouse for appellees. *Mr. William Grant* was with him on the brief.

Mr. Justice Miller delivered the opinion of the court.

The appellant, which was plaintiff below, obtained in the Circuit Court for the Eastern District of Louisiana on January 5, 1885, a judgment against the partnership firm of Gomila & Co. and against Anthony J. Gomila and Larned Torrey, who constituted the partnership, for the sum of $26,731.97. It caused an execution to be issued upon the judgment, and had it levied upon a house, and the grounds belonging to it, in the city of New Orleans, a description of which is set forth in the bill filed in this case. It was discovered that there existed a mortgage upon this property for the sum of $18,000, made by A. J. Gomila, and the railroad company brought the present suit by way of a bill in chancery to remove this incumbrance, as an obstruction to the successful exercise of its right to sell the property for the payment of its debt. The action, commenced in the Civil District Court for the Parish of Orleans, was afterwards removed by Gomila into the Circuit Court of the United States, and the plaintiff there filed a new bill in equity substantially the same as the petition filed in the state court.

This bill, after reciting the judgment in favor of the railroad company, already mentioned, and the levy of the execution under it on the property described, proceeds to state: "That there is inscribed on the books of the recorder of mortgages for the Parish of Orleans, against the name of Anthony J. Gomila and against said property, an inscription of a mortgage made by said Anthony J. Gomila in favor of the commercial firm of Gomila & Co., by act before Samuel Flower, a notary public, dated the 8th of February, 1884, to secure the sum of $18,000." According to the bill, this act recited an indebtedness by A. J. Gomila to the firm of Gomila & Co. for

that much money loaned and advanced to him on that day, and that for said $18,000 he had made his four promissory notes to the order of and endorsed by himself. Three of these notes were for $5000 each, and one for $3000. The $5000 notes were payable in one, two and three years after date respectively, and the $3000 note was payable three years after date.

The bill then alleges that "said mortgage is fictitious, and is a fraud committed by said A. J. Gomila to cover his property and to prevent the seizure and sale thereof; that it is not true, as stated in said act of mortgage, that on the 8th of February, 1884, the said firm of Gomila & Co. loaned and advanced to A. J. Gomila the sum of $18,000, or any other sum of money; and your petitioner alleges that by reason of said fraud the aforesaid notes, amounting in all to $18,000, are null and void; that after they were made and received by Larned Torrey, who accepted the act of mortgage, they were surrendered to A. J. Gomila, and thereby were cancelled, and they have been ever since in his custody or under his control, or in the custody and control of some confederate, whom, when discovered, your petitioner prays leave to make a party hereto;" and the prayer of the bill is that these notes be cancelled and annulled, and that Gomila be required to surrender them up, and for such further relief as the nature of the case may require.

Supplemental and amended bills were filed making defendants to the suit J. Ward Gurley, Jr., and C. D. Barker, upon the allegation that they claim to be the owners of the notes, and assert the sufficiency and validity of the mortgage by which they are pretended to be secured, and they are required to answer the allegations of the original bill and to set forth the nature of their claim. A. J. Gomila answered the bill, and to special interrogatories propounded to him in it he answered under oath as follows:

"To the first of said interrogatories, which reads as follows, viz.:

"To whom did you deliver the notes described in the original bill on file, and when did you do so? Give his full name and address.

"He answers, viz.:

"Ans. The notes were all delivered to Larned Torrey, the other member of the firm of Gomila & Co., when they were made or executed, Feb'y 8th, 1884.

"To the second of said interrogatories, which reads as follows, viz.:

"In whose possession have said notes been at all and any time up to the present time?

"He answers, viz.:

"Ans. The said notes were immediately thereafter delivered to J. Ward Gurley, Jr., of this city, from whom Gomila & Co. received the following sums of cash, viz., on 6th Feb'y, 1884 ($3496.50) three thousand four hundred and ninety-six and 50-100 dollars; on Feb'y 11th, 1884 ($1498.50) one thousand four hundred and ninety-eight and 50-100 dollars; on 20th Feb'y, 1884 ($1000) one thousand dollars, besides some city bonds at various dates just before and subsequently, other small sums of money for costs in different suits, etc., all of which is still due said Gurley, with interest thereon; that $5000 of said sums of money was obtained from said Gurley for the purpose, and used to pay the balance of the purchase price of the property in question to the Hibernia Ins. Co.

"That some months after the said notes were so delivered to said Gurley two of them — viz., the note for $5000, due in two years after its date, and the note for $5000, due in three years after date — were withdrawn from the said Gurley by Gomila & Co. through the said Torrey, and pledged on the 21st Aug., 1884, with and to the Teutonia Ins. Co. of this city, to secure a loan then made by said Ins. Co. to Gomila & Co. of $5000 in cash; that on the 3d Sept., 1884, the said loan was renewed with said Ins. Co., and on the 10th Oct., 1884, the said loan of $5000 was renewed in the State Nat'l Bank of this city, and said two mortgage notes were withdrawn by Gomila & Co., through the said Torrey, from said Ins. Co. and pledged with and to the State Nat'l Bank to secure said loan.

"Subsequently Gomila & Co., through said Torrey, withdrew said two notes from the State Nat'l Bank and placed them with C. D. Barker of this city, on or about 3d November,

1884, from whom said firm of Gomila & Co. received, through said Torrey, the sum of two thousand dollars in cash November 3d, 1884, and the additional sum of one thousand dollars in cash Nov. 5th, 1884, and the additional sum of one thousand dollars in cash Nov. 7th, 1884.

"And, so far as deponent knows, the said last two mentioned notes are still held by said Barker, and the other two notes, one for $5000, due in one year after its date, and one for $3000, due in three years after its date, are now, and have always been, held by said Gurley since they were first delivered to him as aforesaid.

"To the 3d of said interrogatories, which reads as follows, viz.:

"Who is now the holder of said notes? Give his name and address.

"He answered, viz.:

"Ans. This interrogatory is answered by the answer just given above.

"A. J. Gomila."

Gurley answered the bill, under oath, setting forth the matter pretty much as Gomila's answer does, and averring that the notes and mortgage were true, real and *bona fide*, and that those which he owned are not now and have not at any time since the issue thereof been under the control or in the possession of A. J. Gomila, and that he took them for money advanced to the firm of Gomila & Co. before they were due; and he sets forth the amount of his advance with precision and particularity, showing that $5000 of the money which he advanced went to pay the purchase price of the house and lot mentioned in the mortgage; and he says that said notes were acquired by him for a full and valuable consideration in due course of business, and that they were issued in the interest and for the benefit of Gomila & Co. and their creditors, to enable them to continue business, and that the said notes and the full amount of them are still justly and fully due to the defendant.

Caleb D. Barker, the other defendant, in whose possession

some of the notes were, files an answer also under oath, in which he shows that Torrey, as a member of the firm of Gomila & Co., sold him two of the notes for $5000 before they were due, pledging them to secure a loan, in November, 1884, and they have been in his actual possession ever since, except for a short time when Torrey received possession of them to see if he could not raise the money on them to pay the existing loan of Barker. Failing in this, Torrey returned the notes to Barker, with an agreement that if the money was not paid on the 8th of January, 1885, they should become the property of Barker; that the loan was not repaid and never has been, and the said notes are now the property of Barker; and he avers that the notes were negotiable paper taken by him before maturity in good faith, for valuable consideration in due course of business, without any intention to defraud the creditors of Gomila or Gomila & Co.

Replications were filed which made issue on these averments, and testimony was taken. Gomila died, and the suit was revived against his wife and one Wiltz, who had been made dative testamentary executor of Gomila after which it was heard and decided by the court below rendering the decree from which this appeal is taken. That court finds that the transaction by which these notes and the mortgage were made and issued and came to the hands of Gurley and of Barker was in every respect an honest transaction; that the mortgage is a valid mortgage; and that the sums secured by it to the defendants Gurley and Barker are valid liens upon the property prior to that of the complainant; and on these grounds it dismissed the bill. Wiltz having died, the present appellee, as his successor, has been substituted in this court.

We concur entirely with the view of the evidence taken by the Circuit Court. There is nothing but the barest suspicion of fraud or unfairness in the making of these notes and mortgage and in the use afterwards made of the notes. Mr. Gomila, in his efforts to save the credit of his firm, consented that the house and grounds in which he lived might be mortgaged to raise money for that purpose. He accordingly made the four notes and the mortgage to secure them, covering

that property. Five thousand dollars of the money first raised on these notes went immediately to pay a prior incumbrance in the nature of a vendor's lien on the property mortgaged. The remaining notes were handed to Mr. Torrey, the partner of Gomila in the firm of Gomila & Co., and he raised the sums due to Gurley by delivering to him part of the notes. He also raised money from certain banks by delivering some of the notes as security for the indebtedness of Gomila & Co. These notes he redeemed, and ultimately turned them over to Barker as security for the loans advanced by him for the benefit of the firm of Gomila & Co. It is distinctly denied by A. J. Gomila that, after he delivered these notes to Torrey to be used for the benefit of Gomila & Co., they ever came back to his possession or under his personal control, and no evidence of that fact is produced, nor are we aware that, if such had been the case, it would impair the rights of their present holders, who received them in the regular course of business, paying a valuable consideration for them before their maturity. It is idle to pursue the subject further. A recital in this opinion of the testimony of each witness examined could lead to no useful results. That Mr. Gomila covered his homestead with a mortgage, which was used to raise money by the firm of which he was a member to pay its debts, is surely not a transaction that should be branded as a fraud.

The decree of the Circuit Court is

Affirmed.

GRAVES *v.* CORBIN.

FIRST NATIONAL BANK OF CHICAGO *v.* CORBIN.

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

Nos. 155, 980. Argued December 10, 12, 13, 1889. — Decided January 6, 1890.

A bill in equity was filed in a state court by a creditor of a partnership to reach its entire property. The prayer of the bill was that judgments

confessed by the firm in favor of various defendants, some of whom were citizens of the same State with the plaintiff, might be set aside for fraud. On the allegations of the bill there was but a single controversy, as to all of the defendants. One of the defendants, who was a citizen of a different State from the plaintiff, removed the entire cause into a Circuit Court of the United States. After a final decree for the plaintiff, and on an appeal therefrom, this court held that the case was not removable under § 2 of the act of March 3, 1875, 18 Stat. 470, and reversed the decree, and remanded the case to the Circuit Court, with a direction to remand it to the state court, the costs of this court to be paid by the petitioner for removal.

In equity. The cause was argued in full on the merits. The case is stated in the opinion.

Mr. J. M. Flower, for appellant, to the question of jurisdiction cited: *Capron* v. *Van Noorden*, 2 Cranch, 126; *Breithaupt* v. *Bank of the State of Georgia*, 1 Pet. 238; *Brown* v. *Keene*, 8 Pet. 112; *American Bible Society* v. *Price*, 110 U. S. 61; *Sewing Machine Co. Case*, 18 Wall. 553; *Vannevar* v. *Bryant*, 21 Wall. 41.

Mr. William J. Manning, for appellee, to the same point cited: *Langdon* v. *Fogg*, 18 Fed. Rep. 5; *Kerling* v. *Cotzhausen*, 16 Fed. Rep. 705; *Sheldon* v. *Keokuk Northern Line Packet Co.*, 9 Bissell, 307; *Barney* v. *Latham*, 103 U. S. 205; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Edwards* v. *Conn. Mut. Life Ins. Co.*, 20 Fed. Rep. 452.

Mr. Justice Blatchford delivered the opinion of the court.

On the 1st of March, 1883, Chester C. Corbin filed a bill in equity in the Circuit Court of Cook County, in the State of Illinois, against William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves, who had composed the limited partnership of Boies, Fay & Conkey, in which Graves was the special partner and the three others were the general partners, the partnership being formed under a statute of Illinois, and doing business in Chicago, as wholesale grocers and importers. The First National Bank of Chicago, Illinois,

Alvin F. Shumway, The Bay State Sugar Refining Company of Massachusetts, The First National Bank of Westboro', Massachusetts, Walter Potter, James M. Flower, Curtis H. Remy and Stephen S. Gregory, the last three being a firm of attorneys-at-law, under the name of Flower, Remy & Gregory, Seth F. Hanchett, sheriff of Cook County, Illinois, and twenty-one other persons and corporations were also made defendants to the bill.

The bill set out that the plaintiff was the creditor of the said limited partnership, as being the owner of two promissory notes made and endorsed by it, and made the following averments: The limited partnership carried on business at Chicago from March, 1882, until January, 1883, and contracted debts during that time amounting to about $400,000. On the 13th of January, 1883, its assets were insufficient to pay more than about 50 cents on the dollar of its liabilities, and during the time named it borrowed large sums of money, by loans and discounts of commercial paper made by it. On or about December 2, 1882, the members of the partnership, knowing it to be insolvent, and with the intent to hinder, delay and defraud such of its creditors as they did not see fit to prefer, and in contemplation of its insolvency, and with the intent to prefer certain of their creditors, or pretended creditors, and to evade the provisions of the statute of Illinois, pretended to dissolve the partnership, and recorded in the office of the county clerk of Cook County a paper purporting to be a dissolution of it; but the paper was a mere device contrived by them to evade the provisions of the statute, and to give color of validity to the acts of Fay and Conkey, thereinafter set forth, in executing the judgment notes, warrants of attorney, and confessions of judgment thereinafter described. After the pretended dissolution Fay and Conkey pretended to carry on the business under the firm name of "Fay & Conkey," and assumed to be the owners of all the assets of the limited partnership. Boies and Graves pretended to release and convey to Fay and Conkey all their interest in such assets; but such release was void as against the creditors of the limited partnership. By the statute of Illinois, under which the partnership

was formed, all of its assets were pledged to the payment of its debts ratably, and it was the duty of the four partners, when they first had knowledge of its insolvency, or at the time of its pretended dissolution, to appoint a trustee to take charge of its assets and convert them into money and distribute the same ratably among its creditors. Fay and Conkey, on or about the 22d of January, 1883, in pursuance of said fraudulent scheme, executed in favor of six of the defendants seven promissory notes, payable on demand, with warrants of attorney annexed to confess judgment for such amount as might appear to be unpaid thereon, with costs and five per cent attorneys' fees, the notes amounting to $91,353.18, of which one note, for $40,000, was in favor of the First National Bank of Chicago, and one note, for $17,500, was in favor of the defendant Graves. On the 22d of January, 1883, judgments were entered in the Superior Court of Cook County, Illinois, against Fay and Conkey upon each of the seven notes, together with the costs and five per cent attorneys' fees, in favor of the six defendants mentioned, there being seven judgments in all, amounting in the aggregate to $95,965.83, of which one judgment was in favor of the First National Bank of Chicago, for $42,000, and one in favor of Graves, for $18,375. On or about the 22d of January, 1883, Fay and Conkey, in further pursuance of said fraudulent scheme, executed in favor of fifteen of the defendants fifteen promissory notes, payable on demand, with warrants of attorney to confess judgment annexed, amounting in the aggregate to $120,999.61, of which one note, for $27,000, was made in favor of Graves, one for $6990 in favor of Shumway, one for $10,000 in favor of The Bay State Sugar Refining Company of Massachusetts, one for $12,000 in favor of the First National Bank of Westboro', Massachusetts, and one for $4300 in favor of Potter. On the 22d of January, 1883, or between that day and the 26th of January, 1883, inclusive, there were entered in the Circuit Court of the United States for the Northern District of Illinois judgments against Fay and Conkey upon each of the last named fifteen notes, in pursuance of said warrants of attorney, together with the costs and five per cent attorneys' fees, in

favor of fifteen of the defendants, amounting in the aggregate to $127,044.61, of which judgments one was in favor of Graves for $28,350, one in favor of Shumway for $7339.50, one in favor of The Bay State Sugar Refining Company for $10,500, one in favor of the First National Bank of Westboro', Massachusetts, for $12,600, and one in favor of Potter for $4515. On or about the 22d of January, 1883, and immediately after the entry of the judgments in the Superior Court of Cook County, the defendants Flower, Remy and Gregory, as attorneys for the defendants Boies, Fay, Conkey and Graves, and as attorneys of record for the respective plaintiffs in those judgments, caused execution to be issued on each of them against the property of Fay and Conkey, to the sheriff of Cook County, who, by direction of the attorneys, seized and levied on a large quantity of merchandise, of the value of about $75,000, part of the assets of the limited partnership. The levy and seizure were made in further pursuance of said fraudulent scheme, and with intent to delay, hinder and defraud the plaintiff and other creditors of the limited partnership, and to give a preference to each of the defendants in whose favor the judgments were entered. The sheriff has sold the property seized, with the exception of about $12,000 worth which was replevied, and has in his possession about $54,000 as the proceeds of said sales. Immediately after four of the judgments in the Circuit Court of the United States for the Northern District of Illinois were entered, namely, that in favor of the Commercial National Bank of Dubuque, Iowa, for $14,962.50, that in favor of Graves for $28,350, that in favor of the Dubuque County Bank of Dubuque, Iowa, for $12,495, and that in favor of the Importers' and Traders' National Bank of New York City for $16,800, the defendants Flower, Remy and Gregory, on the 22d of January, 1883, as the attorneys of Boies, Fay, Conkey and Graves, and as the attorneys of the plaintiffs in those four judgments, caused execution to be issued on each of them, directed to the marshal of the district, against the property of Fay and Conkey. The marshal, on the same day, returned those executions *nulla bona*. Thereupon, Flower, Remy and Gregory, as attorneys

for the plaintiffs in those four judgments, filed a creditors' bill in the Circuit Court of the United States for the Northern District of Illinois, alleging divers frauds on the part of Fay and Conkey, and praying for the appointment of a receiver. That court appointed as receiver the defendant Hancock, a brother-in-law of Flower, and the books of account and assets of the limited partnership were delivered to him by Fay and Conkey, and he has possession of them, and is collecting them, the drafts, notes, accounts and choses in action amounting to more than $210,000. Immediately after the entry of the judgments in the Circuit Court of the United States in favor of seven of the defendants, including Shumway, The Bay State Sugar Refining Company, the First National Bank of Westboro', and Potter, Flower, Remy and Gregory, as attorneys of Boies, Fay, Conkey and Graves, and as attorneys for the plaintiffs in said seven judgments, caused executions to be issued upon them to the marshal, against the property of Fay and Conkey. The marshal returned them *nulla bona*, and thereupon Flower, Remy and Gregory, as such attorneys and on behalf of the plaintiffs in the seven judgments, filed a creditors' bill in the said Circuit Court of the United States, alleging that Fay and Conkey had concealed their property, and praying the appointment of a receiver. Hancock was appointed such receiver, or his first receivership was extended. The judgments in the Circuit Court of the United States were rendered in pursuance of the said fraudulent scheme on the part of Boies, Fay, Conkey and Graves. Upon the entry of each of the judgments before mentioned, there was added to and included therein a sum equal to five per cent of the original demand on which the judgment was rendered, as attorneys' fees for the entry thereof, the aggregate amount of such attorneys' fees being $10,657.65. That amount was an excessive charge for the service, and was charged for the purpose of absorbing to that extent the assets of the limited partnership, and Fay and Conkey are interested therein, and have some secret agreement with said attorneys for a division of that sum. Flower, Remy and Gregory are and have been the attorneys of Boies, Fay, Conkey and Graves, and are the

attorneys of Hancock, receiver. The plaintiff has applied to Hancock, receiver, for an examination of the books of the limited partnership, for the purpose of ascertaining what settlement, if any, Boies, Fay and Conkey had made with Graves, or what settlement Fay and Conkey had made with Boies; but Hancock refused such examination, and said that such refusal was in accordance with directions given him by Flower, Remy and Gregory, as his attorneys. The judgments so entered on confession are, or some one or more of them is or are, fictitious, and rendered for more than was due to the plaintiffs therein respectively; and this excess is alleged to exist in regard to twenty-two of the judgments, including the two in favor of Graves and those in favor of the First National Bank of Chicago, Shumway, The Bay State Sugar Refining Company, the First National Bank of Westboro', Massachusetts and Potter. Fay and Conkey, at the time the notes and warrants of attorney were made and the judgments were entered, knew that the limited partnership was insolvent; and they executed the notes and warrants, and confessed the judgments, with the intention of paying and securing to each of the persons in whose favor the notes and warrants were executed and the judgments were confessed a preference over any other creditors of the limited partnership. The confessions were unlawful acts, prohibited by the statute of Illinois, and the judgments, and all acts done in pursuance thereof, and all process issued thereon, and all acts done under such process, are void. None of the persons or firms in whose favor the notes were given knew of the execution of them until after judgment had been entered thereon, and all of the judgments were entered without the knowledge or consent of the persons mentioned as plaintiffs therein. None of the notes were made in the ordinary course of business, but they were all made with intent on the part of Fay and Conkey to carry out the said fraudulent scheme; and all of the judgments were entered by Flower, Remy and Gregory, by direction of Fay and Conkey or of Fay. The property so taken on execution by the sheriff of Cook County, and the assets so transferred to the possession of Hancock, as receiver, consti

tute the whole of the assets of the limited partnership; and its *bona fide* debts amount to about $400,000.

The bill waives answers on oath, and prays for a decree that the pretended transfer of the assets of the limited partnership to Fay and Conkey was fraudulent and void; that each of the judgments so entered on confession, the executions issued and the proceedings thereon, or on their return, and everything done under the judgments and executions, or in any suit based on any of the judgments, and every sale or transfer involving any of them, be declared void; that it be decreed that all of the goods levied upon under the executions, and the assets taken possession of by Hancock as receiver, are the property of the limited partnership, and as such subject to the lien, and charged with the payment, of the debt due to the plaintiff, and all other debts owed by the limited partnership, ratably; that each of the defendants be decreed to pay to the receiver to be appointed in this suit whatever money they have received by virtue of their respective judgments or any suit based thereon, out of said property; that such money and all moneys realized by such receiver from the assets of the limited partnership be paid to its creditors ratably; that such receiver be appointed to convert the property into money and distribute it; that the defendants Flower, Remy, Gregory and the sheriff be temporarily enjoined from paying over to any person any proceeds of the property of the limited partnership, which they now have or may hereafter receive under any of said judgments, executions or creditors' bills; and that such injunction be made perpetual on a hearing.

Boies, Fay, Conkey, the First National Bank of Chicago, Flower, Remy and Gregory, the sheriff of Cook County and four others of the defendants, were served with a summons. Flower, Remy and Gregory entered an appearance in the suit for Boies, Fay and Conkey on the 21st of March, 1883, and on the 2d of April, 1883, also entered an appearance for themselves, the sheriff of Cook County and two others of the defendants.

On the 2d of April, 1883, Flower, Remy and Gregory, as solicitors for the defendant the First National Bank of Chicago,

served on the solicitors for the plaintiff a notice that, on the 4th of April, 1883, they would present to the Circuit Court of Cook County a petition and bond, on behalf of that bank, for the removal of the cause to the Circuit Court of the United States for the Northern District of Illinois, and ask for an order removing the cause.

The petition and bond were presented, both of them dated April 2, 1883. The petition was sworn to by the defendant Flower, one of the firm of Flower, Remy & Gregory, who also executed the bond as surety. The petition is made by the First National Bank of Chicago, Illinois, and is entitled in the suit, naming as defendants those against whom the bill prays process. It states "that the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the State of Illinois; that Chester C. Corbin, the complainant, was then and still is a citizen of the State of Massachusetts;" that twelve of the defendants "were then and still are citizens of the State of Illinois;" that four of them "were then and still are citizens of the State of Iowa;" that one of them was then and still is a citizen of the State of New York; one, of the State of Ohio; two, of the State of Michigan; three, of the State of Wisconsin; one, of the State of Colorado; "that the defendants, The Bay State Sugar Refining Company, the First National Bank of Westboro', Alvin F. Shumway and Walter Potter, were then and still are citizens of the State of Massachusetts;" and that "in the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said petitioner, who is a citizen of the State of Illinois, and the said complainant, Chester C. Corbin, who is a citizen of the State of Massachusetts."

No order appears to have been made by the state court on the presentation of the petition and bond, but the clerk of that court on the 9th of April, 1883, signed a certificate under its seal to a transcript of the record in that court, which was filed in the Circuit Court of the United States for the North-

ern District of Illinois on the 11th of April, 1883; and the cause has since proceeded in the latter court.

The cause was put at issue, proofs were taken by the respective parties, and, on the 17th of November, 1885, a decree was made by the court, finding as facts that on or about the 20th of August, 1882, the limited partnership composed of Boies, Fay, Conkey and Graves was insolvent, and so continued to the termination of its business, with the knowledge of each of the members thereof; that, with such knowledge, such members continued to do business until the 22d of January, 1883, when Fay and Conkey, assuming to be successors of Boies, Fay & Conkey, confessed seven judgments in the Superior Court of Cook County, one of them in favor of the First National Bank of Chicago and one in favor of Graves, and fifteen judgments in the said Circuit Court of the United States, one of them in favor of Graves, one in favor of The Bay State Sugar Refining Company, one in favor of Shumway, one in favor of the First National Bank of Westboro', Massachusetts, and one in favor of Potter; that the members composing the limited partnership of Boies, Fay & Conkey went through the form of a dissolution thereof, for the purpose of defeating the statute of Illinois which prohibited insolvent limited partnerships from preferring creditors, and to defraud a part of their creditors; that such partnership was still subsisting at the time of the confession and entry of each of the judgments; that the judgments were confessed to prefer certain creditors, but chiefly to save Graves from loss on account of said partnership or on account of liabilities incurred by him on commercial paper made by or on behalf of it; that immediately after the judgments were entered in the Superior Court of Cook County, Graves and Fay caused executions to be issued thereon to the sheriff of that county, who levied them on all the stock in trade and merchandise of the limited partnership and sold the property at public sale, and with its proceeds, on February 26, 1883, paid to the First National Bank of Chicago, on its judgment, $40,000, and on the same day paid to Graves, on his judgment in the Superior Court of Cook County, $9791.18; that the defendants Flower, Remy

and Gregory were employed as counsel by the limited partnership, and by Graves on his own behalf, to enter the judgments by confession, and to advise and represent the said firm and Graves in and about all matters and things affecting it and Graves, and received from them $2500 for services rendered and to be rendered in that behalf; that each of the judgments was confessed for the full amount due the several preferred creditors, and in some cases for more than was due, and for five per cent in addition thereto for attorneys' fees, which latter amount was intended as a provision for Flower, Remy and Gregory out of the assets of the limited partnership; and that they received without right, out of such assets, on account of attorneys' fees, $8559.80.

The decree further found that Fay and Conkey had each taken from the assets of the firm, and fraudulently appropriated to his own use, certain specified sums of money; that Graves had, on the 21st and 22d days of January, 1883, fraudulently appropriated to his own use drafts and checks belonging to the limited partnership, amounting to $2741.38; that on the 22d and 23d days of January, 1883, and after the levy of the executions aforesaid, Flower, Remy and Gregory collected drafts and checks belonging to the limited partnership, amounting to $1927.96, which they still held; that the judgments in favor of the Dubuque County Bank, the Commercial National Bank and the Importers' and Traders' National Bank were confessed at the special instance of Graves; that the judgment in favor of the Commercial National Bank was not an indebtedness due from the limited partnership to the bank; that Graves owes that partnership a sum equal to its assets which had been applied by his direction in payment of the last-named three judgments; that in a creditors' suit brought by Graves and the last-named three banks against Fay and Conkey, Hancock as receiver, and with the funds in his hands as such, paid to said three banks in the aggregate $41,525.59, and to Graves, on his judgment in the Circuit Court of the United States, $27,232.50; that in a certain other suit by creditors' bill in said Circuit Court of the United States, wherein The Bay State Sugar Refining

Company, Shumway, the First National Bank of Westboro', Massachusetts, Potter and three other persons were plaintiffs, and Fay and Conkey were defendants, and in which also Hancock was receiver, he paid, out of the assets in his hands as such receiver, to The Bay State Sugar Refining Company, on its judgment, $2000, to that company on the judgment in favor of Shumway, $1398, to the First National Bank of Westboro', on its judgment, $2400, to Potter, on his judgment, $860, and to the other three persons $2060 in all; that the two creditors' bills above named, one brought by the Commercial National Bank and others, and the second brought by The Bay State Sugar Refining Company and others, were each brought and prosecuted with the intention of defrauding the creditors of the limited partnership of their just rights; that Fay and Conkey consented to the filing of said bills and the appointment of a receiver thereunder; and that the limited partnership was indebted to the plaintiff in the sum of $4359.31.

The decree then proceeded to adjudge that all the property and effects held by the limited partnership on the 20th of August, 1882, and subsequently thereto, and when the judgments were confessed, were a special trust fund for the payment of the firm debts ratably among its creditors; that Graves pay to the clerk of the court within thirty days, for the benefit of the plaintiff and such other creditors of the limited partnership as should prove their right to share in the distribution of the assets of the firm, $100,796.71, with interest; that Flower, Remy and Gregory in like manner pay to the clerk of the court $9886.57; that Fay and Conkey pay in like manner $2728.92; that execution issue against the property of such defendants respectively, in case of non-payment; referring it to a master to take proof of the debts of the creditors of the limited partnership; charging Graves, Fay and Conkey with the costs of the cause; and reserving all matters not decreed upon, including the right to decree against the creditors in whose favor the judgments were confessed, with leave to the plaintiff to apply for such further order as might be necessary in relation to any matter not finally determined by that decree.

Graves and Flower, Remy and Gregory prayed separate appeals to this court, which were allowed. The appeal of Flower, Remy and Gregory was afterwards dismissed while it was pending in this court.

On the 23d of January, 1888, the plaintiff and other creditors of the limited partnership, having proved their claims before the master to the amount of $125,737.34, (and the master having reported in favor of said claims on the 9th of July, 1886,) filed a petition in the cause, stating that Graves had failed to pay any part of the amount decreed against him; that but very little more had been realized under the decree of November 17, 1885, than sufficient to pay the costs, expenses and solicitors' fees incurred in the suit; and that the petitioners insisted that, under the proofs already taken, they were entitled to a decree against the First National Bank of Chicago for $50,000. They therefore prayed for a decree against that bank, requiring it to pay, within thirty days, to the receiver in the cause, $50,000, with interest at six per cent per annum from March 1, 1883.

On the 23d of April, 1888, the Circuit Court, held by Judge Gresham, delivered an opinion, (34 Fed. Rep. 692,) in which it recited the grounds on which the decree of November 17, 1885, had been made, and ordered a decree against the First National Bank of Chicago.

The decree was entered on the 3d of May, 1888. It found that on the judgment for $40,000 in favor of the bank, confessed by Fay and Conkey as successors of the limited partnership, on January 22, 1883, the bank had, on or about February 26, 1883, received out of the sale of the assets of that partnership by the sheriff, on an execution in its favor, $38,708.35; that at the time of the pretended dissolution of the partnership, in October, 1882, and on the 2d of December, 1882, and later, the bank knew that such partnership was insolvent and unable to pay all its creditors, and knew that the contract for its dissolution was a pretended one and entered into for the purpose of protecting Graves from liability as special partner and as endorser for the firm; that the bank co-operated with the members of the partnership for the accom-

plishment of such purpose; and that the judgment was confessed for that purpose, and to obtain an illegal preference over other creditors. It decreed that the bank pay to the receiver within thirty days the sum so received, with interest at six per cent from February 26, 1883, amounting in all to $50,721.95; and that, if it were not paid, execution should issue against the property of the bank.

The bank prayed an appeal to this court. The record on the appeal of Graves was filed in this court October 11, 1886, and the record on the appeal of the bank was filed October 17, 1888.

Both of the appeals have been argued in full on the merits. But the preliminary question arises as to the jurisdiction of the Circuit Court in the case, by virtue of the removal of the cause from the state court on the petition of the bank; and the point is taken by the respective appellants that the Circuit Court acquired no jurisdiction, because at the time of the commencement of the suit and at the time of its removal, as appears by the petition for removal, the plaintiff and four of the defendants, namely Shumway, Potter, The Bay State Sugar Refining Company and the First National Bank of Westboro', were all of them citizens of Massachusetts. The determination of this question must depend upon whether, at the time of the commencement of the suit, there was a separable controversy between the plaintiff and the petitioner for removal, the First National Bank of Chicago. If there was but a single controversy in the entire cause, of course there could be no separable controversy between the plaintiff and the bank.

By section 2 of the act of March 3, 1875, c. 137, 18 Stat. 470, under which the removal took place, it was provided that when, in any suit mentioned in the section, "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." The petition for removal states that in the suit "there is a

controversy which is wholly between citizens of different States, and which can be fully determined as between them," namely, a controversy between the plaintiff and the bank. But we are of opinion that there was in the suit but a single controversy, and that that controversy was not wholly between citizens of different States. There were various branches of the controversy, various defendants and various claims by the several defendants; but the controversy was between the plaintiff on the one side, and the defendants who were alleged by the bill to have claims adversely to the plaintiff against the property of the limited partnership, as a whole, on the other side.

The case as made by the bill, and as it stood at the time of the petition for removal, is the test of the right to removal. The bill was filed to reach the entire property of the limited partnership. In order to do that, it was necessary to sweep away not some but all of the confessed judgments and all the rights obtained by executions and levies thereunder, and to restore to the assets and moneys of the partnership in the hands of the court the assets and moneys which had been fraudulently diverted therefrom by the members of the partnership, with the co-operation of the various defendants. The bill states that promissory notes were given in favor of the four defendants who were citizens of Massachusetts; that judgments on confession, in pursuance of warrants of attorney, were rendered in the Circuit Court of the United States for the Northern District of Illinois, against Fay and Conkey, in favor of the four Massachusetts defendants; that, immediately after the entry of those judgments, Flower, Remy and Gregory, as the attorneys of the members of the limited partnership, and as the attorneys of record for the plaintiffs in those judgments, caused executions to be issued thereon to the marshal of the district, against the property of Fay and Conkey; that the same were returned *nulla bona;* that, thereupon, Flower, Remy and Gregory, as such attorneys, and on behalf of the plaintiffs in said four judgments and in three others, filed a creditors' bill in the Circuit Court of the United States, to reach the property of Fay and Conkey, in

which suit a receiver was appointed; that the said four judgments were entered in pursuance of the fraudulent scheme alleged in the bill, on the part of the members of the limited partnership, to hinder, delay and defraud its creditors, and evade the provisions of the statute of Illinois, and to prefer the plaintiffs in those several judgments over other creditors; that the four judgments in favor of the citizens of Massachusetts were largely in excess of the amount due to them respectively at the time of the entry of the judgments; and that those judgments are void. It prays for a decree declaring the four judgments to be void, and directing the payment to the receiver of all moneys received by such four defendants under the judgments or under any proceedings based thereon. These allegations, with the others contained in the bill, made but a single controversy, as to all of the defendants. The relief asked could not have been granted unless all who were made defendants were parties. Therefore, all of them were necessary parties.

In *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 139, it was held that a creditors' bill could be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act. The case there arose on a demurrer to the bill. It was urged that the bill was multifarious in uniting all the defendants and distinct and unconnected matters. Fraud was charged against the five trustees of the Genesee Company, in confessing judgments and causing the property of the company to be sold. There was a charge of a combined fraud, affecting seven of the defendants, two of whom were not concerned in every part of the fraudulent conduct. All the acts sought to be impeached were alleged to have been done with a fraudulent intent as respected creditors. The court says: "There was a series of acts on the part of the persons concerned in this Genesee Company, all produced by the same fraudulent intent and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama; but it was still one piece — one entire per-

formance, marked by different scenes; and the question now occurs, whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer." The court then reviews the leading cases on the subject, and says that the principle to be deduced from them is, "that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct;" that the general right claimed by the bill was a due application of the capital of the company to the payment of the judgments of the plaintiffs; that the subject of the bill and of the relief, and the only matter in litigation, was the fraud charged in the creation, management and disposition of the capital of the company; that in that charge all the defendants were implicated, though in different degrees and proportions; and that the case fell within the reach of the principle stated, and the demurrer could not be sustained.

This ruling of Chancellor Kent was considered, recognized and approved by the Court of Errors of New York, without a dissenting voice in *Fellows* v. *Fellows*, 4 Cowen, 682. See, also, *New York & New Haven Railroad* v. *Schuyler*, 17 N. Y. 192, and 34 N. Y. 30.

The principle above stated has been applied by this court, in considering the question of removal, in cases like the present.

In *Ayers* v. *Chicago*, 101 U. S. 184, a bill was filed in a state court of Illinois, by the city of Chicago against citizens of Illinois, to enforce a deed of trust. A citizen of Alabama, having a judgment against one of the defendants, and claiming a lien on the property covered by the deed of trust, was admitted as a party defendant to the suit, and filed a cross-bill to enforce such lien, and removed the suit into the Federal Court, on the ground that in the original suit there was a controversy wholly between him and the original plaintiff, and that in the cross-suit the controversy was wholly between citizens of different States. The cause was remanded, and on appeal this court affirmed that decision, saying that the original bill and the cross-bill constituted one suit; that the intervener

was allowed to take part in a controversy between the city and the debtor; that he had no dispute with the debtor, and none separably with the city; that he and the debtor had a controversy with the city as to its lien on the property; that the debtor, who was on the same side of the controversy with him, was a citizen of the same State with the city; and that, such being the case, the suit was not removable.

In *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280, it was held that a creditors' bill to subject incumbered property to the payment of the judgment of the creditor, by selling it and distributing its proceeds among lien-holders according to priority, created no separate controversy as to the separate lien-holders, parties defendant, within the meaning of the removal act, although their respective defences might be separate. The court said: "The suit as brought by Huntington is a creditor's bill to subject incumbered property to the payment of his judgment, by a sale and distribution of the proceeds among lien-holders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defence to the action, but we have held many times that separate defences do not create separate controversies within the meaning of the removal act. *Louisville & Nashville Railroad* v. *Ide*, 114 U. S. 52; *Putnam* v. *Ingraham*, 114 U. S. 57; *Pirie* v. *Tvedt*, 115 U. S. 41; *Starin* v. *New York*, 115 U. S. 248; and *Sloane* v. *Anderson*, 117 U. S. 275. The judgment sought against the Fidelity Company is incident to the main purpose of the suit; and the fact that this incident relates alone to this company does not separate this part of the controversy from the rest of the action. What Huntington wants is not partial relief, settling his rights in the property as against the Fidelity Company alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this company shows the questions that will arise under this branch of the one controversy,

but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case."

To the cases above cited may be added *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; *Little* v. *Giles*, 118 U. S. 596, 601; *East Tennessee Railroad* v. *Grayson*, 119 U. S. 240; *Brooks* v. *Clark*, 119 U. S. 502, 511; *Laidly* v. *Huntington*, 121 U. S. 179; *Peninsula Iron Co.* v. *Stone*, 121 U. S. 631; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535; and *Young* v. *Parker's Administrator*, *ante*, 267. The transcript of the record from the state court in the present case was filed in the Circuit Court of the United States on the 11th of April, 1883. The decisions of this court above cited were all but one of them made at and after October term, 1884.

There is nothing in the record before us which shows that the question of the removability of the present case, on the petition for removal which was filed, was raised in the Circuit Court, either at the time the transcript from the state court was presented to be filed, or afterwards by a motion to remand, except what may be inferred from a statement in the record in the Graves case, at the conclusion of the testimony of a witness taken April 6, 1883, that the counsel for the plaintiff stated that he had been before Judge Drummond, in the United States Circuit Court for the Northern District of Illinois, and the judge had taken jurisdiction of the cause under the petition for removal by the First National Bank of Chicago. We find reported, however, the case of *Corbin* v. *Boies*, 18 Fed. Rep. 3, the present case, where Judge Drummond, in an opinion which appears to have been given on an application to order the transcript from the state court to be filed in the Circuit Court and the case to be docketed in the latter court, held that there was in the case a controversy which was wholly between the plaintiff and the First National Bank of Chicago, namely, a controversy as to whether the judgment in favor of that bank was a valid judgment as against the limited partnership, and the plaintiff as one of its creditors; and that the bank was not interested in any contro-

versy which the plaintiff might have with other creditors of the firm. But, as already shown, this view was erroneous.

Under the provision of section 5 of the act of March 3, 1875, 18 Stat. 472, that if, in any suit removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed, as justice may require, this court has held that when it appears to this court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below, and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. *Williams* v. *Nottawa*, 104 U. S. 209. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court, in *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555; *Mansfield &c. Railroad* v. *Swan*, 111 U. S. 379, 386; *Farmington* v. *Pillsbury*, 114 U. S. 138, 144; and *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225, 226.

In *Stevens* v. *Nichols*, 130 U. S. 230, it was held that if a proper diversity of citizenship does not appear by the record to have existed both at the commencement of the suit and at the time of filing the petition for removal, this court will remand the cause 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. This same principle was asserted in *Crehore* v. *Ohio & Mississippi Railroad*, 131 U. S. 240, where it was also held that where a suit is entered upon the docket of a Circuit Court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, no amendment of the record made in the Circuit Court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the Circuit Court as of the date when it was so docketed.

Opinion of the Court.

This same rule was applied at the present term, in *Jackson* v. *Allen*, *ante*, 27, where the judgment of the Circuit Court was reversed at the cost of the parties who attempted to remove the cause, and it was remitted to the Circuit Court with directions to remand it to the state court.

There is nothing in the foregoing views which involves the decision of this court in *Barney* v. *Latham*, 103 U. S. 205, which was to the effect that where in a case there was in fact an entirely separate controversy between the plaintiffs and several defendants petitioning for removal, with which controversy another defendant, a citizen of the same State with one of the plaintiffs, had no necessary connection, and which controversy could be fully determined as between the parties actually interested in it, without the presence as a party in the cause of such other defendant, not only could there be a removal, but the removal carried with it into the Federal Court all the controversies in the suit between all parties to it.

It is suggested that it is a hardship to the plaintiff to reverse his decrees for want of jurisdiction in the Circuit Court after he has prosecuted his suit in that court successfully, on his being taken into that court adversely more than six years ago. The answer is that the jurisdiction of this court in the present case to review the question of the jurisdiction of the Circuit Court could only arise on the hearing of an appeal from a final decree of the latter court, because by § 5 of the act of March 3, 1875, 18 Stat. 472, this court was authorized to review only an order of the Circuit Court remanding a cause, and not one retaining jurisdiction over it. Even that provision was repealed by § 6 of the act of March 3, 1887, 24 Stat. 555; and this court can now review a question as to the jurisdiction of a Circuit Court only in reviewing a final judgment or decree, although by the act of February 25, 1889, 25 Stat. 693, it may do so in a case not involving over $5000.

It results from the foregoing considerations that both of the decrees of the Circuit Court, as well that against Graves as that against the First National Bank of Chicago, must be reversed, and the case be remanded to the Circuit Court with a direction to remand it to the Circuit Court of Cook

County, Illinois, the costs of this court to be paid by the First National Bank of Chicago, the petitioner for removal.

MR. CHIEF JUSTICE FULLER did not sit in this case or take any part in its decision.

RICHMOND *v.* BLAKE.

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

No. 171. Argued December 20, 1889.— Decided January 6, 1890.

The plaintiff had a place of business, indicated by a sign over the door, where his mail matter was received, and where he could be met by his clients, and where the latter could deliver to him stocks to be sold by him or under his supervision, and he was engaged there in the business of buying and selling stocks for his customers, in which business he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers; *Held*, that he was a "banker" within the meaning of that term as used in Rev. Stat. § 3407, and subject to taxation as such under the provisions of § 3408.

THE case is stated in the opinion.

Mr. Henry E. Tremain (with whom was *Mr. Mason W. Tyler* on the brief) for plaintiff in error.

Mr. Alphonso Hart, Solicitor of Internal Revenue (with whom was *Mr. Solicitor General* on the brief) for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover certain sums of money paid under protest by the plaintiff in error to the United States in the years 1881, 1882 and 1883, and which he alleged were exacted from him under an illegal assessment made upon capital employed in his business.

If within the meaning of the statutes under which the assess-

ment was made the plaintiff was a banker, and if the capital assessed was employed in the business of banking, the judgment must be affirmed.

By section 3407 of the Revised Statutes of the United States, it is provided that "every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or a banker." 13 Stat. 251, c. 173, § 79; 14 Stat. 115, c. 184, § 9.

Section 3408 provides that there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation, engaged in the business of banking; also "a tax of one twenty-fourth of one per centum each month upon the capital of any bank, association, company, corporation, and on the capital employed by any person in the business of banking beyond the average amount invested in United States bonds: *Provided*, That the words 'capital employed' shall not include money borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in the said bank, association or firm." 13 Stat. 277, c. 173, § 110; 14 Stat. 137, 146, c. 184, § 9; 17 Stat. 256, c. 315, § 37; 18 Stat. 311, c. 36, § 19.

That the plaintiff, during the period covered by the assessment against him, employed a capital in his business is beyond dispute; for he distinctly states that the capital used by him in his business ranged from $30,000 to $50,000. Upon that basis he made his returns for taxation. But did he, during that period, have a place of business where stocks were received for sale? If he did, then, by the very terms of the

statute, he was a banker under the definition given in section 3407.

It is contended by him that he was only a stock broker, and, within the true meaning of section 3407, did not have "a place of business," nor "receive" stocks for sale. That he had a room or place, indicated by a sign over the door, where his mail matter was received, and where he was, or could be, met by his clients, and where the latter could deliver stocks to be sold by him, or under his supervision, and that he bought and sold stocks for his customers, is abundantly shown by his own testimony.[1] Still, he insists that when stocks were delivered

---

[1] His testimony occupies many pages of the record. The substance of what he said is shown in the following extracts. On his examination in chief he stated: "My place of business is 33 New Street; during the years 1881 and 1882 and 1883 my business was that of a stock broker; according to my understanding, that is a well-defined avocation; it consisted in buying and selling stocks for customers, and carrying them by borrowing money for customers to carry those stocks on; that occupation was carried on by a great many members of the New York Stock Exchange; there are some bankers in the Stock Exchange, but the business carried on there, as a rule, is that of stock brokers."

Upon cross-examination he stated: "I have a sign on the door which has been there four or five years. It reads, 'David Richmond, Stock Broker.' If a customer came into my office to buy stock he would give me an order and hand me a margin to protect me against loss for the purchase; then the next day, when the stock was delivered to me, I would borrow money to pay for it. This is a regular purchase; sometimes customers pay in full for stock. We seldom book orders; we buy stock on the stock board, sometimes receiving the margin and sometimes not. We receive certificates purchased on the stock board, as a rule, next day. It is sent to my office by the seller, and he receives a check in payment, drawn on the Leather Manufacturers' Bank against a deposit I keep there; that deposit is, as a rule, my own money. Q. Your capital? A. A portion of it; not always. Q. How much capital did you have in your business at that time? A. I have forgotten; it was nothing like $300,000: it ranged from $30,000 to $50,000. It was on that capital that I made the return for taxation. I had in business that amount. It was on that return that I was taxed one twenty-fourth of one per cent per month, and it is to recover back that tax that this suit is brought. . . . Q. Do you keep an open account with your customers? A. I do. Q. On your ledger? A. Yes. Q. Do you credit him with the amount of the margin which you receive? A. We credit him with the amount; if it is money, he receives credit for it; if it is securities, he receives credit, of course, for that. Q. Do you charge him with the cost

to him at this place of business for sale they were not "received" by him "for sale," within the meaning of the statute. We cannot assent to this view.

---

price of the stock purchased pursuant to his order? A. I do. Q. And do you charge him with the interest on the difference between the cost price of the stocks and the amount of his margin? A. I do. Q. How is your difference settled? A. He receives interest on the amount placed to his credit, and is charged interest on the amount placed to his debit, which is practically the same. You asked me the way in which it is done, I understand? Q. Then, instead of deducting the lesser number from the larger number, and then calculating the interest charge to be made to the customer, you make two calculations, debiting one and crediting the other? A. Exactly so. Q. And that interest is charged against him up to what time? A. No stated time; it depends upon whether the stock is sold or not, or whether it is paid for afterwards by him — taken up. Q. It is charged to him up to the time that he either closes out his account or — A. Settled in full. Q. That may be done either by selling out the stock which you hold or by paying the amount charged against him on your books as the purchase money? A. Yes." "Q. Now, you have described the manner of doing business on orders to purchase; won't you please tell the jury about the manner of doing business when you receive orders to sell? A. Sometimes a customer may write us from the country to sell stock, and then he says he will forward it by mail when sold; another time he may inclose it with the order; another time a customer will come into the office with a certificate and say 'sell this:' another time he may come in and say, 'sell this and I will deliver the certificate to-morrow,' and so on. I sell the stock, and when the time to deliver it to the broker or buyer arrives I deliver it and receive his check for it. If the seller wants the money I give it to him, If he does not want it he may leave the money there over night, or two or three days, but that would be only incidental to the business. It isn't my line of business to receive money in that way; it is an incident of the business. When it is left with me the customer in the country does not make a draft on me; I almost invariably send him my own check. Q. How as to the sale of the stock? A customer comes in with a certificate and asks you to sell it; describe the entire transaction. A. I go up to the board and sell it; I pay him sometimes that day, sometimes the next, but very rarely indeed when he delivers the certificate of stock. I keep the certificate in the office until I go to the board to sell stock; sometimes until the next day; sometimes I borrow money on it over night. I keep it in the drawer, or in the safe, on in the desk; it is paid for with money in the bank to my credit by my personal check. In the case of the country customer who sends an order to sell, stating that he will forward the certificate of stock by mail, or as soon as required, I sell the stock and notify him of the sale; then probably he sends me the certificate. I don't send him the money for that certificate before I receive it. This order to sell would probably be sent to my place of business. In the

In support of this position the plaintiff cites *Warren* v. *Shook*, 91 U. S. 704, and *Selden* v. *Equitable Trust Co.*, 94 U. S. 419. In the first of those cases the question was whether a firm, holding a special license as bankers, was liable to the tax imposed by section 99 of the act of June 30, 1864. 13 Stat. 273. That statute imposed a tax of one twentieth of one per centum upon the par value of stock and bonds sold by "brokers and bankers doing business as brokers." It

---

case of a 'short sale' it was just the reverse of the purchase business; I sell it, and when the time comes for delivery I borrow the stock of another broker. Q. You tell your broker friend or business acquaintance that you want to get one hundred shares of Lake Shore, for instance? A. I would tell a friend that I wanted to borrow one hundred shares of Lake Shore, and he says, 'All right; you can have it.' He sends it down to my office in a short time, and I pay him for it; I pay him the market price with money to my credit in the bank; the customer who has ordered the short sale may have sent me money or may not have; he may have given me stock as margin or other security. Q. He is credited on that amount of margin, is he? A. He is when we get it. Q. On your books is he debited with anything? A. He is not. Then he gets a credit for the amount of stock that is sold, the amount of money received for it, and we charge him for whatever is paid for the use of the stock; the general custom is to charge for the use of the stock. Stocks might be running flat; he is credited with the interest on his margin; the transaction might be closed at any time by the purchase of the stock for and on account of the customer. On our books he would be charged with the cost of the stock as bought on the board, with commission. Our letting the account stand would depend altogether on the price the stock was bought at and the price it was sold at. Q. Assuming that there had been an advance in the stock market pending the borrowing and the sale pursuant to the original order, and the purchase made for the purpose of closing the transaction, how would the books stand? A. The customer might have bought stock at another office, and bring it in. You cannot figure on those things, except on the actual facts at the time. Suppose, for instance, the stocks were sold for ninety and bought back at ninety-five, that would show a loss of about $525, on the supposition that nothing was paid for the use of the stock. His margin would then be encroached upon by just the amount of the difference between the original price sold for and the price paid by us on closing it and the commissions and whatever we had to pay for the use of the stock. If, on the contrary, there had been a profit to the customer, we would be in his debt then the amount of the margin deposited and the amount of his profit; we would have that to his credit; almost invariably he would be given a check for it; if he saw fit to make his draft upon us, that could be done, of course, but they did not do it; if he did make his draft I should honor it."

was held that Congress intended to impose the duty prescribed by section 99 upon bankers doing business as brokers, although a person, firm or company, having a license as a banker, might be exempted by subdivision nine of section 79 of the act of 1864, as amended by the act of March 3, 1865, 13 Stat. 472, from paying the special tax imposed upon brokers. Nothing more is decided in that case.

In *Selden* v. *Equitable Trust Co.*, the question was whether corporations whose business was to invest their own capital — not that of others — in bonds secured by mortgage upon real estate, and to negotiate, sell and guarantee such bonds, were banks or bankers within the meaning of section 3407 of the Revised Statutes. It was held that they were not; that Congress did not intend that a person or corporation selling its own property, not that received from other owners for sale, should be classed as a banker or bank for the purposes of taxation. The court, in that case, referred to section 3407 as describing three distinct classes of artificial and natural persons, distinguished by the nature of their business; first, those who have a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order; second, those having a place of business where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes; third, those having a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale. In respect to the third class it was said: "The language of the statute is, 'where' such property is 'received' 'for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills or notes, for discount or for sale. He receives the bonds, bills, or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion or stocks

for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as agent for a principal who is the owner. He is not one who buys and sells on his own account."

This language embraces the present case. The plaintiff was not a broker who, without employing capital of his own, simply negotiated purchases and sales of stocks for others, receiving only the usual commissions for services of that character. In his business of buying and selling stocks for others, he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers, substantially as it would be earned by a bank upon money loaned to its customers. In the parlance of the Stock Exchange, he might be called a stock broker; yet, here were all the conditions, which, under the statute, made the case of a banker, whose capital, employed in his business, was liable to a tax of one twenty-fourth of one per centum each month. It is not a sufficient answer to this view to say that the business of a stock broker is ordinarily distinct from the business of a banker, or that according to the common understanding a stock broker is not a banker. A stock broker may do some of the kinds of business that are usually done by bankers, and many banks and bankers do business which, as a general rule, is only done by stock brokers. Congress did not intend that the question of taxation upon capital employed in the business of banking, should depend upon the mere name given to such business, either by those engaged in it or by others. When the plaintiff admits, as he does, that his business was that of buying and selling stocks for his customers, and that in such business he employed capital, he proves that he was a banker within the statutory definition, and that, within the meaning of section 3408, his capital was employed in the business of banking. He brings himself within the rule that Congress prescribed for determining who, *for the purposes of the taxation in question* — though not necessarily in the commercial sense — were bankers and what was banking business. That

Statement of the Case.

rule is expressed in words that leave no doubt as to what was the intention of Congress. The judgment below gives effect to that intention, and it is

Affirmed.

Mr. Justice Field, with whom concurred Mr. Justice Miller, dissented.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WANGELIN.

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

No. 169. Submitted December 19, 1889. — Decided January 6, 1890.

Under the act of March 3, 1875, c. 137, § 2, one of two corporations sued jointly in a state court for a tort, although pleading severally, cannot remove the case into the Circuit Court of the United States, upon the ground that there is a separable controversy between it and the plaintiff because the other corporation was not in existence at the time of the tort sued for — without alleging and proving that the two corporations were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

The original action was trespass, brought in a court of the State of Illinois on May 10, 1883, by Lucinda Wangelin, a citizen of Illinois, against the Louisville and Nashville Railroad Company, a corporation of Kentucky, and the Southeast and St. Louis Railway Company, a corporation of Illinois, for breaking and entering her close, and tearing up and carrying away a railroad switch, and thereby destroying the connection between a coal mine of the plaintiff and the St. Louis and Southeastern Railway, and injuring the value of the mine, to her damage in the sum of $6000. The defendant corporations, after being duly served with process, severally pleaded not guilty.

The case was removed into the Circuit Court of the United States upon a petition of the Louisville and Nashville Railroad Company, alleging that there was a separate controversy

between it and the plaintiff, which could be fully determined between them; and specifically alleging that the St. Louis and Southeastern Railway Company, an Illinois corporation, built and owned the railway and the switch mentioned in the declaration in 1870, and operated the railway until November 1, 1874; that thenceforth that railway was held and operated by a receiver appointed in a suit to foreclose a mortgage from that company until January 1, 1880; then by the Nashville, Chattanooga and St. Louis Railway Company under a lease from such receiver until May 1, 1880, and by the Louisville and Nashville Railroad Company under an assignment of that lease until January 27, 1881; and on November 16, 1880, was sold under a decree of foreclosure to purchasers for the Southeast and St. Louis Railway Company, and by such purchasers conveyed on January 27, 1881, to that company; that the Southeast and St. Louis Railway Company was incorporated under the law of Illinois on November 12, 1880, and not before; that the supposed trespasses alleged in the declaration were committed, if at at all, in August, 1880; that at that time "the defendant, the Southeast and St. Louis Railway Company, had no corporate or legal existence, and no existence in fact, had no stockholders, officers, agents, employés or servants, and had taken no steps whatever to become a corporation, and was not in any way acting as a corporation or otherwise;" that that company never came into possession of that railway until January 27, 1881, when it entered into a contract with the Louisville and Nashville Railroad Company, under which this company had since operated that railway; and that, at the time of the supposed trespasses, this company was in the sole and exclusive possession of that railway, operating it under the aforesaid assignment of lease.

Annexed to the petition for removal was an affidavit of the vice-president of the Louisville and Nashville Railroad Company to the truth of its allegations.

In the Circuit Court of the United States, the Louisville and Nashville Railroad Company, by leave of the court, filed additional pleas, setting up, among other things, the matters alleged in the petition for removal.

Opinion of the Court.

Upon a motion of the plaintiff to remand the cause to the state court "for reasons apparent upon the face of the record," the court on April 7, 1886, ordered it to be remanded; and on April 9, 1886, the Louisville and Nashville Railroad Company sued out this writ of error.

Mr. J. W. Hamill, for plaintiff in error, cited; *Wood* v. *Davis*, 18 How. 467; *Carneal* v. *Banks*, 10 Wheat. 181; *Browne* v. *Strode*, 5 Cranch, 303; *Boon's Heirs* v. *Chiles*, 8 Pet. 532; *McNutt* v. *Bland*, 2 How. 9; *Walden* v. *Skinner*, 101 U. S. 577, 589; *Arapahoe County* v. *Kansas Pacific Railway Company*, 4 Dillon, 277, 283; *Removal Cases*, 100 U. S. 457; *Bacon* v. *Rives*, 106 U. S. 99; *Hartog* v. *Memory*, 116 U. S. 588, 591; *Morris* v. *Gilmer*, 129 U. S. 315, 329.

Mr. Charles W. Thomas for defendant in error.

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

It often has been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the Circuit Court of the United States, under the act of March 3, 1875, c. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. 471; *Pirie* v. *Tvedt*, 115 U. S. 41; *Sloane* v. *Anderson*, 117 U. S. 275; *Plymouth Co.* v. *Amador & Sacramento Co.*, 118 U. S. 264; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535.

It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner — unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

In *Plymouth Co.* v. *Amador & Sacramento Co.*, above cited, a suit by a canal company against a mining corporation and its agents, for polluting a stream of water belonging to the plaintiff, was held to have been rightly remanded to the state court in which it had been commenced, although the corporation's petition for removal alleged that it was the only real defendant, and that the other defendants were nominal parties only, and were sued for the purpose of preventing the corporation from removing the cause into the Circuit Court of the United States. Chief Justice Waite in delivering judgment said: "It is possible, also, that the company may be guilty and the other defendants not guilty; but the plaintiff in its complaint says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself, but until his defence is made out the case stands against him, and the rights of all must be governed accordingly. Under these circumstances, the averments in the petition, that the defendants were wrongfully made [parties] to avoid a removal can be of no avail in the Circuit Court upon a motion to remand, until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case." 118 U. S. 270, 271.

In *Little* v. *Giles*, 118 U. S. 596, where a bill in equity charged the defendants jointly with having fraudulently deprived the plaintiff of her property, Mr. Justice Bradley delivering the opinion of the court said that one of the defendants "could not, by merely making contrary averments in his petition for removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States Court." 118 U. S. 600, 601.

So in *East Tennessee Railroad* v. *Grayson*, 119 U. S. 240, 244, in a suit in equity against two corporations, the question was whether there was a separable controversy between one of them and the plaintiff which would warrant a removal into the Circuit Court of the United States; and it was said by

Chief Justice Waite, and adjudged by this court, that the allegations of the bill must, for the purposes of that inquiry, be taken as confessed. To the same effect is *Graves* v. *Corbin*, just decided, *ante*, 571, 585.

In the case at bar, the declaration charged two corporations with having jointly trespassed on the plaintiff's land; whether they had done so or not was a question to be decided at the trial; and it is not contended, and could not be, in the face of the decisions already cited, that the record of the state court, as it stood at the time of the filing of the petition for removal, showed a separable controversy between the plaintiff and either defendant.

The argument in support of the jurisdiction of the Federal Court is that the Louisville and Nashville Railroad Company was the only real defendant, because, at the time of the trespass complained of, the other defendant was not in existence. But this was a matter affecting the merits of the case, and one which the plaintiff was entitled to deny and disprove at the trial upon the issues joined by the pleadings. Both the defendants were sued and served as corporations, and pleaded as such, in the state court; and it is not denied that each of them was a corporation when the action was brought. The question whether one of them was in existence as a corporation at the time of the alleged trespass did not affect the question whether it could be now sued, but the question of its liability in the action; in other words, not the jurisdiction, but the merits, to be determined when the case came to trial. It could not be tried and determined in advance, as incidental to a petition by a codefendant to remove the case into the Circuit Court of the United States.

As to the suggestion, made in argument, that the Southeast and St. Louis Railway Company was fraudulently joined as a defendant in the state court for the purpose of depriving the Louisville and Nashville Railroad Company of the right to remove the case into the Circuit Court of the United States, it is enough to say that no fraud was alleged in the petition for removal, or pleaded, or offered to be proved, in the Circuit Court.

Judgment affirmed.

AVERY *v.* CLEARY.

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

No. 162. Argued December 13, 1889. — Decided January 6, 1890.

On the facts, as stated in the opinion of the court, it is *held*, that this suit is one between an assignee in bankruptcy and one claiming an adverse interest touching the property which is the subject of controversy, within the meaning of Rev. Stat. § 5057, prescribing a limitation for the commencement of such an action.

The omission by a bankrupt to put upon his schedules, or the omission by him or by his administrator to disclose to his assignee in bankruptcy the existence of policies of insurance on his life which had been taken out by him, and had, before the bankruptcy, been assigned to a trustee for the benefit of his daughters, does not amount to a fraudulent concealment of the existence of the policies, so as to take an action against the administrator (who was also guardian of the daughters) to recover from him the amount of insurance paid to him as administrator, out of the operation of the limitation prescribed in Rev. Stat. § 5057.

Mere ignorance of the existence of a cause of action by an assignee in bankruptcy does not remove the bar against such action prescribed by a statute of limitation; but, in order to set aside such bar, within the rule as announced in *Bailey* v. *Glover*, 21 Wall. 342, there must be no laches on the part of the assignee in coming to the knowledge of the fraud which is the foundation of the suit.

In the year 1867, the Connecticut Mutual Life Insurance Company issued three policies of insurance upon the life of Matthias Ellis, numbered respectively 68,428, 68,429 and 68,430, the first two being for $10,000 each, and the last for $5000. Each policy was payable to the executors, administrators and assigns of the assured, upon proof of his death.

On the 19th of May, 1877, the assured, in writing, transferred and assigned these policies, and all profits, dividends, non-forfeiture policies, money or other property that might arise from or be paid for or on account of them, to E. Rollins Morse, in trust, to pay the income, profits, or proceeds thereof to his two daughters, Helena and Marie. This assignment was lodged with the insurance company, though it does not clearly appear by whom, nor when, except that it must have been prior to March 1, 1879.

Statement of the Case.

Ellis filed, July 3, 1878, in the District Court of the United States for the District of Kentucky, his petition in bankruptcy, and, having been adjudged a bankrupt, his estate was transferred by the register to Horace W. Bates, who acted as assignee until May, 1882. He was succeeded by the present defendant in error.

The schedules in bankruptcy made no mention of the above policies of insurance.

On the 1st day of March, 1879, policy 68,430 was surrendered to the company for the sum of $1054, which amount was applied in payment as well of the premiums due in that year on policies 68,428 and 68,429 as of future premiums, in cancellation of premium note or credit, and in discharge of the accrued interest on that note. The receipt showing the details of this transaction was signed by Ellis, and by Morse as trustee.

The bankrupt died November 21, 1879, and on the 31st of December in the same year the company paid to his administrator, the plaintiff in error, (he being also the guardian of the children of the assured,) the sum of $9390.43, the proceeds of policy 68,428, and $258.21 the balance of the surrender value of policy 68,430.

The present action was brought September 30, 1882, by the assignee in bankruptcy to recover from Ellis' administrator the sums so received by the latter. It proceeds upon the ground that the policies constituted part of the bankrupt's estate, and passed to his assignee. The declaration alleges that the existence of the policies was concealed and withheld from the assignee, and remained in Ellis' possession and control until his death, when they were taken possession of by the defendant, in his capacity as administrator, except that policy No. 68,430 had been surrendered by Ellis, on or about March 2, 1879; that the assignee in bankruptcy had no knowledge or information concerning the policies until shortly before the commencement of this suit, "the same being concealed by said Ellis in his lifetime, and since his death by his administrator; and that immediately upon being informed of the existence of said property he demanded the same or the proceeds thereof from the defendant."

Argument for Defendant in Error.

The answer puts in issue the material allegations of the declaration, and pleads specially that the cause of action did not accrue to the assignee, nor against the defendant as administrator, within two years before the suing out of the plaintiff's writ.

The court refused to grant any of the defendant's requests for instructions, including one based upon the statute of limitations, and instructed the jury that the plaintiff was entitled to recover the two sums claimed by him, with interest on each from the date of the writ. A verdict was thereupon returned in favor of the plaintiff for the sum of $11,539.56, upon which judgment was rendered.

Mr. Joshua D. Ball (with whom was *Mr. Edward Avery* on the brief) for plaintiff in error.

Mr. Eugene M. Johnson (with whom was *Mr. Nathan Morse* on the brief) for defendant in error.

The third error assigned is: "That the court should have ruled that this action was barred by the provisions of § 5057 of the Revised Statutes of the United States (being the limitation of two years contained in the bankrupt law of the United States,) unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant to disclose to Bates, the assignee, the facts, would not amount to a fraudulent concealment." The court was right in refusing to give this ruling.

Section 5057 of the Revised Statutes of the United States provides that no suit at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a *person claiming an adverse interest* touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against said assignee. It has been expressly held that this section has no application to a suit against the bankrupt. *Clark* v. *Clark*, 17 How. 315; *Phelps* v. *McDonald*, 99 U. S. 298; *In re Conant*, 5 Blatchford, 54;

French v. *Merrill*, 132 Mass. 525; *Minot* v. *Tappan*, 127 Mass. 333.

Nor does it affect the right of the assignee to demand and receive from the bankrupt that which belongs to him by virtue of the assignment. The administrator takes no greater right in the property than the bankrupt had at his death; his duty was to deliver it to the assignee; he is not "a claimant other than the bankrupt," in whose favor the statute runs.

The fourth assignment of error is: "That the court should have ruled that mere ignorance on the part of the assignee in bankruptcy of the cause of action would not take the case out of the statute of limitations." Whereas the court refused so to rule. This ruling was rightly refused by the court.

The evidence in the case showed that the policies were omitted from the schedules. This was a concealment of the property by the bankrupt. *Re Goodridge*, 2 Nat. Bank. Reg. (Quarto ed.) 105; *Re Rathbone*, 2 Nat. Bank. Reg. (Quarto ed.) 89; *Re Hussman*, 2 Nat. Bank. Reg. (Quarto ed.) 140.

The evidence shows not a case of mere ignorance on the part of the assignee in bankruptcy, but a fraudulent concealment of property by the bankrupt.

The instruction asked was not called for by the facts of the case. *Dwyer* v. *Dunbar*, 5 Wall. 318.

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

It is provided by section 5057 of the Revised Statutes of the United States that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." 14 Stat. 518, c. 176, § 2.

The court below was asked to rule that the action was

barred by this section, "unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant to disclose to Bates, the assignee, the facts, would not amount to a fraudulent concealment. It was also asked to rule that mere ignorance upon the part of the assignee of the cause of action would not take the case out of the statute of limitations. If these instructions, or either of them, ought to have been given, the judgment must be reversed.

The first question to be examined is whether this is a suit "between an assignee in bankruptcy and a person claiming an *adverse* interest." It is contended that section 5057 has no application to a suit against a bankrupt, and, consequently, none to a suit against his administrator, who takes no greater right in property transferable to or vested in the assignee, than the bankrupt had at his death. Without stopping to examine the authorities bearing upon this proposition, it is clear that the rule contended for ought not to control the present case. More than a year prior to the bankruptcy of Ellis he had, by written assignment, transferred these policies to Morse, in trust to pay the income, profits, or proceeds thereof to the two infant daughters of the assured. That instrument was delivered to the insurance company many months before the death of the assured. This is manifest from the receipt taken by the company on the first of March, 1879, and which was signed by the assured and by Morse, as trustee. The company must have been aware at that time of the assignment. As it does not appear on what day the written transfer to Morse, for the benefit of the daughters of the assured, was delivered to the company, it may be argued that there is an entire absence of proof showing that Ellis had parted with his interest in the policies prior to his bankruptcy. Still, the daughters of the assured must be held as claiming an interest in the policies, adverse to the assignee in bankruptcy, at least from the time the written transfer to Morse, as their trustee, was lodged with the insurance company. That must have occurred as early as March 1, 1879, more than three years prior to the commencement of this suit.

This conclusion is not at all affected by the fact that Morse had no recollection, when he testified in this case, of ever having had in his possession the written transfer to him of May 19, 1877. His want of recollection cannot outweigh the fact that on the first of March, 1879, as trustee for the daughters of Ellis, he co-operated with the latter in surrendering policy 68,430, and in applying the amount allowed on account of such surrender, to the payment, among other things, of the premiums due and to become due on the other two policies. It is hardly to be supposed that he would have assumed to act as trustee, in matters of such importance, without knowing by whom, and for whose benefit, he was made such trustee. Besides, the rights of the daughters, under the above written transfer, did not depend upon his formal acceptance of the trust imposed upon him. Those rights would have been protected by a court of equity, even if he had declined to act as trustee.

Nor is it a material circumstance that Morse, after the death of Ellis, stated, in his letter to the insurance company of December 29, 1879, that he could not "find" any assignment of policies 68,428 and 68,429, and did not claim any interest in them. Neither his inability to find the assignment under which he had acted, nor his disclaimer of an interest in the policies, could affect the rights of Ellis' daughters. Further, it is quite manifest that this letter was written merely to facilitate the collection of the proceeds of the policies by the administrator, who was also the guardian of the infant children of the assured. Although the present suit is against the administrator, the latter, in respect to the policies in question, really represents his wards, to whom, so far as we can see from the present record, he must account for the moneys collected from the insurance company.

For the reasons stated, we are of opinion that within the meaning of section 5057 this is a suit between the assignee in bankruptcy and one claiming an adverse interest. It is, therefore, barred by limitation, unless it can be brought within the rule announced in *Bailey* v. *Glover*, 21 Wall. 342, 349. In that case the court, construing section 5057, said: "We hold

that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." See also *Rosenthal* v. *Walker*, 111 U. S. 185; *Traer* v. *Clews*, 115 U. S. 528.

The ground upon which the plaintiff claims exemption from the limitation of two years is that the schedules in bankruptcy omitted all mention of the policies in question, and that the fact that the policies existed was "concealed and withheld" by the bankrupt in his lifetime, and, since his death, by his administrator.

If it be assumed that Ellis had not, prior to his bankruptcy, delivered the assignment of May 19, 1877, and that his interests and rights in these policies were transferable to his assignee, the mere fact that he omitted any mention of the policies in his schedules in bankruptcy, and that neither he nor his administrator gave information of them to the assignee, would not establish fraud within the meaning of the rule announced in *Bailey* v. *Glover*. The omission from the schedules of any reference to the policies, and the failure to call the attention of the assignee to them, may have been caused by an honest belief, upon the part of Ellis, that they belonged to his children, or were not such property as the law required to be surrendered to the assignee; and, therefore, he lodged the assignment to Morse — possibly after his bankruptcy — with the insurance company. Be this as it may, the bankrupt's children are to be regarded as asserting an interest in the policies, at least from March 1, 1879, when the receipt of that date was executed. Fraud is not imputable to them, nor to the guardian, simply because neither they nor he informed the assignee in bankruptcy of their claims. Their silence, when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee, did not amount to concealment. They did nothing to prevent him from obtaining full information in reference to

the assets of the bankrupt. The record discloses no circumstance tending to prove that they sought to keep their claim from the knowledge of the assignee.

On the contrary, it appears in proof that Bates, the first assignee, was well acquainted with Ellis, and knew that, for many years prior to the bankruptcy, he had carried a large amount of insurance upon his life. It is true he says that he got the impression from conversation with Ellis that many of those policies had lapsed because of the latter's inability to pay the premiums. But he admitted that about the time of the bankruptcy he "learned indirectly that an assignment of some policy or policies had been made to E. Rollins Morse of Boston." He stated that his understanding with said Ellis was, "after learning of the assignment to E. Rollins Morse, that such policy or policies had some time previously passed from his control and were not a part of his assets in bankruptcy; that from such information as he, witness, received, he concluded there was no value to the creditors in such policy or policies." He acted upon this belief as to the situation, and forbore to make such inquiries as due diligence required. He did not cease to be assignee until May, 1882, nearly four years after his appointment, and more than three years after the written transfer to Morse, in trust for Ellis' daughters, had been lodged with the insurance company. If he did not know of such transfer, he could easily have ascertained what policies upon the life of the assured were in force at the time of the adjudication in bankruptcy. It is fundamental, in the rule announced in *Bailey* v. *Glover*, that there must not be negligence or laches upon the part of the assignee in bankruptcy in coming to the knowledge of the fraud which is the foundation of his suit, and which is relied upon to defeat the limitation of two years. A rigid enforcement of that condition is essential to meet the object of the statute of limitation. That object was to secure a prompt determination of all questions arising in bankruptcy proceedings and a speedy distribution of the assets of bankrupts among their creditors. A critical examination of the evidence leaves no room to doubt that, apart from any question as to concealment upon the part

Counsel for Plaintiff in Error.

of the bankrupt or of his administrator, the assignee did not show such diligence as entitles him to exemption from the limitation of two years prescribed by the statute. The court below would not have erred if it had given a peremptory instruction to find for the defendant upon the issue as to limitation.

The case presents another question raised by the defendant's requests for instructions, namely, whether, in view of the peculiar nature of contracts of life insurance, any interest which the bankrupt had in these policies — assuming that he had not, at the time of his bankruptcy, effectively transferred them for the benefit of his daughters — passed to his assignee. The defendant contended in the court below, and contends here, for the negative of this proposition, and insists that if any interest passed to the assignee, it was only such as was represented by the cash value of the policies at the time of the bankruptcy. We do not find it necessary to consider these questions, as what has been said will probably result in a disposition of the whole case under the issue as to the statute of limitations.

The judgment is reversed, and the cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

CLEARY *v.* ELLIS FOUNDRY COMPANY.

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

No. 160. Argued December 13, 1889. — Decided January 6, 1890.

Avery v. *Cleary*, *ante*, 604, affirmed; but as the defendant did not prosecute a writ of error, the judgment below is affirmed on the ground that no error was committed to the plaintiff's prejudice.

THE case is stated in the opinion.

Mr. Eugene M. Johnson (with whom was *Mr. Nathan Morse* on the brief) for plaintiff in error.

Mr. Joshua D. Ball for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The statement of facts made in *Avery* v. *Cleary*, just decided, is, in the main, applicable to the present case. The additional facts necessary to be stated are these:

On the 21st of May, 1879, Ellis made a written assignment to the Ellis Foundry Company, a Massachusetts corporation, of policy 68,429, and all his rights under it, with all moneys payable or which might be payable thereon. That corporation, at the same time, gave a writing to Ellis showing that it received the above policy as collateral security for the payment of a debt due to it from Ellis of $5540.14 within one year from March 1, 1879, with interest, and of all other sums of money that he might owe that company within four years thereafter. Out of the proceeds of this policy collected by Avery as administrator of Ellis, the Foundry Company received, December 31, 1879, the sum of $5901.64, the amount which Ellis, at his death, owed that corporation.

The present action was brought September 30, 1882, to recover from the company the entire amount received by it on policy 68,429. It proceeds upon the same grounds substantially as those set forth in the other suit. The defendant denied that it had collected such proceeds, and, besides controverting the material allegations of the declaration, pleaded in bar of the action the statute of limitations of two years.

At the close of the evidence it claimed the right to go to the jury, and presented certain prayers for instructions which the court declined to give. This claim was denied, and the court ruled, as matter of law, that upon the evidence the plaintiff was entitled to recover from the defendant only the amount the insurance company would have paid the assignee in bankruptcy as the cash surrender value of the policy at the date of the filing of the petition in bankruptcy, namely, July 3, 1878. It being agreed that such value was $1200, the jury were instructed to return a verdict in favor of the plaintiff for that amount, with interest from December

31, 1879, the date of the payment by Ellis' administrator to the defendant of the sum of $5901.64. To that instruction the plaintiff excepted, but did not present any prayers for instructions. A verdict was returned in conformity with the direction of the court, and judgment was entered thereon.

For the reasons given in the opinion in *Avery* v. *Cleary*, the peremptory instruction to the jury to find a verdict in favor of the plaintiff for the surrender value of policy 68,429 was erroneous. But as the defendant did not prosecute a writ of error, the judgment below must be affirmed, upon the ground that no error was committed to the prejudice of the plaintiff. His action was barred by limitation; for, there can be no doubt that this suit is between the assignee and a corporation claiming an adverse interest.

Judgment affirmed.

ROBERTSON *v.* EDELHOFF.

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

No. 170. Argued December 19, 20, 1889. — Decided January 6, 1890.

Ribbons, composed of silk and cotton, in which silk is the component material of chief value, used exclusively as trimmings for ornamenting hats and bonnets, and having a commercial value only for that purpose, are liable to only 20 per cent duty, under the following provision in "Schedule N. — Sundries," in § 2502 of Title 33 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 512: "Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow-sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem;" and are not liable to 50 per cent duty, under the following clause in "Schedule L. — Silk and Silk Goods," in the same section, Id. 510: "All goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem."

The present case is controlled by that of *Hartranft* v. *Langfeld*, 125 U. S. 128. It was proper for the Circuit Court to direct a verdict for the plaintiff.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Joseph H. Choate (with whom were *Mr. Henry Edwin Tremain* and *Mr. Mason W. Tyler* on the brief) for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought in the Superior Court of the city of New York, by Charles August Edelhoff and Emil Rinke against William H. Robertson, collector of the port of New York, on the 25th of March, 1884, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover an excess of duties paid under protest on goods entered at the custom house on the 20th of August, 1883, the duty having been paid on the same day.

The case was tried by Judge Coxe and a jury, on April 12th, 1886. The articles in dispute were ribbons, composed of silk and cotton, in which silk was the component material of chief value. There was due protest and appeal. The collector assessed a duty of 50 per cent ad valorem upon the goods, under the following clause in "Schedule L. — Silk and Silk Goods," in section 2502 of Title 33 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 510: "All goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." The plaintiffs claimed in their protest and upon the trial that the goods were liable to only 20 per cent duty, under the following provision in "Schedule N. — Sundries," of the same title, 22 Stat. 512: "Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow-sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem."

On the trial, the undisputed evidence was that the articles in question were used exclusively as trimmings for ornamenting hats and bonnets, and had a commercial value only for that purpose. The defendant offered no evidence on that subject in contradiction of that put in by the plaintiffs. At the close of the testimony, the defendant asked the court to direct a verdict in his favor, upon the ground that the foregoing provision in Schedule N, in regard to "Hats, and so forth, materials for," should be construed as embracing only articles made of a substance or material not elsewhere specially enumerated or provided for in the act of 1883, and articles made only of straw, chip, grass, palm-leaf, willow, hair, whalebone, or some other like substance or material; but this request was denied by the court, and the defendant excepted. The court then, at the request of the plaintiffs, directed the jury to find a verdict in their favor, for the excess of duties collected on the hat-ribbons or hat-bands, and upon certain charges, commissions and coverings, in regard to which there was no dispute; and the defendant excepted to such action of the court. The jury found a verdict accordingly for the plaintiffs, on which a judgment was entered in their favor, to review which the defendant has brought a writ of error.

That the articles in question, silk being their component material of chief value, were liable to a duty of 50 per cent ad valorem, as "goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value," if they were not specially enumerated or provided for in the act of 1883, is plain. The question, and the only question, therefore, is whether they come under the clause, "Hats, and so forth, materials for:" as being "trimmings," "used for making or ornamenting hats, bonnets and hoods," composed of any of the seven substances specifically named, "or any other substance or material, not specially enumerated or provided for in this act," and were thus liable to a duty of only 20 per cent ad valorem.

It is to be especially noted that the act of 1883 does not, in Schedule L, in regard to silk and silk goods, or elsewhere,

impose any duty upon silk ribbons by that name, or upon ribbons made of silk or of which silk is the component material of chief value, otherwise than as they may be covered by the clause above quoted in regard to 50 per cent duty.

We think it perfectly clear that the words "composed of," in the 20 per cent clause above quoted, relate to the eight articles previously specifically mentioned in that clause, and not to the words "hats, bonnets and hoods;" also, that the words in the same clause, "not specially enumerated or provided for in this act," relate to the same eight articles, and not to the words "hats, bonnets and hoods," or to the words "any other substance or material." The clause is to be read as if the word "and" were inserted before the word "composed" and again after the word "material," so that the clause, as far as the question involved in the present case is concerned, would read: "Trimmings used for ornamenting hats, bonnets and hoods, *and* composed of" any of the seven articles specially named, "or any other substance or material, *and* not specially enumerated or provided for in this act."

We cannot agree with the contention of the defendant that the words "any other substance or material" are to be read as if they were "any other *like* substance or material;" because, while "straw, chip, grass, palm-leaf, willow" are vegetable substances, "hair" and "whalebone" are animal substances. There is no identity of genus among the two descriptions of articles specifically mentioned; and we see no warrant for interpolating the word "like," and applying it distributively to each of the two classes of substances specifically mentioned. The contention that, in the presence of the words "any other substance or material," the naming of seven substances specifically is surplusage and without meaning, because the words "any other substance or material" are adequate to cover those seven substances, seems to us without force in view of the well-known tautological phraseology of provisions in tariff acts.

There is a clause in Schedule N of section 2502 of Title 33 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 511, which it is proper to consider in connection

with the clause in regard to "Hats, and so forth, materials for:" and which reads as follows: "Bonnets, hats and hoods for men, women and children, composed of chip, grass, palm-leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem."

It will conduce to the solution of the question in hand to consider prior legislation on the subject.

In section 22 of the act of March 2, 1861, c. 68, 12 Stat. 192, a duty of 30 per cent ad valorem was imposed on "flats, braids, plaits, sparterre and willow squares, used for making hats and bonnets," and on "hats and bonnets for men, women and children, composed of straw, chip, grass, palm-leaf, willow, or any other vegetable substance, or of hair, whalebone, or other material, not otherwise provided for;" and by section 16 of the same act, (p. 186,) the following duties were imposed on silk and silk articles: "On silk in the gum, not more advanced in manufacture than singles, tram, and thrown or organzine, fifteen per centum ad valorem; on all silks valued at not over one dollar per square yard, twenty per centum ad valorem; on all silks valued at over one dollar per square yard, thirty per centum ad valorem; on all silk velvets, or velvets of which silk is the component material of chief value, valued at three dollars per square yard, or under, twenty-five per centum ad valorem; valued at over three dollars per square yard, thirty per centum ad valorem; on floss silks, twenty per centum ad valorem; on silk ribbons, galloons, braids, fringes, laces, tassels, buttons, button cloths, trimmings, and on silk twist, twist composed of mohair and silk, sewing silk in the gum or purified, and all other manufactures of silk, or of which silk shall be the component material of chief value, not otherwise provided for, thirty per centum ad valorem." By this provision, a duty of 30 per cent was imposed on "silk ribbons" by name. No question of the kind before us could have arisen under that statute.

In section 8 of the act of July 14, 1862, c. 163, 12 Stat. 551, are found the following clauses in regard to duties: "On bonnets, hats and hoods, for men, women and children, composed

of straw, chip, grass, palm-leaf, willow, or any other vegetable substance, or of silk, hair, whalebone, or other material, not otherwise provided for, forty per centum ad valorem; On braids, plaits, flats, laces, trimmings, sparterre, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, or any other vegetable substance, or of hair, whalebone, or other material, not otherwise provided for, thirty per centum ad valorem." There was no provision in that act in regard to silk, or silks, or silk ribbons, other than the one in the first of the two clauses above quoted, in regard to bonnets, hats and hoods composed of silk. So the provision of the act of 1861, in regard to silk, silks and silk ribbons, remained in force, and the provision in the second clause above quoted, in regard to trimmings, could not apply to silk ribbons, because they were "otherwise provided for" in the act of 1861; though the question would not have been material, because silk ribbons were, under the act of 1861, subject to 30 per cent duty, and the trimmings were, under the act of 1862, subject to the same duty.

By the act of June 30, 1864, 13 Stat. 202, duties on imports were increased, and by section 8 of that act, (p. 210,) from July 1, 1864, in lieu of existing duties, the following were imposed on silk and articles of silk: "On spun silk for filling in skeins or cops, twenty-five per centum ad valorem. On silk in the gum not more advanced than singles, tram, and thrown or organzine, thirty-five per centum ad valorem. On floss silks, thirty-five per centum ad valorem. On sewing-silk in the gum or purified, forty per centum ad valorem. On all dress and piece silks, ribbons and silk velvets, or velvets of which silk is the component material of chief value, sixty per centum ad valorem. On silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, sixty per centum ad valorem. On all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum ad

valorem." Thus the duty on silk ribbons by name was advanced from 30 per cent, as in the act of 1861, to 60 per cent.

No subsequent legislation until the Revised Statutes of June 22, 1874, affected the duty on silk ribbons. In "Schedule M. — Sundries," of section 2504 of the Revised Statutes, 2d ed. p. 474, were contained the following provisions: "Bonnets, hats and hoods, for men, women and children, composed of chip, grass, palm-leaf, willow, or any other vegetable substance, hair, whalebone, or other material, not otherwise provided for, forty per centum ad valorem; composed of straw, forty per centum ad valorem;" and p. 476: "Hats, etc., materials for. — Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, or any other vegetable substance, or of hair, whalebone, or other material, not otherwise provided for, thirty per centum ad valorem;" and in "Schedule H. — Silks and Silk Goods," p. 469: "Silk in the gum not more advanced than singles, tram, and thrown or organzine, thirty-five per centum ad valorem. Spun silk for filling in skeins or cops: thirty-five per centum ad valorem. Floss silks, thirty-five per centum ad valorem. Sewing silk in the gum or purified, forty per centum ad valorem. Silk twist, twist composed of mohair and silk, forty per centum ad valorem. Dress and piece silks, ribbons and silk velvets, or velvets of which silk is the component material of chief value, sixty per centum ad valorem. Silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, and ready-made clothing of silk, or of which silk is a component material of chief value, sixty per centum ad valorem. Buttons and ornaments for dresses and outside garments made of silk, or of which silk is the component material of chief value, and containing no wool, worsted, or goat's hair, fifty per centum ad valorem. Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum ad valorem."

Thus, in the clause in regard to "Bonnets, hats and hoods," the word "silk," found in the act of 1862, was omitted in the Revised Statutes; and silk ribbons, or ribbons of which silk was the component material of chief value, were made by the Revised Statutes dutiable *eo nomine* at 60 per cent, as in the act of 1864.

Then came the act of February 8, 1875, 18 Stat. 307, by the first section of which the following provision was made in regard to duties on silk and articles of silk, in lieu of then existing duties: "On spun silk, for filling, in skeins or cops, thirty-five per centum ad valorem; on silk in the gum, not more advanced than singles, tram, and thrown or organzine, thirty-five per centum ad valorem; on floss silks, thirty-five per centum ad valorem; on sewing silk, in the gum or purified, forty per centum ad valorem; on lastings, mohair cloth, silk twist, or other manufactures of cloth, woven or made in patterns of such size, shape, or form, or cut in such manner as to be fit for buttons exclusively, ten per centum ad valorem; on all goods, wares and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws, or of their commercial designation, sixty per centum ad valorem: *Provided*, That this act shall not apply to goods, wares, or merchandise which have, as a component material thereof, twenty-five per centum or over in value of cotton, flax, wool, or worsted."

By that act, ribbons of silk, or ribbons in which silk was the component material of chief value, were not made dutiable *eo nomine*, but were dutiable at 60 per cent, as "goods, wares and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value." They were not otherwise provided for in the act of 1875. This act superseded all prior statutes in regard to goods made of silk, or of which silk was the component material of chief value. Of course, under the act of 1875, the goods in question here would have been dutiable at 60 per cent.

Then came the act of 1883, the three provisions in which, in regard to "Bonnets, hats and hoods," "Hats, and so forth,

materials for:" and "Silk and silk goods," have been before quoted. The changes made in that act from the Revised Statutes of 1874, in regard to "Bonnets, hats and hoods," were these: Those articles were qualified with the words "not specially enumerated or provided for in this act," and the duty was reduced from 40 per cent to 30 per cent. The changes made in regard to "Hats, and so forth, materials for:" were these: The words, "willow, or any other vegetable substance, or of hair, whalebone or other material not otherwise provided for," were changed to the words, "willow, hair, whalebone or any other substance or material, not specially enumerated or provided for in this act," and the rate of duty was reduced from 30 per cent to 20 per cent. Changes were also made in the schedule in regard to "Silks and silk goods." The duty of 60 per cent on silk ribbons *eo nomine* was omitted, and also the like duty on silk trimmings, or of which silk was the component material of chief value; and the duty of 50 per cent on "Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," was changed to a like duty on "All goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk or of which silk is the component material of chief value."

Section 6 of the act of March 3, 1883, provides that, on and after the 1st of July, 1883, "the following sections," being twenty-three sections, one of which is section 2502, with Schedules A to N, "shall constitute and be a substitute for Title thirty-three of the Revised Statutes of the United States," thus abolishing all enactments found in the original Title 33, in regard to duties on imports.

It is thus seen that, by the act of 1883, no duty is imposed upon silk ribbons by name. Under the Revised Statutes of 1874 silk ribbons, being charged by name with a duty of 60 per cent, were not charged with a duty of 50 per cent as "manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," because they were otherwise provided for; and they could not have been liable to a duty of 30 per cent as "trimmings . . . used for . . . ornamenting hats, bonnets and hoods," and not

otherwise provided for, because they were otherwise provided for, in Schedule H, as silk ribbons, by name, at 60 per cent. But when we come to the act of 1883, silk ribbons are not therein specifically named, in Schedule L or elsewhere, and are not dutiable at 50 per cent, as silk goods not specially enumerated or provided for in the act of 1883, because in the clause in regard to "Hats, and so forth, materials for:" they are specially enumerated and provided for in that act, as trimmings used for making or ornamenting hats, bonnets and hoods, and composed of some other substance or material than the seven substances specially named, and are not otherwise specially enumerated or provided for in that act, and are therefore dutiable at 20 per cent.

The question, however, is not only clear on principle, on a review of the statutory provisions, but it is disposed of by decisions of this court.

In *Arthur* v. *Zimmerman*, 96 U. S. 124, the articles imported were composed of cotton, and were known commercially as "hat braids." The collector imposed duty upon them under that clause of section 6 of the act of June 30, 1864, 13 Stat. 209, which provided for a duty of 35 per cent on "cotton braids, insertings, lace trimmings or bobbinets, and all other manufactures of cotton." The importers claimed that they were dutiable at only 30 per cent. It appeared that the articles were used exclusively for making and trimming hats and bonnets, and the Circuit Court and this court held them to be dutiable at only 30 per cent, under that clause of section 8 of the act of July 14, 1862, c. 163, 12 Stat. 557, and of Schedule M of section 2504 of the Revised Statutes, (2d ed. p. 476,) which imposed that rate of duty on trimmings used for making or ornamenting hats, bonnets and hoods, and composed of other material than the substances specifically named, and not otherwise provided for.

But the question in regard to goods substantially identical with those in question in the present case was presented to this court and decided by it in the case of *Hartranft* v. *Langfeld*, 125 U. S. 128. The goods in that case were imported into Philadelphia, and entered at the custom house there in

September and October, 1883. The suit was begun on the 28th of February, 1884. It was tried on April 6th, 1886. The writ of error was sued out August 5th, 1886, while the writ of error in the present case was brought September 29th, 1886. The two transcripts of record were filed in this court the same day, October 13, 1886, but the Langfeld case was advanced, on motion, and heard February 15, 1888, while the present case has stood on the docket until reached in its regular order.

The articles in the Langfeld case were velvet ribbons made of silk and cotton, in which silk was the material of chief value. The collector assessed upon them a duty of 50 per cent, under that clause of Schedule L of section 2502 of Title 33 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 510, before quoted, which reads as follows: "All goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." The plaintiffs in the suit claimed, and the jury found, under the instructions of the court, that the duty ought to have been assessed under the paragraph in Schedule N of section 2502 of the same title, providing for "Hats, and so forth, materials for:" above quoted, and that the duty should have been only 20 per cent. The goods in question there were "trimmings," and were used "for making or ornamenting hats, bonnets and hoods." There was no evidence that they were used exclusively for that purpose. The testimony on the part of the plaintiffs tended to show that they were used chiefly for making or ornamenting hats, bonnets and hoods, but that they might also be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. The Circuit Court charged the jury that the use to which the articles were chiefly adapted, and for which they were used, determined their character within the meaning of the statute; and that, if the articles were hat trimmings, chiefly used for making and ornamenting hats, the jury should find a verdict for the plaintiffs, the suit having

been brought by the importers against the collector, to recover the difference between 20 per cent and 50 per cent. The defendant had requested the court to charge the jury that, if the articles were not specially enumerated or provided for, and silk was their component material of chief value, they were dutiable at 50 per cent, under the clause before quoted, and the verdict should be for the defendant; also, that if the jury should find that silk was the component material of chief value in them, and they were not exclusively or specially used for hat trimmings, they were not subject to the 20 per cent duty; also, that if the jury should find that the articles could properly be classified, under the above rules, as liable to 20 per cent duty, and also as liable to 50 per cent duty, they were dutiable at the higher rate, and the verdict should be for the defendant; and also that, unless the jury shall find that the articles were not specially provided for, and were fitted only for use for making or ornamenting hats, their verdict should be for the defendant. The Circuit Court declined to give those instructions, and the defendant excepted.

It appears by the opinion of this court that it was contended here, on the part of the defendant, that the true construction of the statute was not only that the use of the material must be for making or ornamenting hats, bonnets and hoods, but that the material itself must be in some one of the forms named in the clause regarding "Hats, and so forth, materials for." This court, however, held that, under the charge of the court as given, the objection was not well taken that the charge would have authorized a recovery if the goods in question were materials used for making or ornamenting hats, although not coming within the enumeration of the articles so specified. This court further said that the Circuit Court instructed the jury that they must find the goods in question to be "trimmings," chiefly used for making or ornamenting hats, bonnets and hoods, composed of a material not otherwise specially enumerated or provided for. This court also said that velvet ribbons were not specially mentioned as subject to a duty by that name or description; that they were manifestly trimmings, according to the natural meaning of

that word, and because they were used to trim either hats or dresses; and that the real controversy was as to the purpose for which, as "trimmings," they were principally used. As to the request of the defendant to charge the jury that, if they should find that the articles could be classified properly as subject to 20 per cent duty and also as subject to 50 per cent duty, they were liable to duty at the higher rate, under the provision of section 2499 of the Revised Statutes, this court said that the principle of that section was not applicable to the case, because the ribbons were found by the jury to be trimmings chiefly used for making or ornamenting hats; that this brought them within the provision of Schedule N, which fixed the duty at 20 per cent; and that, being thus specially provided for, they were excluded from the operation of all other provisions. On these views, this court affirmed the judgment of the Circuit Court.

Therefore, in addition to the conclusion which results from considering the history of the legislation on the points involved, we are of opinion that the decision in the case of *Hartranft* v. *Langfeld* controls this case, and that it was proper for the Circuit Court to direct a verdict for the plaintiffs. Such practice has been often sanctioned by this court. There was no question of fact for the jury, and the defendant did not ask to go to the jury. *Bevans* v. *United States*, 13 Wall. 56; *Walbrun* v. *Babbitt*, 16 Wall. 577; *Hendrick* v. *Lindsay*, 93 U. S. 143; *Arthur* v. *Zimmerman*, 96 U. S. 124; *Arthur* v. *Morgan*, 112 U. S. 495; *Anderson County* v. *Beal*, 113 U. S. 227, 242; *Marshall* v. *Hubbard*, 117 U. S. 419; *North Pennsylvania Railroad* v. *Commercial Bank*, 123 U. S. 727, 733.

Judgment affirmed.

PATRICK *v.* GRAHAM.

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

No. 152. Argued December 10, 1889. — Decided January 6, 1890.

Where a case has gone to a hearing, testimony been submitted to the jury under objection but without stating any reason for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state for the first time a reason for that objection which would make it good.

In an action to recover damages for the taking of ore from a mine by the proprietor of an adjoining mine, who had broken in, a witness for defendant was asked whether he had a model of the mine, but was not asked whether it was correct, and did not say that it would illustrate the subject about which he was testifying. Plaintiff objected to its production and the objection was sustained. In this court no copy of the model was produced; *Held*, that it was properly rejected.

The evidence of a person who did not personally know about the amount of ore taken from the mine was properly rejected at the trial of such action, and cannot be held to be admissible under a stipulation which does not form part of the record.

An exception to the refusal to give instructions in the language of counsel is of no avail if the court substantially gives the same instructions, although in different language.

THE case is stated in the opinion.

Mr. C. S. Thomas, (with whom was *Mr. T. M. Patterson* on the brief,) for plaintiffs in error.

Mr. A. W. Rucker for defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

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

In that court, Graham and Guggenheim sought to recover of Patrick and others the value of certain mineral ores taken from the Minnie lode mining claim of the plaintiffs and converted to their own use, alleging that the defendants were

guilty of a trespass, and that the quantity taken amounted to five hundred tons of gold, silver and lead-bearing ore of the value of $60,035. To this the defendants answered, admitting that plaintiffs were owners in fee of the Minnie lode mining claim, but denying that they were sole owners of said claim, and insisting that Samuel Harsh was a co-owner and co-tenant with them. They deny the trespass and conversion of the five hundred tons or any quantity of the ore, and deny that the ore was of the value of $60,035 or any other sum.

A replication was filed by plaintiffs denying the co-ownership of Harsh, and the cause came on for hearing and was submitted to a jury, who found in favor of the plaintiffs, and assessed their damages at the sum of $20,779. A motion was made to set aside this verdict and grant a new trial, which was overruled, and a judgment entered for the amount of the verdict in favor of plaintiffs. To this judgment the present writ of error is prosecuted.

It seems to have been conceded at the trial that the defendants, who owned the adjoining mineral claim, called the Colonel Sellers lode, in pursuing that lode, had broken into the vein of the plaintiffs, known as the Minnie lode, which was the prior and superior claim, and that they had taken therefrom a very considerable quantity of valuable ore, which they had mixed with the ore from their own lode and converted to their own use, by selling it with theirs.

The only question in contest before the jury was the rule by which the damages of the plaintiff should be ascertained. As to that subject, the plaintiffs took one or two exceptions to the ruling of the court in regard to the admission of testimony.

The ground of the first assignment of error is, that the court admitted, against the objection of the defendants, certain testimony of Meyer Guggenheim, one of the plaintiffs. In his testimony Guggenheim undertook to detail a conversation which he had had with Patrick and Whiting, two of the defendants, before the bringing of the suit and with regard to the trespass. The question was asked him: "What was said between you upon the subject, commencing with the first conversation you had, if you had more than one? State what the conver-

sation was." To this question, "the defendants, by counsel, then and there objected on the grounds — " But the court overruled the objection, and permitted the witness to answer. In his answer, he stated that Patrick admitted that they had mixed the ores from the Minnie mine and from the Colonel Sellers mine, and he said that he had written to the parties in control of the mine that they should get off the ground.

The objection taken here to this testimony is, that it was part of a conversation had with a view to a compromise of the controversy and that it could not be used as evidence against the party for that reason. The testimony itself, being evidence of the conversion of the ore by the defendants, with a knowledge that it was the property of plaintiffs, was pertinent as to the measure of damages. It was, therefore, only to be excluded, if at all, on some ground other than its want of relevancy to the issue.

The record before us does not show that the defendants at the time of the trial and at the time that the objection was made to the introduction of this evidence gave any reason at all why it should be rejected, much less the reason which they now insist on.

It cannot be permitted that, after the case has gone to a hearing, testimony submitted to the jury and a verdict rendered, a party, for the first time, shall state a reason for his objection to that evidence which would make the objection good. The record is precisely as we have copied it, showing that while defendants "then and there objected on the grounds — " the record is then silent. No grounds were stated so far as we know. For this reason we think there is no error in the record on that subject.

If we were inclined to have any doubt upon this point, it would be satisfied by the language of the court in its charge to the jury, where it is said that "it is in proof that in going over into the plaintiffs' territory the defendants' foreman was in ignorance of the fact that he was upon plaintiffs' ground, and the question is, whether under the circumstances in evidence this amounts to gross negligence on the part of the defendants." This charge of the court accords with the state-

ment in the bill of exceptions, that in reply to further objection to the testimony relating to the effort to agree, the court said that the "part which is not competent under the rule will be stricken out." It is obvious that the jury were in effect told to disregard any testimony showing that the trespass on the part of defendants was intentional and with knowledge of the rights of plaintiffs.

The next assignment of error is that a witness called by the defendants to testify as to the value and quantity of the ore taken out of plaintiffs' mine (after stating that he had made measurements of the stope from which the plaintiffs' ore had been taken, by which measurement he calculated the amount of ore that had been so taken) had introduced a plat of the mine and of these measurements. He was then asked the question:

"What proportion of the vein comprised in the Minnie and A. Y. mines does this stope bear, according to your measurement? Have you a model that would show that?

"A. I have a model here.

"Q. Produce it."

To the production and exhibition of this model the plaintiffs objected. The objection was sustained by the court, and to this an exception was taken by the defendants. This exception is now urged as sufficient to reverse the judgment. But we have no copy of the model here. We have no description of it. The witness did not swear to its correctness. He did not even say that it would illustrate the subject about which he was testifying. He simply said "I have a model here." It is impossible for this court to assume that the judge at the trial was incorrect in refusing to permit such a model to go in evidence.

The defendant, J. C. Whiting, was introduced as a witness, and in the course of his testimony he was asked: "What companies or smelters were purchasing ores from the Colonel Sellers mine during the months of March, April, May and June, 1883?" To which he answered as follows:

"A. We had in these months a contract running with the Harrison Smelter, with the Arkansas Valley, with the Colo-

rado Smelting and Refining Company, the Pueblo, with the Kansas City, and with the Argentine Smelting and Refining Company. I can't remember all.

"Q. In making settlements during this time did you receive duplicate statements from them of the amounts of ore sold?

"A. Ordinarily we didn't get duplicate statements; we got the original statements.

"Q. You received a statement?

"A. Yes, sir.

"Q. Can you state what the gross receipts of ore sold from the Colonel Sellers mine for the month of April, 1885, were?

"A. I can.

"Q. Now state what they were.

"Plaintiffs object to the question on the ground that ore shipments from the Colonel Sellers mine certainly can throw no light upon this case; also the point argued at length that a mixture of high-grade ore from the stope in question with the low-grade ores from the grounds of the Colonel Sellers mine would so reduce the value per ton of ore from plaintiffs' property as to make the statement on that basis manifestly unjust to the plaintiffs.

"The objection was sustained."

The counsel for defendant then said: "I nave a stipulation from the other side that the evidence, if received at all, may be introduced in the shape of ore statements verified by the officers of the smelters furnishing them, so as to dispense with the necessity of producing so many witnesses." But this stipulation is nowhere produced in the record. Nor is there any verification of these ore receipts, nor any proof whatever of their truth. The court, we think, very properly rejected the testimony of Mr. Whiting on that subject, for it does not appear that he himself personally knew anything about the quantity of ore taken out during the period alluded to.

These seem to be all the errors assigned on which counsel for plaintiffs in error rely. An exception was taken to the refusal of the court to grant certain prayers for instructions offered by defendants, but these were substantially given, although in different language, in the charge of the court to

the jury. This charge presented in a clear and, as we believe, correct light a sound view of the question of damages as it relates to this case. To it no exception was taken, nor to any part of it. On the whole, we do not find any error in the record, and the judgment of the Circuit Court is accordingly

Affirmed.

CLAYTON *v.* UTAH TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 143. Argued December 5, 1889. — Decided January 6, 1890.

This court has jurisdiction to hear and determine, irrespective of the amount involved, an appeal from a decree of the Supreme Court of the Territory of Utah, in which the power of the governor of the Territory, under the organic act, to appoint a person to be the auditor of public accounts is drawn in question.

Under the organic act of that Territory the power to appoint an auditor of public accounts is vested exclusively in the governor and council.

Under the power of Congress, reserved in the organic acts of the Territories, to annul the acts of their legislatures, the absence of any action by Congress is not to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created.

So much of the acts of the legislature of Utah of January 20, 1852, and February 22, 1878, as relates to the mode of appointing an auditor of public accounts, is in conflict with the organic act and is invalid; but so much as relates to the creation of the office is valid.

THERE was a motion to dismiss, and the cause was also argued on the merits. The case is stated in the opinion.

Mr. Eppa Hunton, (with whom was *Mr. Jefferson Chandler* on the brief,) for appellant.

Mr. Solicitor General for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Utah.

The action was commenced in the District Court of the

Third Judicial District of Utah Territory, county of Salt Lake, by a complaint in the name of the people of the Territory of Utah, by William H. Dickson, United States Attorney of said Territory, against the present appellant, then defendant, Nephi W. Clayton, under the allegation that he had usurped and intruded into the office of auditor of public accounts in and for said Territory in the year 1879, and ever since that time had held and does still hold and exercise the functions of said office without authority of law.

An additional allegation in the complaint is, that on the 13th day of March, 1886, and after the final expiration and adjournment of the legislative assembly and council of the Territory, Eli H. Murray, governor of said Territory, duly appointed Arthur Pratt to be auditor of public accounts of said Territory, and that thereupon said Pratt was qualified by taking the oath of office and the execution of an official bond, with sufficient sureties, as required by law, and, on the 17th of March aforesaid, was commissioned as such officer; and that, after being so appointed and commissioned, and so qualified, the said Pratt, on the day last mentioned, demanded of defendant that he surrender to him the office and the insignia thereof, which demand was then and there refused by the defendant.

The petition also states that on several occasions during the session of the legislative assembly previous to March, 1886, the governor had nominated and presented to said council the name of a fit person to fill the office of auditor of public accounts, but the council, at each of said sessions, failed and refused to take any action thereon, and that this was done with the full knowledge of said council that the defendant was then unlawfully holding the office and exercising its functions.

The defendant answered this complaint, denying almost every allegation of the petition specifically, or by stating that he is without knowledge on the subject of its averments; and then proceeded to say, that on the 1st day of August, in the year 1880, he was a citizen of the United States of the age of twenty-one years, and was eligible to hold office under the laws of Utah Territory; that at the regular election of that year, on the 2d day of August, 1880, he was duly elected auditor of

public accounts for the Territory of Utah; and that thereafter, to wit, in September, 1880, Eli H. Murray, the governor of Utah, issued to him, under his hand and the seal of said Territory, a commission as auditor, which was also signed by the secretary of the Territory. And he further alleged, that since said election of 1880, no one had been elected to fill the office, nor had defendant resigned, and that he is by virtue of that election and the commission of the governor acting as auditor of public accounts of said Territory.

The defendant also demurred to the complaint, and the case was afterwards heard upon the demurrer of the defendant upon the pleadings on file and on the motion of plaintiff for judgment of ouster against the defendant.

In regard to the motion, the court rendered the following judgment:

"It is now ordered and adjudged that the said demurrer of the said defendant be, and the same is hereby, overruled and denied; and it is further ordered and adjudged that the answer of the said defendant is insufficient as a defence or justification for his holding and exercising the functions of said office; that the said defendant, Nephi W. Clayton, is guilty of usurping and unlawfully holding and exercising the said office of territorial auditor of Utah Territory, and that said defendant be, and he is hereby, excluded from the said office and from exercising any of the duties pertaining thereto."

As to the application of Pratt to be admitted into and hold the office of territorial auditor it rendered the following judgment:

"It is further considered, ordered and adjudged that the said Arthur Pratt is the lawfully appointed and commissioned auditor of said Territory, and is entitled, after taking the oath of office and executing such official bond as by law required, to use, hold and exercise the said office, and perform the duties thereof and receive the emoluments thereto belonging, until his successor is duly appointed and qualified.

"And it is further ordered and adjudged that the said defendant, Nephi W. Clayton, do forthwith yield and deliver up to the said Arthur Pratt the said office of territorial auditor,

and all the books, papers, keys, safes, furniture, property, moneys and records belonging or pertaining to the said office or the business thereof, and that the said plaintiff have and recover of and from said defendant the costs herein, taxed at twenty-two dollars and fifty cents."

On appeal to the Supreme Court of the Territory, taken by Clayton, both these judgments were affirmed.

The legislature of Utah, by an act approved January 20, 1852, created the offices of treasurer and auditor of public accounts, and defined the duties of each. It declared that those officers should be elected by the joint vote of both houses of the legislative assembly, and that their term of office should be four years, and until their successors were elected and qualified, unless sooner superseded by legislative election. An act of the legislature, approved February 22, 1878, declares that the territorial treasurer and auditor of public accounts shall be elected by qualified voters of the Territory at the general election in August, 1878, and biennially thereafter.

The case being tried on complaint and answer, the allegation of the defendant Clayton, that he was elected under that law in 1880 to the office of auditor of public accounts, received the commission of the governor upon that election, was duly qualified, gave bond, and entered upon the duties of his office, must be taken as true. Also the allegation that no other person has since been elected to the same place, and that he holds over under the act of 1852, is to be taken as correct. It must also be considered as established in the case that the governor undertook to exercise the power to appoint a suitable man auditor of public accounts, and that he made proper and fit nominations to fill that office to the council of the Territory at various times, upon which they declined to act; that on the 13th of March, 1886, when such legislative body was not in session, he duly appointed Arthur Pratt to be auditor of public accounts of said Territory; that Pratt thereupon qualified by taking the proper oath and executing a sufficient official bond, and was on the 17th of March aforesaid commissioned as such officer; that he demanded of the

defendant that he surrender to him the said office, which demand was then and there refused.

The District Court of the Third Judicial District decided that the act of 1852, which vested the appointment of the auditor of public accounts in the legislature by a joint vote of its two branches, and the act of 1878, which transferred the power to fill this office to an election by the people of the Territory at a general election, were void, as being in conflict with the seventh section of the organic act of September 9, 1850, creating the Territory of Utah. That act is the fundamental law which confers upon the Territory, upon its legislature, and upon its territorial officers, all the powers which the government of the United States intended they should exercise. 9 Stat. 453, c. 51. The seventh section is in the following language:

"That all township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the Territory of Utah. The governor shall nominate, and, by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly, and shall lay off the necessary districts for members of the council and house of representatives and all other offices."

This part of the statute is reproduced almost verbatim in section 1857 of the Revised Statutes of the United States as applicable to all the Territories.

1. The first question presented to us for decision concerns the jurisdiction of this court to entertain the appeal from the Supreme Court of the Territory. The law which governs that jurisdiction now, is the act of Congress of March 3, 1885, 23 Stat. 443, c. 355, and is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, 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."

In regard to the amount in controversy required by the first section of this act, we are not at all satisfied that any such value can be applied to the office of auditor of public accounts; but we have no difficulty in holding that the record before us presents a case in which there was drawn in question an authority exercised under the United States, within the meaning of the second section. This authority was that exercised by the governor in the appointment of Arthur Pratt, acting upon the hypothesis that there was a vacancy in that office which he had a right to fill.

If the legislation of the Territory of Utah, vesting this appointment at first in the legislature of the Territory, and afterwards in the votes of the people at a popular election, is valid, of course the governor had no right to make such appointment, and the commission issued upon the election of Clayton in 1880 continues him in the office until his successor is appointed. Under the pleadings in the case as presented to us, it must be held that no successor has been appointed, unless the appointment of Pratt be a valid one. If, therefore, the governor had authority and was the only person who had authority, under the act organizing the Territory of Utah, and under section 1857 of the Revised Statutes, to make this appointment, then Clayton never was legally appointed, never was auditor of public accounts *de jure*, and the action of the governor in appointing another person to the place was valid.

It will be observed that this second section of the statute, while it is based upon the general principle which is found in the act of Congress allowing writs of error from this court

to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the state authorities, does not use the language which is found in that act, that to give this court jurisdiction the decision of the state court must be *against* the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this court over that of the state courts is left out when the matter comes to be applied to the Territories, and it is held sufficient that there should be drawn "in question the validity of a treaty or statute of or an authority exercised under the United States;" and it is not required that the decision of the state court should be against the validity of the treaty, statute or authority so exercised or claimed. We are therefore very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the governor by the seventh section of the organic act of Utah to make appointments to office, this power was drawn in question, and gives the defendant Clayton a right to have the judgment of this court upon it.

The motion to dismiss the case for want of jurisdiction is therefore overruled.

2. The next question presented to us is the alleged error of the Supreme Court of the Territory in holding that this power was vested exclusively in the governor and council as regards the office of auditor of public accounts. We are at some loss to see how there can be any doubt upon this question, if it be admitted that in case of a conflict between the organic act creating the Territory, of September 9, 1850, 9 Stat. 453, c. 51, and any act of the territorial legislature, the act of Congress must prevail. That statute is not at all ambiguous in its division of the power of appointment. "All township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the Territory of Utah." This defines very clearly the power of the legislature of Utah in providing for appointments to office. The next sentence in the same

section declares that the governor shall nominate and, with the advice and consent of the council, appoint all officers not herein otherwise provided for; that is to say, all officers of the Territory who are township officers, district officers or county officers, shall be appointed in such manner as shall be provided by law, namely, by a statute made by the governor and legislative assembly of the Territory; but all other officers, all which are not local or confined in their duties to some particular township, district or county, shall be nominated by the governor and by and with the advice and consent of the council appointed.

That this mode of dividing the power of appointing to offices within the Territories is one to which Congress attached importance, is seen by the fact that it was subsequently adopted in the organic acts establishing the Territories of Washington, 10 Stat. 175, c. 90, § 7; Colorado, 12 Stat. 174, c. 59, § 7; Arizona, 12 Stat. 665, c. 56, § 2; Dakota, 12 Stat. 241, c. 86, § 7; Idaho, 12 Stat. 811, c. 117, § 7; Montana, 13 Stat. 88, c. 95, § 7; Wyoming, 15 Stat. 180, c. 235, § 7; and it is reproduced as applicable to all the Territories by section 1857 of the Revised Statutes.

The office in question is not a township office, nor is it a district office, nor is it a county office. It is not in any sense a local office. It is a general office, whose duties concern and pervade the entire Territory of Utah, and whose functions are performed for the benefit of the whole Territory.

The sixth section of the organic act is relied on as conferring upon the legislature of Utah the authority to pass the act of 1852 and the act of 1878 in question. The language of section six of that act is "that the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the *provisions of this act*," and it is immediately following this section that it is declared that the governor shall nominate and, by and with the advice and consent of the council, appoint all officers of the Territory, except township, district and county officers. The inconsistency of an act which declares that the legislature shall appoint these officers, or that they shall be appointed by

a popular election, with an express provision of the organic act that they shall be nominated by the governor and appointed by him with the consent of the council, is too obvious to require illustration. The governor of the Territory, the secretary of the Territory, the judges of the Territory, the United States marshal and the United States district attorney are all appointed by the President, — these all being general officers, and not local. The law then continues this control of the federal authorities over the officers in the Territory by declaring that wherever the office is a general office and pervades the whole Territory, and is not a township, district or county office, the appointment shall be made by the governor. It is utterly inconsistent both with the policy and the express language of the statute that the legislature of the Territory of Utah can change the appointing power and vest it in any other body whatever, however popular, or that in the creation of offices of this general character, whose duties and functions pervade the whole Territory, they can confer the appointing power upon anybody else but the governor and council.

The question of the conflict of a law passed by the legislature of Utah Territory with this same organic act is considered at some length in the case of *Ferris* v. *Higley*, 20 Wall. 375. The act of Congress contains the provision that "the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in justices of the peace;" and that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of justices of the peace, shall be as limited by law." It was urged in that case that an act of the legislature of Utah was valid which conferred upon the Probate Courts of the Territory power to exercise original jurisdiction, both civil and criminal, as well in chancery as at common law, when not prohibited by legislative enactment. This proposition was supported by a reference to the same clause of the organic act which is relied on in this case, namely, that the legislative power of the Territory extends to all rightful subjects of legislation consistent with the Constitution of the United States and with that act. It became a question in that case, as in

this, whether the law conferring this extraordinary power upon the Probate Courts was consistent with the organic act which conferred the same powers upon the Supreme and District Courts of the Territory. That law was evidently intended to dispense with the jurisdiction of the courts of the United States appointed by the President and Senate, as far as it could be done, by investing the Probate Courts, which were under the control of the legislature of the Territory, with the same powers which the former courts had.

While there was no definition of the powers of Probate Courts in the organic act, this court held that the essential nature of Probate Courts was not such as to justify the conclusion that they were intended to exercise such powers, and especially it was held that it was not competent for the legislature to create other courts, or vest in other courts created by the organic act, powers which had already been vested in the District and Supreme Courts of the Territory, and that therefore the statute of the Territory conferring common law and equity jurisdiction on the Probate Courts was void, as being in conflict with that provision of the act of Congress. We think the present case is much clearer than that, because the act of Congress in unequivocal terms declares where the appointing power to all offices shall be deposited, and the power of appointment to the office now under consideration is distinctly reposed in the governor and council. The council, which we have so often referred to, was a body constituting a part of the legislature of the Territory, which answers to the place of a senate in the general political system of the several States and of the federal government. See section 4 of the act to establish territorial government for Utah, 9 Stat. 454.

The case of *Snow* v. *The United States*, 18 Wall. 317, is supposed to conflict with these views. In that case, the office of attorney general was created by an act of the legislature of Utah, whose duty it should be to attend to all legal business on the part of the Territory before courts where the Territory was a party, and prosecute individuals accused of crime in the judicial district in which he kept his office, in cases arising under the laws of the Territory, and such other duties as per-

tained to his office. This was supposed to be in conflict with the provision of the organic act, which authorized the appointment of an attorney for the Territory by the President. The court, however, held that the duties of the office created by the territorial legislature were not identical with those of the attorney for the Territory created under the organic act, and that it differed especially in that his functions only extended to the prosecution of individuals accused of crime in the judicial district in which he kept his office, in cases arising under the laws of the Territory, and that for other districts a district attorney should be elected in like manner and with like duties. And the court with some hesitation based its decision on this ground, and on the fact that the act had been in operation without contest for many years.

It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created.

The question of the appointing power, which is the matter in controversy here, was not before the court in that case. We do not think that the acquiescence of the people, or of the legislature of Utah, or of any of its officers, in the mode for appointing the auditor of public accounts, is sufficient to do away with the clear requirements of the organic act on that subject. It is also, we think, very clear that only that part of the statute of Utah which is contrary to the organic act, namely, that relating to the mode of appointment of the officer is invalid; that so much of it as creates the office of auditor of public accounts and treasurer of the Territory is valid; and that it can successfully and appropriately be carried into effect

by an appointment made by the governor and the council of the Territory, as required in the act of Congress.

The judgment of the Supreme Court of the Territory of Utah is affirmed.

JACK *v.* UTAH TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 144. Argued December 5, 1889. — Decided January 6, 1890.

Clayton v. *Utah*, *ante*, 632, affirmed and applied to this case.

The case is stated in the opinion.

Mr. Eppa Hunton, (with whom was *Mr. Jefferson Chandler* on the brief,) for appellant.

Mr. Solicitor General for appellee.

Mr. Justice Miller delivered the opinion of the court.

This case, which is an appeal from the Supreme Court of the Territory of Utah, differs from the preceding case of Clayton against the same appellees, in the fact that Jack was charged with usurping and intruding into the office of territorial treasurer for the Territory of Utah, as Clayton was alleged to be an intruder into the office of auditor of public accounts. These two offices were created by the same statute of the Territory, at the same time, and the mode of election prescribed by that statute was changed at the same time by the same statute to an election by the people, and Jack claims to have been elected treasurer at the same general election in which Clayton was elected auditor; that he received the commission of the governor of the Territory, and that he has held the office ever since by reason of the fact that no other election had been held and no other person had been lawfully appointed to the office. The same principles govern this case as

govern the other. The judgment of the Supreme Court of the Territory of Utah was based upon the same grounds, and for the reasons given by us in that case we affirm the judgment in this.

Affirmed.

UNITED STATES *v.* CARR.

APPEAL FROM THE COURT OF CLAIMS.

No. 411. Submitted December 3, 1889. — Decided January 6, 1890.

When a sum of money has been voluntarily paid by the United States to a mail contractor, by mistake of fact, or under circumstances to bring the payment within the provisions of Rev. Stat. § 4057, the amount may be applied by the government towards the payment of any balance that may be found due him, in the settlement of his accounts, for other services under his contract.

A contract to carry the mails from one station to another station, by way of two intervening specified stations, a stated number of miles and back, is not performed by carrying them over that route one way, returning from the terminal station to the place of beginning by a shorter route, avoiding the intermediate stations.

When a contractor for carrying the mails seeks to recover the full contract price, for a service which, as actually performed, was less than that contracted for, the burden of proof is on him to show knowledge or information by the Department of his conduct in the premises.

Knowledge by the Post-Office Department of the failure of a mail contractor to perform the full service required by his contract is not to be presumed from reports of the local postmaster to the Department that the service had been performed.

CARR filed his petition against the United States in the Court of Claims on the 17th of February, 1885, averring that the Postmaster General entered into a contract in writing with him in April, 1878, for carrying the mails of the United States from Salinas City, in the State of California, to Gabilan, in that State, and back from Gabilan to Salinas City for the annual sum of $796, a copy of which contract he attached to his petition; that at the time of the letting of the contract, and for upwards of four years prior thereto, the mails were carried upon the route aforesaid, outward from Salinas to Santa Rita,

a distance of three miles, and from Santa Rita to Natividad, a distance of four miles, and from the last-named place to Gabilan, a distance of eight miles, and on the return trip direct from Gabilan to Salinas, a distance of about ten miles, without passing through Natividad and Santa Rita; that he believed that the mode of transportation last aforesaid was established under the authority of the Postmaster General for said route, and proposed to carry the mails upon said route for the compensation aforesaid, upon the understanding that the mails were, during the term of the contract, intended by said proposal to be carried in the manner before stated; that he commenced service under the contract July 1, 1878, and for four years, including the 30th day of June, 1882, carried the mail six times a week from Salinas, by way of Santa Rita and Natividad, to Gabilan, and back direct from Gabilan to Salinas, by a direct line, not passing through Natividad and Santa Rita; that the compensation was paid up to January 1, 1882, but not from the first of January to the first of July, 1882; and that the Postmaster General had refused to pay petitioner the sum of $398, the amount of compensation due for the period last mentioned, upon the ground that petitioner had not performed his contract, inasmuch as he had not carried the mails from Gabilan to Salinas by way of Natividad and Santa Rita. Petitioner further alleged that at the letting he presented proposals to the Postmaster General for carrying the mails upon four other routes for the period of four years, namely, from July 1, 1878, to June 30, 1882, and obtained contracts therefor at certain compensation in the proposals named; that from the compensation due on the last-named contracts, $348.25 was withheld on account of the first-named contract, and there was also deducted from the four last contracts the sum of $35.92, for certain alleged delays in the transportation of the mail. Petitioner therefore prayed judgment for the sum of $782.17.

The findings of fact and conclusion of law are as follows:

"I.

"In April, 1878, the Postmaster General and the claimant entered into a contract to carry the mails on route No. 46,118,

in the State of California, from Salinas, by Santa Rita and Natividad, to Gabilan and back, six times a week, for the annual sum of $796. The material portions of said contract are set forth in Finding V.

"II.

"The mails were carried on said route under said contract for four years, commencing July 1, 1878, and ending June 30, 1882, as follows:

"The mails were carried by the claimant from Salinas, by way of Santa Rita and Natividad, to Gabilan, and back to Salinas by a direct route from Gabilan to Salinas. The distance from Salinas, by Santa Rita and Natividad, to Gabilan is twelve miles; the distance from Gabilan to Salinas by a direct route is ten miles.

"That the said route was operated by the claimant since the year 1870, the mails being always carried in the same manner in which the same were carried by the claimant, namely, from Salinas, by way of Santa Rita and Natividad, to Gabilan, and from Gabilan to Salinas direct, and until the date of the certificate of inspection of the 12th of May, 1882, have always been certified as duly carried and paid for accordingly by the Post-Office Department. The provisions of the contract under which said service was performed were in all respects similar to the provisions of the contract sued on.

"III.

"For the failure of claimant to carry the mails via Santa Rita and Natividad, as aforesaid, from July 1, 1878, to March 31, 1882, the Postmaster General, upon May 13, 1882, entered a deduction from his compensation of $746.25, which deduction equals one-quarter of the total compensation fixed by the contract for whole service under it during the period covered by the alleged delinquency.

"There is no proof that any subsequent failure to said date of the claimant to carry the United States mail via Santa Rita and Natividad has ever come to the notice of the Postmaster General or the Post-Office Department.

"IV.

"In the advertisement of November 1, 1877, inviting proposals for carrying the mails of the United States in certain States and Territories, the Postmaster General invited bids for carrying said mails on the following route in California, to wit:

"'46,118. From Salinas, by Santa Rita and Natividad, to Gabilan, 15 miles and back, six times a week.

"'Leave Salinas daily, except Sunday, at 1 P.M.;

"'Arrive at Gabilan by 7 P.M.;

"'Leave Gabilan daily, except Sunday, at 6 A.M.;

"'Arrive at Salinas by 12 M.

"'Bond required with bid, $1800.'

"V.

"'No. 46,118. $796.

"'This article of contract, made on the 15th of March, 1878, between the United States of America (acting in this behalf by the Postmaster General) and J. D. Carr, contractor, and A. B. Jackson, of Salinas, Monterey County, California, and George Pomeroy, of Salinas, Monterey County, California, as his sureties, witnesseth: That whereas J. D. Carr has been accepted, according to law, as contractor for transporting the mail on route No. 46,118, from Salinas, Cal., by Santa Rita and Natividad, to Gabilan and back, six times a week, at $796 per year, for and during the term beginning July 1, 1878, and ending June 30, 1882.

* * * * *

"'For which services, when performed, the said J. D. Carr, contractor, is to be paid by the United States the sum of $796 a year, to wit: Quarterly, in the months of November, February, May and August, through the postmasters on the route, or otherwise, at the option of the Postmaster General; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

"'It is hereby stipulated and agreed by the said contractor

and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the service retained: *Provided, however*, That in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

"'It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that they shall forfeit —

"'1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

"'2. At least one-fourth of the pay of the trip when the running is so far behind time as to fail to make connection with a depending mail.

"'3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail; or giving preference to passengers or freight over the mail or any portion thereof, or for leaving the same for their accommodation; or carrying, otherwise than in the mail, matter which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

"'4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster General, according to the nature or frequency of the failure and the importance of the mail: *Provided*, That except as herein

otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.'

* * * * *

[Duly signed, sealed and delivered.]

"VI.

"'CERTIFICATE OF INSPECTION.

"'POST-OFFICE DEPARTMENT.

"'OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL.

"'DIVISION OF INSPECTION,

"' *Washington, D. C., October* 23, 1878.

"'SIR: I hereby certify that the mails have been carried by contractors in accordance with provisions of contract, or orders, on routes stated herein by number in the State of California, without any failures or delinquencies, so far as shown by returns received, for the quarter ended September 30, 1878.

* * "'46,118 * *

"'J. L. FRENCH,

"' *Acting Second Assistant Postmaster General.*

"'To the AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT.'

"On March 22, 1882, Second Assistant Postmaster General addressed a letter to the postmaster at Natividad and received information from him on April 6, 1882, that the mail was not carried from Gabilan by way of Natividad and Santa Rita, and that such had been the practice since the present contractor had the contract. The postmaster at Santa Rita certified to the Postmaster General that such had been the practice since he became postmaster. The date of the letters as to the continuance of the mode of carrying the mails was May 1, 1882.

"CONCLUSION OF LAW.

"Upon the foregoing facts the court determines, as a conclusion of law, that the claimant is entitled to recover the sum of $746.25."

Judgment was thereupon rendered in favor of the petitioner

for $746.25, from which the defendant appealed to this court. The opinion of the Court of Claims will be found in 22 C. Cl. 152.

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

Mr. A. J. Willard and *Mr. Samuel M. Lake* for appellee.

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

The amount sued for was $782.17, of which the sum of $35.92, the aggregate of some small deductions upon other contracts, was disallowed by the Court of Claims, and that result accepted by the claimant.

It appears from the third finding that the Postmaster General deducted from the claimant's compensation, under contract No. 46,118, $746.25, "which deduction equals one-quarter of the total compensation fixed by the contract for whole service under it during the period covered by the alleged delinquency;" being the three years and three-quarters from July 1, 1878, to March 31, 1882. It follows, then, that the contractor performed the service for the months of April, May and June, 1882, as required by the contract, as hereafter considered. As to $398 of the $746.25, that sum was withheld from the compensation under the contract in question, the last two quarters not having been paid, but the balance of $348.25 was deducted from moneys coming to the petitioner on other contracts, and he contends that it should not have been so deducted, because that amount had been voluntarily paid by the United States, and, therefore, could not be recovered back. But if the contractor was not entitled to $746.25 of the compensation provided by this contract, and if payments were made thereon up to the last two quarters by mistake, for service that had not been performed, or under such circumstances as brought them within section 4057 of the Revised Statutes, then the payments could be recovered back, and their deduction in part from other money coming to

petitioner was proper in the settlement of the accounts between the parties.

Section 4057 is as follows:

"In all cases where money has been paid out of the funds of the Post-Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

This section was applied in *United States* v. *Barlow*, *ante*, 271, 281, and Mr. Justice Field, in delivering the opinion, quotes with approval the language of Baron Parke in *Kelly* v. *Solari*, 9 M. & W. 54, 58, that "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it;" and adds: "Reasons for the application of the rule are much more potent in the case of the contracts of the government than of contracts of individuals; for the government must necessarily rely upon the acts of agents, whose ignorance, carelessness or unfaithfulness would otherwise often bind it, to the serious injury of its operations." Nothing more need be said on this point, and this brings us to the real question in the case.

Claimant contracted to carry the mails "from Salinas, by Santa Rita and Natividad, to Gabilan, 15 miles and back." The time to be taken on the trip was specified at six hours each way. There is no ambiguity in this contract, from which a doubt could arise as to whether the return route was to be

identical with the outward route. Where places are designated as on the line of a mail route from one point to another and back, no reason is perceived for their omission on the return. There may be instances where retracing the road is not deemed important, or is impracticable in view of particular exigencies; but if so, the difference in route would be specified. And where the transportation is for a given number of miles and back, this does not mean the number named one way and an indefinite and less number the other.

The contractor was clearly required to return to Salinas from Gabilan by the same way he went to Gabilan from Salinas.

The Court of Claims did not take any other view of the language of the contract, but determined the case to the contrary, upon the ground that the contract had been otherwise "construed by the claimant, and the responsible power of the defendants, and that construction became and was the contract at the time the services were performed covered by the period of deductions." This conclusion is reached as to the Post-Office Department upon the reasoning that as "it was the duty of the postmasters connected with the mail route at the termini to report to the department the manner in which the service was performed, and the presumption is, that they performed their duty and that the department was advised, not only during the time of the performance of the contract in controversy but the antecedent contracts, covering the same service embraced in contract No. 46,118;" and as the evidence was, "that on October 23, 1878, the Acting Second Assistant Postmaster General certified to the Auditor of the Treasury for the Post-Office Department that for the quarter ending September 30, 1878, there had been no failure or delinquency in the execution of the contract upon the part of the contractor;" and as "it is safe to assume that for all preceding payments the same certificate was made, based upon reports furnished by the postmasters connected with route No. 46,118;" the acts of "the responsible officers of the department being in possession of the same information and knowledge" as the postmasters, "commit the defendant to the construction of the agreement as placed upon it by the parties who performed

the labor of its execution, and who were cognizant of the mode in which it was performed."

The Department did not direct or affirmatively permit the contractor to pursue the course he did, and if he could recover in whole or in part, upon the ground of an acquiescence equivalent to assent in a certain mode of dealing with the subject matter of the contract, the burden was on him to show knowledge or information by the Department of his conduct in the premises. No evidence to establish such knowledge or information having been adduced, the case was made to rest upon the presumption that the postmasters at the termini, where the schedules of the time of the arrival and departure of the mails were kept and registers thereof made and returned, were acquainted with the terms of the contract and claimant's non-compliance therewith, and this being presumed, upon the further presumption that they must have reported the failure in performance to the Department.

In *United States* v. *Ross*, 92 U. S. 281, 284, Mr. Justice Strong, speaking for the court, says:

"The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his Treatise on Evid. sect. 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

Section 3849 of the Revised Statutes provides that "every postmaster shall promptly report to the Postmaster General every delinquency, neglect, or malpractice of the contractors, their agents or carriers, which comes to his knowledge."

By none of the findings of fact is it shown that the delinquency in question ever came to the knowledge of the postmasters at the termini of this mail route. But under Finding VI it appears that "on March 22, 1882, Second Assistant Postmaster General addressed a letter to the postmaster at Natividad and received information from him on April 6, 1882, that the mail was not carried from Gabilan by way of Natividad and Santa Rita, and that such had been the practice since the present contractor had the contract. The postmaster at Santa Rita certified to the Postmaster General that such had been the practice since he became postmaster. The date of the letters as to the continuance of the mode of carrying the mails was May 1, 1882;" and from Finding III, that the Postmaster General instantly repudiated that manner of carrying the mails, and that they were not so carried for the remaining quarter under the contract.

Of course the postmasters at Santa Rita and Natividad knew that the mails did not come back through those places, but it does not follow that they were aware that the contractor was obliged so to carry them. Indeed, as they made no effort to have this state of things remedied, so far as appears, it is rather to be presumed that they were not aware that it was the result of the delinquency of the contractor.

The fact of knowledge on the part of the postmasters of the delinquency, from which the inference is drawn that they reported it, was a fact to be proven and not to be presumed. If they knew of the delinquency it was undoubtedly their duty to report it, but it is not to be assumed that they did report it, without some evidence of such knowledge; and upon this record the irresistible inference is that the delinquency, if reported, would not have been permitted to continue.

The certificate of the Second Assistant Postmaster General is dated October 23, 1878, and states that the mails had been carried "without any failures or delinquencies, so far as shown by returns received, for the quarter ended September 30, 1878." As the contract was a plain one, and was not performed according to its terms, we think this certificate indi-

cates clearly that the "returns received" did not show the non-performance. So far from strengthening the alleged presumption that the postmasters reported the facts as they existed, its effect is to the contrary. What they did report, in fact, is not shown; and, inasmuch as under Finding VI no other inference can be drawn than that the first information that the Postmaster General had that the mail was not carried from Gabilan by way of Natividad and Santa Rita, was April 6, 1882, we cannot accept the conclusion that the responsible officers of the Department were in possession of information and knowledge of the conduct of the contractor before that time, and acquiesced in the manner in which he carried the mails during the period in question, or during the preceding years, in respect to which it is found that he so operated the route under a similar contract.

We can find nothing in the findings to justify us in holding that the Department paid this claimant the full measure of his compensation prior to March 31, 1882, with knowledge of the manner in which he was performing the work, or that the Department ever put the interpretation upon the contract which is now contended for, or induced the contractor to enter into the contract by reason of any such interpretation on its part. The deduction of $746.25 was properly made, and the conclusion of law on the facts found was erroneous.

The judgment is reversed and the cause remanded with directions to enter judgment for the United States.

FORBES LITHOGRAPH MANUFACTURING COMPANY *v.* WORTHINGTON.

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

No. 163. Submitted December 13, 1889. — Decided December 23, 1889.

Plaintiff imported into the United States a quantity of iron advertising or show cards of various sizes. They were sold here for advertising pur-

poses, to hang on walls, or in windows, in public places, and contained generally the name of the person or of the article advertised and some picture or ornament, which were printed from lithographic stones upon the plates of sheet iron in the same way that lithographing is done upon paper or cardboard. The principal part of the value of the completed card was in the printing done upon the material, and not in the material itself; *Held*, that they were subject to a duty of 45 per cent *ad valorem* as manufactures, etc., not specially enumerated or provided for, composed wholly or in part of iron, under the last paragraph of Schedule C, Rev. Stat. § 2502, as enacted March 3, 1883, 22 Stat. 501, c. 121; and not as printed matter not specially enumerated or provided for, under the first paragraph of Schedule M in the same amending act.

This cause was heard by the district judge for the District of New Hampshire, holding the Circuit Court, upon the following agreed statement of facts:

"This was an action in which the writ was dated April 18, 1884, brought by the Forbes Lithograph Manufacturing Company, a corporation located at Boston, in said district, to recover back $1081.42, the amount of duties alleged by them to have been illegally exacted by the defendant Worthington, as collector of the port of Boston, on certain merchandise described in the invoice and entries as 'iron show-cards' imported by them. The pleadings may be referred to. The plaintiffs imported these cards into the port of Boston from Paris, in France, by different steamers from Liverpool, the importations being made in ten separate lots, and extending from December 19, 1883, to April 2, 1884.

"On each importation as received the plaintiffs paid the assessed duties under protest, and duly filed such protest with the collector and their appeal with the Secretary of the Treasury. A copy of one of the protests, which may stand for all, is hereto annexed and marked 'A,' and this action was seasonably brought.

"The collector exacted a duty of forty-five per centum ad valorem (amounting in the aggregate to $2432.62), under the clause in Schedule C (last section) of the tariff law of March 3, 1883, which is as follows: 'Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron . . . or any other metal, and

whether partly or wholly manufactured, forty-five per centum ad valorem,' while the said importers claimed that the goods were dutiable at twenty-five per centum ad valorem only, (the aggregate amounting to $1351.20,) under the clause in Schedule M, (first section,) which is as follows: 'Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for in this act, engravings, bound or unbound, etchings, illustrated books, maps and charts, twenty-five per centum ad valorem.'

"The difference between the amount of said duties, at forty-five per cent and at twenty-five per cent, is $1081.42, which s the amount that the plaintiffs claim in this case.

"All the goods charged with the duties were iron show-cards or advertising cards or signs.

"They were manufactured in Paris on orders given by the said importers to fill orders from parties here, who used them for advertising purposes (to hang on the walls or in windows or in public places, to give to customers, etc.). The importers imported and sold them to the consumers here for such advertising purposes only. The cards were of different sizes, being on the average about a foot long by six inches wide, and contained generally the name of the person and of the article advertised, with some picture or ornament thereon — for example, as follows:

BREWERY ESTABLISHED ROBERT SMITH'S A.D. 1875.

INDIA PALE ALE & BROWN STOUT,

IN BOTTLE. PHILADELPHIA. U. S. A. ON DRAUGHT.

LITH. MAX CREMITZ, PARIS. FORBES CO., BOSTON, SOLE AGENTS.

"These cards were prepared in different colors on plates of sheet iron. It is agreed, if relevant to the issue, that the value

of the iron plates before the printing was put upon them was about two or three cents each, and that the other material of the card as material was of like trifling value, while that of the completed card or sign was about twenty to twenty-five cents.

"These cards or signs were lithographed (that is to say, printed) from lithographic stones on hand presses in the same way that lithographing is done on paper or on card-board. Samples of said cards are filed herewith, marked 'Exhibit B,' and may be referred to at the hearing.

"The case is submitted by the parties on the above as an agreed statement of facts.

"If upon the foregoing facts the merchandise should have been assessed at 25 per cent, judgment is to be rendered for the plaintiffs for $1081.42 and costs; otherwise for defendant for costs."

Copy of the protest was attached to the statement, and samples of the cards accompanied it as exhibits.

The court found for the defendant and entered judgment accordingly, and a writ of error was sued out from this court upon exceptions to the findings and rulings. The opinion is reported in 25 Fed. Rep. 899.

Mr. Selwyn Z. Bowman for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

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

We concur with the district judge in his conclusion that these iron show-cards were properly assessed as manufactures of iron not specially enumerated or provided for in the act of March 3, 1883, and as such liable to duty under the last paragraph of Schedule C of section 2502 of the Revised Statutes, as enacted by that act, which reads:

"Manufactures, articles or wares, not specially enumerated

or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem." 22 Stat. 501, c. 121.

This is conceded by plaintiff in error unless the articles were dutiable as "printed matter" under the first paragraph of Schedule M of that section, 22 Stat. 510, c. 121, which is quoted in the statement of facts, and given hereafter.

The diligence of counsel has furnished us with definitions, from many dictionaries and encyclopædias, of the words "print," "printing" and "printed matter," from which it is argued that the essential feature of printing is not the substance on which the printing is done, but the mode of making the impression. But the question here is not whether these iron show-cards, being lithographed or printed, could be styled "printed matter" within the meaning of these words as given by lexicographers, but whether they were "printed matter" as those words are used in Schedule M of the act of March 3, 1883.

There was no evidence that signs of this kind were known commercially, or by printers, bookbinders, dealers in books, pamphlets or periodicals, or others, as "printed matter."

In *Arthur* v. *Moller*, 97 U. S. 365, certain chromo-lithographs printed from oil stones upon paper were held subject to the duty levied upon printed paper; and Mr. Justice Hunt, in delivering the opinion of the court, says that "the term 'print' or 'printing' includes the most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface;" and that "the pictures in question were printed from lithographic stones, by successive impressions, each impression giving a different portion of the view and of a different color. Like other pictures, they are made and used for the purpose of ornament. Equally with engravings, copper plates and lithographs, they are printed, and properly fall within the statutory designation of printed matter. If further argument were needed it would be found in the principle *noscitur a sociis*. 'Printed matter' is

named in the list with engravings, maps, charts, illustrated papers. With these printed pictures are naturally associated."

Undoubtedly the words "printed matter" are popularly considered as applying to paper or some similar substance commonly used to receive the impression of letters, characters or figures by type and ink, and reference to the legislation of Congress demonstrates that the phrase was used in the schedule in question in this sense.

By section 18 of the act of March 2, 1861, fixing duties on imports, etc., a duty of fifteen per centum ad valorem was levied "on all books, periodicals and pamphlets, and all printed matter and illustrated books and papers." 12 Stat. 187.

In section 94 of the act of June 30, 1864, appears this paragraph:

"On all printed books, magazines, pamphlets, reviews and all other similar printed publications, except newspapers, a duty of five per centum ad valorem." 13 Stat. 267.

By "Schedule M, Sundries," of section 2504 of the Revised Statutes, it is provided:

"Books, periodicals, pamphlets, blank books, bound or unbound, and all printed matter, engravings, bound or unbound, illustrated books and papers, and maps and charts, twenty-five per centum ad valorem." Rev. Stat. 2d ed. 474.

In section 2502, of Title 33, of the Revised Statutes as enacted by the act of March 3, 1883, the first paragraph of the schedule headed "Schedule M, Books, Papers, etc.," reads:

"Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for in this act, engravings bound or unbound, etchings, illustrated books, maps and charts, twenty-five per centum ad valorem." 22 Stat. 510.

And then follow nine paragraphs, making ten in all in this schedule, relating to blank books, bound or unbound, and blank books for press copying; paper, sized or glued, suitable only for printing paper; printing paper, unsized, used for books and newspapers exclusively; manufactures of paper not specially enumerated; sheathing paper; paper boxes, and

all other fancy boxes; paper envelopes; paper hangings and paper for screens or fire-boards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper not specially enumerated or provided for in the act; pulp, dried, for paper-makers' use.

It is very clear that these iron signs were not dutiable under a schedule headed "books, papers, etc.," and confined throughout to the subject matter thus indicated.

If a duty had been imposed on iron show-cards *eo nomine*, the latter would not have been dutiable as "manufactures of iron," any more than "braces and suspenders," though made of rubber, were dutiable as "manufactures of rubber," *Arthur* v. *Davies*, 96 U. S. 135, or "artificial flowers," though made of cotton, were dutiable as "manufactures of cotton." *Arthur* v. *Rheims*, 96 U. S. 143. The specific designation would prevail over the general words which otherwise embraced the article. In *Arthur* v. *Jacoby*, 103 U. S. 677, decorated porcelain ware being subject to one rate of duty and pictures to another, it was held that where it appeared that certain pictures had been painted by hand on porcelain, which, it was proved, "did not in itself constitute an article of chinaware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings," they were taxable as pictures and not as decorated porcelain ware. The question decided, as stated by Mr. Chief Justice Waite at the close of the opinion, was that "the goods were not chinaware, but paintings."

But here the articles were clearly manufactures of iron, and were not "printed matter," within the meaning of the clause relied on by the plaintiff, because those words, as there used, applied only to articles *ejusdem generis* with books and pamphlets, which iron show-cards were not.

We find no difficulty in concluding that the case was properly decided, and the judgment is

Affirmed.

Syllabus.

MILLER *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

WORRALL *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

DUNLAP *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Nos. 737, 867, 868. Submitted January 2, 1889. — Decided January 6, 1890.

R., a citizen of Texas, made his will there June 7, 1848, by which he devised all his property, including the real estate in controversy, (1) to his wife for twenty-one years after his death; (2) after that to his offspring, child or children by his said wife; (3) in the event of the death of his wife without offspring by him, to the children of M. by M.'s then wife, who was a sister of R.'s wife; (4) in the event of the death of the offspring which he might have by his wife, to his wife for life. M. was named as executor of the will. R. died January 10, 1850, leaving surviving his wife and an infant son. This son was born after the making of the will and died in 1854. The will was duly proved by the executor shortly after R.'s death. About six months after R.'s death his widow married F., by whom she had several children. Two years after the probate of the will F. and his wife commenced proceedings to have the will declared null and void on the ground that the property was communal property. In these proceedings the executor was defendant, and a guardian *ad litem* was appointed for the infant, and such proceedings were had therein that in October, 1852, a decree was entered, declaring the will to be null and void, and setting it aside; *Held*,

(1) That the devise to the children of M. was a contingent remainder, to vest only in case of the death of the testator's wife without offspring by him, and limited after the fee which was primarily given to the testator's child;

(2) That, the executor being a defendant and appearing and answering, and the infant son being represented by a guardian *ad litem*, and the executor being interested on behalf of his own children that the will should stand, (if that was of any consequence,) all the necessary parties were before the court to sustain the decree;

(3) That the decree could not be attacked collaterally, and was binding on the children of M.

McArthur v. *Scott*, 113 U. S. 340, distinguished from this case.

A contingent interest in real estate or an executory devise is bound by ju-

dicial proceedings affecting the real estate, where the court has before it all parties that can be brought before it in whom the present estate of inheritance is vested, and the court acts upon the property, according to the rights that appear, without fraud.

In Texas an equitable claim of title to real estate is equally available with a legal one.

In Texas, the holder of a head-right certificate could locate it upon a tract of public land, and then abandon the location and locate it upon another tract, and, in such case the abandoned tract became thereby again public land, subject to location by other parties.

From the evidence it would appear that the Rutledge certificate which is in controversy in this case was in the land office in Texas on or before August 1, 1857, in compliance with the requirements of the act of the Legislature of Texas of August 1, 1856. 1 Paschal's Digest, 701, art. 4210.

By the act of the legislature of Texas of April 25, 1871, 2 Paschal's Digest, 1453, arts. 7096–7099, it was provided that a certificate of location and survey of public lands, not on file at the passage of that act, and not withdrawn for locating an unlocated balance, should be returned to and filed in the office within eight months thereafter, or the location and survey should be void; *Held*, that in the absence of clear proof that a valid located certificate was not on file there within the statutory time, the court would not raise such a presumption in favor of another title, superposed upon the land at a time when the certificate was valid and possession was enjoyed under it.

The practice of locating land certificates upon prior rightful locations is not favored by the laws of Texas.

The failure of the holder of a head-right certificate in Texas to complete his title, by complying with statutory provisions in regard to the filing of his certificate, enures to the benefit of the State alone.

In Texas the rights of a subsequent locator, having actual notice of a prior location, are postponed to the superior rights of the prior locator, although the subsequent location may have passed into a patent.

The provisions in the constitution and laws of Texas respecting the location of land certificates, reviewed.

In Texas land certificates are chattels, and may be sold by parol agreement and delivery, the purchaser and grantee thereby acquiring the right to locate a certificate and to take out a patent in his own name and to his own use.

The failure, in a certificate of acknowledgment of a deed of the separate property of a married woman in Texas, to state that she was examined apart from her husband, cannot be supplied by proof that such was the fact.

In Texas an habendum to a deed running "to have and to hold to him the said" grantee, "his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever, claiming or to claim the same," imports a general warranty and estops the grantor and his heirs from setting up an adverse title against the grantee.

On the facts the court holds that the statute of limitations of Texas is a complete bar to the claims set up by the complainants, both in the original bill and in the cross-bills.

Opinion of the Court.

In equity. The suit, as it was commenced in a state court in Texas, was an action of trespass; but, on its removal to the Circuit Court of the United States, a repleader took place on the equity side of the court. The original bill and the cross-bills were dismissed, from which decree this appeal was taken. The case is stated in the opinion.

Mr. F. G. Morris for Miller and others, appellants.

Mr. J. M. Morphis for Worrall and others, appellants.

Mr. Sawnie Robertson for William Dunlap, Virlinda M. Tilney, joined with her husband, R. P. Tilney, John Graham, Mary C. Cook and John Cook by his next friend Mary C. Cook, appellants in No. 868, and appellees in 737, and 867.

Mr. A. S. Lathrop for the Texas and Pacific Railway Company, appellee.

Mr. Justice Bradley delivered the opinion of the court.

This suit was originally an action of trespass to try title, brought in March, 1884, in the District Court of Tarrant County, Texas, by William L. Foster and his children, William D. Foster and others, against Elizabeth J. Daggett and her husband, E. B. Daggett, and The Texas and Pacific Railway Company, The Missouri Pacific Railway Company, The Fort Worth and Denver Railway Company and The Gulf, Colorado and Santa Fé Railway Company, to recover possession of 320 acres of land in the city of Fort Worth. Much of the land in question is laid out in streets and covered with buildings, and nearly 100 acres of it is occupied by the said railroad companies, or some of them, for their tracks, station houses, freight depots, shops, etc. The plaintiffs claimed title as heirs at law of one Thomas P. Rutledge, through Eliza A. Foster, wife of William L. Foster, and mother of the other plaintiffs, who had been the wife and widow of said Rutledge, and mother of his only son, deceased. The defendants filed answers, claiming the lands under an alleged purchase from Rutledge of his head-right certificate under which the lands were located, and also under an independent title derived by purchase from the heirs

of one John Childress; and also by long and undisturbed possession. No patent for the lands had ever been granted on the Rutledge title, which was older than the Childress title; but a patent was granted on the latter in June, 1868: so that the various claims under the Rutledge title were of an equitable character, which, in the Texas jurisprudence, is equally available with the legal title.

In October, 1884, Thomas H. Miller and others, children of one Alsey S. Miller, intervened in the suit as plaintiffs, claiming the same land as devisees of Thomas P. Rutledge.

On the 20th of April, 1885, William Dunlap and others filed their petition in the suit, claiming one-half interest in the lands as heirs-at-law of Adaline S. Worrall, wife of one I. R. Worrall; and on the 23d of March, 1886, Martha R. Worrall and others intervened as plaintiffs, claiming the other half interest in the lands as heirs-at-law of said Adaline, through the said I. R. Worrall. The Dunlaps and the Worralls claim under the same right, and allege that Adaline S. Worrall became entitled to the lands by purchase from the heirs of John Childress, and that, on her dying without issue in 1870, her brothers and sisters, represented by William Dunlap and others, inherited one-half of her interest, and her husband, I. R. Worrall, represented by his mother, Martha R. Worrall, and others, inherited the other half.

In December, 1885, the original plaintiffs, William L. Foster and his children, took a non-suit, and were dismissed out of the case, leaving three sets of claimants to the land, to wit: (1) the original defendants, the Daggetts and the railroad companies, who were in possession, claiming under all the titles; (2) Thomas H. Miller and others, claiming as devisees of Thomas P. Rutledge; (3) the Dunlaps and the Worralls, claiming under John Childress, through Adaline S. Worrall.

In March term, 1886, the last set of claimants, William Dunlap and others, and Martha R. Worrall and others, who were citizens of other states than Texas, removed the proceedings into the Circuit Court of the United States for the Northern District of Texas; and in that court a repleader took place on the equity side of the court. Thomas H. Miller

and others, claiming as devisees of Rutledge, filed a bill to maintain their alleged equitable title to the land, and made the other parties defendants, who all filed answers; and the intervenors, Dunlap and others and Worrall and others, also filed separate cross-bills, to which the other parties filed answers. The court below dismissed both the original and cross-bills, and this appeal is brought from that decree.

The land in question, when the titles set up by the complainants originated in 1852 and 1868, was of small value; but having become the site of a portion of the city of Fort Worth, and of an important railroad centre, it has acquired a very great value, and is the subject of earnest litigation.

The Rutledge title originated under a head-right for 320 acres of land in Texas, granted in October, 1846, to Thomas P. Rutledge as an emigrant, by the board of land commissioners of Gonzales County, where he then resided. It is alleged by the defendants, and proof was adduced to show, that Rutledge sold this certificate to one Matthew Brinson in or about 1848, and that Brinson sold it to one M. T. Johnson in 1851. It was located by Johnson (in Rutledge's name) on the premises in dispute in 1851 or 1852, and a survey in pursuance of such location was made January 8, 1852, by A. J. Lee, deputy surveyor for the Robertson Land District. It had previously been located on lands in Fannin County, but the evidence shows (as we think) that that location was abandoned, and that the location on the lands in dispute took the place of it.

The following is the copy of the survey made by Lee, to wit:

"The State of Texas, *Robertson Land District:*

"I have surveyed for Thomas P. Rutledge 320 acres of land situated in Tarrant County, about ¾ of a mile S. E. from Fort Worth and 5½ miles S. 44 W. from Birdville, by virtue of his head-right certificate No. 134, class 3rd, issued by the board of land comm'rs for Gonzales County on the 12th day of October, 1846 —

"Beginning at the S. E. cor. of W. W. Warnell's 1280 sur.,

now in the name of R. Briggs, at a stake, whence a hackberry 2 in. di. brs. S. 67 E. 77 vs. and an elm 2 in. di. brs. N. 68 W. in the head of a hollow; thence west 1344 vs. to said Warnell's S. W. cor., a stake and mound in prairie; thence south 1344 vs. to a stake and mound in prairie; thence east 1344 vs. to a stake and mound in prairie; thence north 1344 vs. to the place of beginning.

"Surveyed the 8th day of January, 1852.

"A. J. Lee, *D. S. R. L. D.*,

"Mercer Fain & T. I. Johnson, *Chainers.*"

This survey was duly recorded in the records of the land district and filed in the General Land Office of the State; but no patent was issued upon it.

The tract thus surveyed was an exact square of 1344 varas, or 1244½ yards on each side. One E. M. Daggett located another tract of 320 acres somewhere in the same neighborhood, and in the year 1853 or 1854 he made an exchange with Johnson for the lot in question, and in June, 1855, Johnson executed to Daggett a deed, of which the following is a copy to wit:

"The State of Texas, *County of Tarrant:*

"Know all men by these presents that I, M. T. Johnson, of the state and county aforesaid, for and in the consideration of the three hundred and twenty acre land certificate issued by the board of land commissioners of Shelby county, in the name of E. M. Daggett, class 3rd, and as deeded to me by said Daggett this day, I have bargained, sold, and aliened unto the aforesaid E. M. Daggett all and singular the head-right certificate of T. P. Rutledge, and I warrant and defend the right and title of said head-right to his heirs or legal representatives free from myself and heirs, &c., and place E. M. Daggett forever in full ownership, the said head-right being located near Fort Worth, bounded on the east by a survey in the name of M. T. Johnson, a colony certificate, and on the west by a survey made of Jennings, and on the north by a survey in the name of Rebecca Briggs, all to be divested from me,

my heirs or any person claiming the same, and placing E. M. Daggett, his heirs or legal representatives, in full ownership of the same forever.

"Given under my hand and seal this 23d day of June, A.D. 1855.

"M. T. JOHNSON. [L. S.]

"Attest: JULIAN FIELD.
"JOHN P. SMITH."

This deed was duly proved and recorded on the 30th day of March, 1857. Daggett, according to the weight of the testimony, went into possession of the land in 1854, prior to the date of the deed; built upon and improved it, and occupied it as his homestead, (with the exception of such portions as he sold or leased to other parties,) until his death April 19th, 1883. The defendants Elizabeth J. Daggett and her husband claim portions of the land under the will of said E. M. Daggett, and the railroad companies claim other portions as his grantees; and both allege that the possession of said E. M. Daggett and of themselves under him has been continuous for nearly thirty years prior to the commencement of the suit; namely, from the time when said Daggett first took possession of the land in 1854; and that such possession has been under a deed duly registered from the time the said deed was given by Johnson to Daggett.

T. H. Miller *et al.*, the complainants, deny that Rutledge ever sold his head-right certificate to Brinson, or any one else, and claim that its location on the land in question enured to the benefit of Rutledge alone, and to themselves as his devisees, under a will made by him on the 7th of June, 1848. That will is in evidence. By it, Rutledge devised, first, all his property to his wife, Eliza A. Rutledge, for twenty-one years after his death; and after giving some directions about certain specific personal property, devised as follows:

"Fifth. I direct that after the expiration of twenty-one years from and after my death, all of my estate, both real and personal, shall be owned and enjoyed by my offspring or child or children by my said wife. . . .

"Seventh. In the event of the death of my said wife without offspring by me at her death which may survive her, I direct that all of my estate, real and personal, shall be owned equally by the children of Alsey S. Miller which may survive me, which he may have by his present wife.

"Eighth. In the event of the death of the offspring which I may have by my said wife, I direct that my said wife shall have all of my estate, both real and personal, for and during her life. . . .

"Ninth. I do appoint the said Alsey S. Miller, of said county and state, my executor of this my last will and testament."

Rutledge died on the 10th of January, 1850, leaving surviving him his wife, Eliza A. Rutledge, and an infant son, William M. Rutledge, who was born after the making of the will, but who died in 1854, about six years of age. Eliza A. Rutledge, after her husband's death, married William L. Foster in July, 1850, by whom she had several children, and died in February, 1881.

The will was regularly proved in April, 1850, by Alsey S. Miller, the executor, whose wife was a sister of Eliza A. Rutledge, and whose children were the devisees in remainder named in the will. It will be seen that the said remainder was a contingent one, to vest only in case of the death of the testator's wife without offspring by him. It was also limited after the fee which was primarily given to the testator's child.

More than two years after the probate of the will, proceedings were instituted by William L. Foster and his wife Eliza A. Foster, in the District Court of Gonzales County, having the proper jurisdiction, to have the will declared null and void. Alsey S. Miller, the executor, was made defendant, and the court appointed S. B. Conley guardian *ad litem* for William M. Rutledge, the infant child of the testator. The petition for nullity of the will alleged that the property of the deceased was community property; that the will was made before the birth of the child; that the disposition made was contrary to law, and trammelled with illegal and embarrassing conditions. It further stated that the executor had faithfully performed

his trust, had paid all debts of the estate, and was ready to close it. The executor filed an answer, admitting the allegations of the petition, and not opposing its prayer. The guardian *ad litem* filed an answer, leaving the matter under the control of the court to act in its wise discretion as to justice should seem meet. The court thereupon made a decree as follows:

"Saturday, October 23d, 1852.

"Came all the parties by their att'ys, and S. B. Conley, Esq., guardian *ad litem* for the minor, W. M. Rutledge, and the matters and things being all before the court by the pleading and record evidence therein, the same was submitted to the court, and, being heard, it is ordered, adjudged, and decreed by the court that the will of the deceased, Thomas P. Rutledge, made on the 7th June, 1848, and admitted to probate on the 29th April, 1850, be, and the same is hereby, declared to be null, void, and of no effect, and that the same be in all things set aside and held for naught. It is further ordered, adjudged and decreed that the said Eliza Ann Foster, as relict of said Rutledge, deceased, and the said W. M. Rutledge, minor, be entitled to take, receive and hold all the property of said deceased jointly between them as heirs-at-law, be the same real, personal or mixed, and subject to the action of the county court of Gonzales County as to distribution after the debts are paid and estate closed by the report of the executor, whose acts under the will are not impaired by this decree, and that said court is required to make the yearly allowance to the said Eliza Ann Foster, in accordance with law and the order of said county court. It is further ordered and adjudged that the executor, out of the funds of the estate, pay the costs herein expended, and that this decree be duly certified to the county court for observance."

If this decree is valid, it disposes of the claim of the complainants, Thomas H. Miller and others, which is based on the devise of the will. The precise question came before the Supreme Court of Texas in the recent case of *Thomas H.*

Miller et al. v. *W. L. Foster et al.*, (not yet reported,) and was decided against the contention of the appellants, Miller *et al.* The Commission of Appeals held that the decree of nullity was valid, and that all the necessary parties were before the court when it was rendered. This decision was approved by the Supreme Court.

It is contended by appellants that the decision in the case of *MacArthur* v. *Scott*, 113 U. S. 340, is adverse to this view. But a careful examination of that case will show that this is not correct. The decree setting aside the will in that case was held not to be binding upon certain grandchildren of the testator, not born when it was passed, because their interests (which were executory) were supported by a legal trust estate in the executors, which was not represented in the proceedings. No trustee of that estate was made a party. The executors had resigned their office, and the court had accepted their resignation; and no new trustee had been appointed in their stead, as might have been done. There was no party in the case to represent the will, or the interests created by it, or the legal estate which supported those interests. This was the special ground on which the decision in *MacArthur* v. *Scott* was placed, as is fully expressed in the opinion.

In the present case the executor was a defendant in the proceedings instituted for avoiding the will, and appeared and filed an answer; and the infant son of Rutledge, who was devisee in fee of the whole estate after the termination of his mother's interest, was represented in the proceedings by a guardian *ad litem*. Moreover, if the circumstance is of any consequence, the executor was interested on behalf of his own children that the will should stand, — as they were the principal devisees in remainder. We think that the Supreme Court of Texas was right in holding that all the necessary parties were before the court. We are also of opinion that the decree avoiding the will cannot be attacked collaterally; and that it is binding on the appellants, Thomas H. Miller and others. The entire estate was represented before the court, — a particular estate in the widow, and the fee simple remainder in the infant son. The interest of the appellants, Thomas H.

Miller and others, as devisees under the will, was a mere contingent interest, a mere executory devise. In such a case it is sufficient to bind the estate in judicial proceedings to have before the court those in whom the present estate of inheritance is vested. Lord Redesdale's authority on this point is decisive. In *Giffard* v. *Hort*, 1 Sch. & Lef. 386, 408, he says: "Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remainder-men are barred." In another part of the same opinion Lord Redesdale said: "Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." Ib. ibid. These propositions are substantially repeated in his Treatise on Pleading, 173, 174, where he adds, "Contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, *not subject to any preceding vested estate of inheritance by which it may be defeated*, must be made a party to a bill affecting his rights." In the present case, it is true, some of the children of Alsey S. Miller were in being at the time of the proceedings in question (1852); but there was a "preceding vested estate of inheritance," by which their executory devise might be defeated, namely, the estate vested in the infant child of Thomas P. Rutledge, who was a party to the proceedings. We are of opinion that the bill of Thomas H. Miller and others was properly dismissed by the court below.

The complainants in the cross-bills, William Dunlap and others, and Martha R. Worrall and others, claim the lands under the other source of title, that of John Childress; and, to avoid the effect of the defendants' claim under the Rutledge

certificate, they deny that it was assigned by Rutledge to Brinson, or by Brinson to M. T. Johnson; deny that it was ever lawfully located on the land in question; and aver, that if it was ever properly located thereon, it became void by non-compliance with the land laws of Texas.

The Childress title arose in the following manner: John Childress, a brother-in-law of the late Mr. Justice Catron, and brought up in his family, was an early emigrant to Texas under the patronage of his uncle, Sterling C. Robertson, empressario of a colony on the Brazos River. His first visit to Texas was in 1834, and in 1836 he took his wife and two children with him, namely, John W. Childress and George R. Childress. Though numbered among the colonists of Mr. Robertson, for some reason he failed to obtain any valid grant of land, though undoubtedly entitled to one. He died in Texas in the fall of 1837. By an act of the legislature of Texas, passed February 13, 1860, the Commissioner of the Court of Claims was authorized to issue to the heirs of John Childress a land certificate for one league and one labor of land (amounting to about 4605 acres). His widow had, in the meantime, married one Miles Johnson, by whom she had a daughter named Mary. As the act of the legislature was expressed to be for the benefit of the heirs of John Childress, it would seem that no interest in the grant enured to the said Mary. On the 9th of March, 1860, a land certificate was issued by the Commissioner of the Court of Claims to the heirs of John Childress as authorized by the act. It was procured by, and delivered to, a lawyer of Austin by the name of John A. Green, who was employed by Judge Catron on behalf of the heirs to attend to the business. The heirs, John W. Childress and his brother George, seem to have been of a roving disposition. John appeared at Austin in December, 1860, and, supposing that his brother George, who had not been heard from recently, was dead, he gave Green a power of attorney to locate the said certificate in the following manner, namely, one-third for the benefit of his brother George, if he should be alive, and if not, then for John's own benefit; one-third for the benefit of Green, as a compensation for his services; and

one-third for the benefit of one John O. St. Clair, to whom John W. Childress had sold his own share. No location of the certificate was made until after the war.

In May, 1867, Green sold his one-third of the certificate to Doctor I. R. Worrall, of Austin. The deed given cannot be found, but it is alleged on the part of William Dunlap and others, and Martha R. Worrall and others, that it was given to Worrall's wife, Adaline S. Worrall, under whom they claim. The deed, as above said, is lost, and the records of Tarrant County were destroyed by fire in the spring of 1876, but Mr. Furman, a lawyer of Fort Worth, had, before the fire, made an abstract of titles from the county records, and in that abstract he finds, amongst other things, (1) a transfer from John W. Childress to John A. Green, conveying one-third of the grantor's interest in the Childress certificate, filed October 8th, 1868 (date not given); (2) a transfer of the same interest from John A. Green to Adaline S. Worrall, dated May 15th, 1867, filed October 12th, 1868. In addition to this evidence, in the deed from Dr. Worrall and his wife to E. M. Daggett, dated September 30th, 1869, and hereafter to be mentioned, it is recited that the land in question (conveyed by that deed) was the separate property of said Adaline S. Worrall. We think, therefore, that it may be regarded as proven that the deed for the one-third of the Childress certificate, given by John A. Green in May, 1867, was given to Adaline S. Worrall, though Green himself says that he has no recollection to that effect, and that all his transactions were with Dr. Worrall himself.

On the 28th of January, 1868, Dr. Worrall presented to the county surveyor of Tarrant County the following application for a survey, to wit:

"AUSTIN, *Jan'y 28th*, 1868.

"*County Surveyor, Tarrant County, Texas:*

"Sir: By virtue of certificate No. 186, issued by W. S. Hotchkiss to Jno. Childress' h'rs, now in your office, you will please survey for me 1,806,336 sq. vs. (320 acres) of land about one mile S. E. of Fort Worth, being the same land heretofore

surveyed in the name of T. P. Rutledge, the field-notes of which are hereby adopted as a full description of this survey:

"Beginning at the S. E. cor. of A. Briggs's survey and S. W. corner of B. F. Crowley's and running so as to embrace and include all the vacant land connected with said point. That is the said Rutledge survey.

"I. R. Worrall."

A survey was made accordingly on the top of the Rutledge survey by adopting the notes of the same, and the county surveyor certified it as follows, to wit: "I, A. G. Walker, county surveyor for Tarrant County, do hereby certify that the survey designated by the foregoing plot and field-notes was this day made by me by adopting field-notes of the survey which was made, as above stated, the 16th January, 1852, and which I believe to be correct, and that the same is upon s'd survey which is in the name of T. P. Rutledge, certificate No. 134, class 3rd, issued by the board of land commissioners of Gonzales County the 12th day of October, 1846." Dated "this 28th day of May, 1868." On the 17th of June, 1868, a patent was issued on this survey to "the heirs of John Childress, deceased, their heirs and assigns."

It thus appears that the Childress survey, under which the complainants in the cross-bills claim title to the land in dispute, was purposely made by Dr. Worrall on the top of the Rutledge survey, under which Daggett had been in possession of the land for thirteen years. Of course such a title cannot be maintained unless the survey made under the Rutledge certificate was void. It is contended that it was void, first, because the certificate had been located on other lands in Fannin County, before its location on the lot at Fort Worth. This is true. Rutledge had procured a conditional head-right certificate for 320 acres as early as March 20th, 1839, from the board of land commissioners of Washington County; and had in March, 1846, procured a survey under it for 320 acres in Fannin County, which was duly examined and approved, and filed in the General Land Office; but was afterwards endorsed as forfeited for non-return of unconditional certificate by 1st

August, 1857. Rutledge seems to have abandoned this survey, and in October, 1846, obtained a new certificate in Gonzales County, as before stated, under which the survey in Fort Worth, Tarrant County, was made. It was permitted to a settler to abandon one location and adopt another. Indeed, the new certificate and location operated as an abandonment of the first, and the land became public land again, subject to location by other parties. In *McGimpsey* v. *Ramsdale*, 3 Texas, 344, the court sustained a survey made after a former survey under the same head-right had been abandoned, the judge who delivered the opinion saying: "If the question was a new one, I should feel strongly inclined to deny the right of Ramsdale to have raised his former location; but the practice commenced with our land system, and to upset it now, would disturb land titles to an incalculable extent." We do not think that the location of Rutledge's head-right in Fannin County was sufficient to prevent his obtaining a new certificate and a location in Tarrant County, unless he had sold or otherwise disposed of the lands in Fannin County. There is no proof in the case that he had done so; although one of the witnesses, Nance, who resides in Fort Worth, testifies that in September, 1859, being in Austin, and having understood that Daggett could not get his land patented, he inquired of Mr. White, the then commissioner of the General Land Office, why he could not, and the reason given was, that the conditional certificate had been issued long before and had been long before located in Fannin County by another man, to whom it belonged. But as there is no proof of this fact in the record, except the said hearsay testimony, we must conclude that this ground of objection to the Rutledge location is not sustained.

We do not deem it necessary to take particular notice of the Cass County location under the Rutledge certificate, which seems to have been abandoned; or of the survey under the William Sparks certificate, which was fully satisfied by other locations, and was never set up as establishing any right to the property in dispute. These documents may for the time have deterred the commissioner of the General Land Office from granting a patent to Daggett; but we do not see that they

present any insurmountable obstacle to the validity of the survey made by Johnson.

Another ground urged for maintaining that the said location was void when the Childress location was made is, that the unconditional certificate was withdrawn from the General Land Office and not returned within the time required by law. The old wrapper in which it had been folded, and which also contained the survey, was endorsed with the words, "forfeited for non-return of unconditional certificate by 1st Aug. 1857." And yet there was another still older memorandum in pencil, faint and partly obliterated, which read thus: "Unconditional certificate withdrawn by M. T. Johnson . . . Dec. 14, '57, for relocation." A. B. McGill testifies that he was a clerk in the General Land Office from 1859 to 1866, except a short period towards the close of the war; and was chief clerk from 1865 or 1866 to 1870; that the endorsement, "forfeited for non-return of unconditional certificate by 1st Aug. 1857," is in his handwriting, and was written when he was chief clerk; that the other endorsement, "unconditional certificate withdrawn by M. T. Johnson . . . Dec. 14, '57, for relocation," is in the handwriting of Robert M. Elgin, who was chief clerk of the said office in 1857, and until the close of the war; that only the commissioner and chief clerk were authorized to make such memoranda or endorsements on the files; that he (McGill) had no recollection of having seen the pencil memorandum at the time of making his endorsement in ink; that from the appearance of the endorsements he would say that the pencil endorsement was made prior to the time when he (McGill) made the endorsements in ink referred to.

Joseph Spence, formerly commissioner of the land office, testifies as follows, to wit:

"I was commissioner of the land office in 1868. The first knowledge that I had of the Thomas P. Rutledge survey in Tarrant County was after the Childress survey had been made and returned. Dr. I. R. Worrall controlled the Childress survey and was anxious to get a patent upon it. Upon examination of the Childress survey, it was ascertained to cover the Thomas P. Rutledge survey. Mr. A. B. McGill, who was

chief clerk of the land office, referred to me both the Childress and the Rutledge papers, with the information that the Rutledge certificate was not found among the papers of the file. We then together examined the papers, but failed to find the certificate. I remarked to him that we had better not patent until further investigation. Shortly afterwards Dr. Worrall insisted upon the patent issuing on the Childress certificate, and we, not finding the Rutledge certificate, determined to issue the patent on said Childress certificate, and did so."

This evidence shows that the Rutledge certificate was not in the land office, or could not be found therein, in 1868, when the Childress patent was issued, and when undoubtedly McGill, the chief clerk, made the endorsement testified to by him. But it fails to prove that it was not in the office on the 1st of August, 1857. The endorsements on the back of the certificate itself show that it was filed in the office October 4th, 1852 (probably at the same time with the survey); and across its face, in red ink, is written "Registered and approved Dec. 11, 1857." (Signed) "Jas. O. Illingsworth, Comm'r of Claims." This memorandum, in connection with the old pencil memorandum on the wrapper, "Withdrawn by M. T. Johnson . . . Dec. 14, '57," shows that, at that time, December, 1857, Johnson, who was undoubtedly acting for Daggett, was attending to the final authentication of the Rutledge certificate and survey, by getting it approved by the commissioner of claims; and that, for some reason, not now disclosed, he carried it away with him. [The presentation of the certificate to the commissioner of claims, and its registry by him, were made in pursuance of an act passed August 1st, 1856, which created the said officer, and required all land certificates (with certain exceptions) to be presented to him for registry within two years, or to be forever barred from location, surveys and patent.] The whole evidence, taken together, instead of showing, as supposed by McGill in 1868, when he made the endorsement on the wrapper, that it had not been returned to the office by the 1st of August, 1857, rather shows that it was never removed from the office until December, 1857. How long it

was then detained does not appear. We infer from the testimony that it was in the office in 1867. The official land map of Tarrant County was made in that year, and the land in question was marked and designated as the T. P. Rutledge survey, and so continued until 1873. This would hardly have been done if the certificate had not been in the office. When it was taken out of the office, after that, does not appear, — probably it was taken out by Daggett for some purpose and neglected to be returned, as it was shown that he was very careless about his papers. J. P. Smith, a lawyer of Fort Worth, and administrator of Daggett, testifies that in 1879 or 1880 he was counsel for him in a suit of Turner's heirs against him for a community interest under their grandmother, Daggett's wife, (who had died in 1871,) and he wanted the certificate in question; and, not finding it in the land office, he had Daggett search for it, and Daggett found it in his own safe and gave it to Smith, who, after keeping it two or three days, carried it to Austin by Daggett's authority, and handed it to the commissioner of the land office, and requested him to have it returned to its proper file in the office.

The laws which gave importance to the locality or place of deposit of the certificate were an act of the legislature of Texas passed August 30th, 1856, and another act passed April 25th, 1871. Paschal's Dig., Vol. I, Art. 4210, p. 701, and Vol. II, Arts. 7096–7099, p. 1453. The first of these acts declared "that all owners or holders who have conditional certificates now located, or surveys upon lands, shall return to the General Land Office the unconditional certificates, together with the field-notes of the same, on or before the first day of August, 1857, and all unconditional certificates which are not returned by that time, the said locations and surveys shall be null and void, and all such locations and surveys made by virtue of such conditional certificates shall become public domain, and subject to be located upon as other vacant lands." In our view of the evidence, this law did not affect the Rutledge title. The *prima facie* proof is that the certificate was in the land office from 1852 to December, 1857, and that the chief clerk, McGill, made a mistake in endorsing the wrapper as he did, "forfeited

for non-return of unconditional certificate by 1st August, 1857." As already suggested, this endorsement was probably made in 1868, when Dr. Worrall applied for a patent on the Childress survey; and no doubt was honestly made. McGill admits that he did not notice the pencil memorandum on the old wrapper.

By the act of 25th April, 1871, it was provided that in all cases of location and survey of lands, by virtue of any genuine land certificate, including head-rights, etc., the certificate should be returned to the General Land Office with the field-notes within the time prescribed for returning field-notes [which was twelve months from the date of survey]; and the withdrawal of it from the office should render the location and survey null and void; with a proviso allowing a withdrawal where the certificate had only been located in part; and by the second section of the act it was provided that, in all such cases, if the certificate was not on file in the General Land Office at the time of passing the act, and had not been withdrawn for locating an unlocated balance, it should be returned to, and filed in, the said office within eight months from the passage of the act, or the location and survey should be void. It was strenuously contended that the case was within this statute, and, therefore, that the Rutledge survey was void. But it is not absolutely certain from the evidence that the Rutledge certificate was not in the land office when the act of 1871 was passed, or that it was not returned thereto within eight months from that time, which period expired on the 24th of December, 1871. It is true, it was not found by the clerk in 1868 when the patent was issued on the Childress survey; and it was not found on a subsequent search in 1875. Resort must be had to presumptions to conclude that it was not there in 1871. Will such a presumption be raised in favor of another title superposed upon the land at a time when the Rutledge certificate was perfectly valid, and possession was enjoyed under it? And even if it were sufficiently proven that the certificate was not in the office during the years in question, the question would still arise whether the claimants under the Childress survey and patent can take advantage of this circumstance to maintain

their title to the property. When that title was created, in 1868, as already intimated, the Rutledge survey was in full force and effect, and Daggett was in possession under it, and had been so for thirteen years. Did, therefore, the injunction of the statute of 1871, requiring the survey to be returned to the land office within eight months, under penalty of being void if not so returned, enure to the benefit of the holders of the Childress patent, or did it enure to the benefit of the State? The Childress survey when made was void, and therefore the patent issued upon it was void, because made and granted upon lands already appropriated under an elder title, which title, at that time, was perfectly valid, and only became invalid by non-compliance with a statute subsequently passed for reasons of public policy: did the Childress survey and patent, which were void at their inception, become invested with life and validity by means of the subsequent law and the failure to comply with it? If the question was only one between the holders of the Rutledge title and the State, then no parties other than the State could take advantage of the omission to comply with the law.

The practice of locating certificates upon prior rightful locations is not favored by the laws of Texas. It was declared by the act of August 30th, 1856, (Pasch. Dig. Vol. I, Art. 4575,) that whenever an entry is made upon any land which appears to be appropriated, deeded or patented by the books of the proper surveyor's office, or records of the County Court, or General Land Office, the party shall abide by it; and if judgment be rendered against him he shall not have the right to lift or re-enter the certificate, but the same shall be forfeited. The purpose of this act was further secured by the constitution of 1869, by the 10th article of which, section 3, it was declared that "all certificates for land located after the 30th day of October, 1856" (referring undoubtedly to, but mistaking the date of, the last mentioned act) "upon lands which were titled before such location of certificate, are hereby declared null and void," with a proviso in favor of inadvertent conflict with older surveys. Of course if the certificate was made void, the location and survey were *a fortiori* void, and the

obtaining of a patent could not mend the matter, for it was decided by the Supreme Court of Texas, in *Morris* v. *Brinler*, 14 Texas, 285, that a subsequent locator having actual notice of a prior location will be postponed to the superior rights of the prior locator, although the subsequent location may have passed into a patent.

The provision of the constitution of 1869, just cited, was retrospective, was in force when the act of 1871 was passed, and was carried forward, as to all future locations and surveys, into the constitution of 1876, which declared, "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the State, evidence of the appropriation of which is on the county records or in the General Land Office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him." Art. 14, sect. 2.

These constitutional provisions, (whose validity upon the subject in hand cannot be seriously questioned,) taken in connection with the act of 1856, had the effect to make void the location of the Childress certificate upon the land in dispute; for, at that time (1868) the said land was "appropriated" and "titled" by the survey under the Rutledge certificate, which was duly recorded in the county records and entered and filed in the General Land Office, plotted on the map of Tarrant County, and evidenced by the long-continued occupation of Daggett. If, then, the Childress location was absolutely void at its inception, how could it be revived by the subsequent failure of Daggett to comply with the act of 1871? It seems to us quite clear that it could not be, and that said failure enured to the benefit of the State alone. But the State has never availed itself of the omission; and it is probable that nothing but a direct proceeding to vacate the survey would be effectual for the purpose. Daggett and those claiming under him having always been in notorious possession of the land, no person could lay any new location upon it without full knowledge of their pretensions to the ownership; and it was held

by the Supreme Court of Texas in the recent case of *Snider* v. *Methwin*, 60 Texas, 487, that no one having knowledge of the continued claim of those who made title to land under a certificate could acquire any right to said land, although said certificate had been taken from the land office prior to the passage of the act of 1871, and was not returned within the period required by that act. It is true, that the certificate in that case had been taken from the office by a person who had no interest in it, or right to control it; but the parties interested had notice of its absence in time to have supplied a duplicate, but did not do so until after the prescribed time had expired.

In the present case the certificate was returned to the office in 1879 or 1880, from which it had probably been inadvertently detained by Daggett. As between the parties to this controversy, our opinion is, that the Rutledge title must prevail, and that it is a sufficient protection to the defendants against that set up by the complainants in the cross-bills.

This view of the case renders of less importance a question which might have been very material as between the original complainants, Thomas H. Miller and others, and the defendants, had not the former been barred by the decree annulling Rutledge's will. We refer to the question as to the assignment by Rutledge of his certificate to Brinson and by Brinson to M. T. Johnson. We are satisfied from the evidence in the case that Rutledge sold said certificate to Brinson and that Brinson sold it to Johnson, at whose instance, and in whose behalf, it was located on the land in question. M. J. Brinson, son of Matthew Brinson, to whom it is alleged Rutledge sold the certificate, testifies that about 1848 or 1849 Rutledge and one Gill were in the business of horse-raising and horse-trading, and were occasionally at his father's place in Shelby County, and one deal they made with him was the sale to him of the land certificate in question for which the witness's father gave them a pony belonging to witness, (who was then about twenty years old,) and his father gave him another horse instead of it; that afterwards, about 1851, M. T. Johnson bought the certificate of witness's father; and that Johnson afterwards

traded it to Captain E. M. Daggett. It is true, the witness did not handle the certificate, but derived his knowledge of it from conversation with his father and co-temporaneous knowledge of the transactions. The witness further states that whilst his father (Matthew Brinson) owned the certificate he employed Gill to locate it, or have it located for him; but found that he was making a fraudulent use of the certificate, using it in what he termed "lariating land," in Fannin County; and he was obliged to institute proceedings to get possession of it, and finally got it back from some member of Gill's family after his death.

But no assignment of this certificate from Rutledge can now be found. If one ever existed, it is lost or has been destroyed. However, if a sale of the certificate was actually made by Rutledge to Brinson, and by the latter to Johnson, it matters little whether it was actually assigned in writing or not, as it is well settled in Texas that the land certificates of that State are chattels, and may be sold by parol agreement and delivery, whereby the purchaser acquires a right to locate the certificate and procure a patent in the name of the grantee, but for his own use, he becoming thereby the equitable owner of the land located. *Cox* v. *Bray*, 28 Texas, 247; *Peevy* v. *Hurt*, 32 Texas, 146; *Stone* v. *Brown*, 54 Texas, 330, 334; *Parker* v. *Spencer*, 61 Texas, 155, 164. In *Cox* v. *Bray*, Chief Justice Moore said: "But even if the contract were within the statute" [of frauds] "the payment of the purchase money, the location of the land, the procuring of the patent, and the possession and improvements made upon it by the defendant and those under whom he claims, would, as has been frequently decided by this court, have presented sufficient equity to have entitled the defendant to a decree of title, if he had brought a suit for this purpose within a reasonable and proper time. . . . And it certainly could not be less effectual to protect him against the wrongful efforts of the vendor to deprive him of his possession and equitable title to the land, however long he may have delayed his suit for this purpose." p. 261.

Even when a written assignment was made, it was often

made with a blank space left for the name of the assignee, to be filled up with the name of any subsequent purchaser who saw fit to insert his own name therein, — much the same as blank assignments of corporation stock, which pass from hand to hand, perhaps a dozen times, before they are filled up with the name of an assignee. It is distinctly stated in *Hill* v. *Moore*, 62 Texas, 610, 614, that "land certificates were the subjects of transfer, and often passed through the hands of many persons by an assignment in blank." In that case one Jowell owned a land certificate as community property, and, after his wife's death, sold it to one who was a purchaser in good faith, and without notice of the community. The heirs of the wife brought suit for a portion of the land located under the certificate; and contended that the purchaser was bound to take notice of the wife's interest. But it did not appear on the record whether the certificate was issued on Jowell's own head-right, or some other person's. The court held that, for all that appeared, it might have been obtained in the way indicated above. "So far as the record shows," says the court, "it may have been true that Jowell purchased the certificate through a blank assignment, and that he transferred with this assignment on it, simply by delivering it to the persons through whom the appellee claims; if so, his name would not even appear, either on the certificate or on any writing by which the transfer was made, and in such case a purchaser would not be put on inquiry as to the rights of other persons, unless it be of those persons who claim by inheritance from the original grantee, or some one in whom a right vested by operation of law, at the time the certificate issued."

There seems to have been an assignment of this kind of Rutledge's unconditional certificate. Two witnesses are sworn in the case who distinctly testify that they saw it, with Johnson's name inserted as assignee. One of these is C. G. Payne, of Dallas County, Texas, an attorney-at-law. He states that in January, 1868, he visited the land office at Austin, to investigate some land claims and land locations in Tarrant County. Whilst there he examined the Rutledge claim. He says he found that two certificates had been issued to Rutledge;

namely, a conditional one upon which a survey had been made in Cass County; and an unconditional certificate transferred by Rutledge to M. T. Johnson, and by Johnson located in Tarrant County at Fort Worth upon the land now in controversy, the field-notes and survey returned to the General Land Office, and there filed, mapped and platted, and the patent refused on account of the unconditional certificate located in Cass County. He says that the transfer of the latter certificate from Rutledge to Johnson was written in a coarse, rough, round handwriting. The usual form of transfers of certificates was used. The substance of said transfer was an assignment of all right, title, claim and interest of said T. P. Rutledge of, in and to the said certificate to the said M. T. Johnson, and authority therein authorizing the commissioner of the General Land Office to issue the patent to the said M. T. Johnson or to his assigns. On his cross-examination the witness says, that the transfer was acknowledged before some officer authorized to use a seal, and had his certificate of acknowledgment and seal thereon. He states that he also saw the deed from Johnson to E. M. Daggett on record in Tarrant County.

The other witness who testifies to having seen the assignment of the unconditional certificate from Rutledge to Johnson is W. H. H. Lawrence. He testifies that he was engaged in the land business at and about Fort Worth; that he had transactions with E. M. Daggett from 1873 to 1878, and examined his title papers at his request, especially in reference to the 320 acres tract known as the Rutledge survey; that this examination was made, he thinks, in 1876, and he distinctly remembers making a favorable report to Daggett after he had finished the examination. He further says: "My recollection is that among the papers I examined was the Thomas P. Rutledge certificate. I did find a transfer of such certificate to M. T. Johnson. I am sure of this, because had it not been present I should have known that the title from Rutledge was defective." Being asked from whom, to whom, and the form thereof, he said: "I can only say that it was from Rutledge to M. T. Johnson, and in the usual form of transfers of such

certificates." The witness further states: "If there had been no transfer I should have discovered it and made a different report." To another interrogatory he added: "I had occasion in very many cases to look up the titles of different lands in Texas, and became familiar in the course of five years in the land business at Fort Worth with the general laws of the State in regard to lands, as also familiar with the examination of titles."

Apparently (but perhaps not necessarily) opposed to the hypothesis that the certificate in question was purchased by Johnson from Brinson is the evidence of Henry Beaumont, who testifies that in the winter of 1851–2 he placed a lot of land certificates, including the T. P. Rutledge certificate for 320 acres, in the hands of M. T. Johnson for location, under a written contract: and that the certificate in question had come into his hands with others from a party (whose name he does not mention) who had been engaged in locating and surveying lands, and was then retiring from the business. In corroboration of this testimony a receipt in the handwriting of M. T. Johnson was produced in evidence, a copy of which is as follows, to wit:

"Rec'd, Austin, March 9, 1852, of Henry Beaumont the following land certificates, to be located or accounted for, viz.:

	Acres.
"Four leagues Calhoun County school lands for location.	17,712
Thomas Rutledge, H. R., 320, class 3, Gonzales County, 12 Oct., 1846.	320
Wm. P. Milby, H. R., 640, class 3, No. 24, Liberty County, 4th March, 1845.	640
John Becton, 320 H. R., 3rd class, No. 234, Victory County.	320
Sam'l Hudler, bounty warrant, dated Jan'y 1st, 1838, signed Barnard Bee, sec. war.	1,280
James H. Barnwell, bounty warrant, 7th January, 1837, signed G. W. Poe, pay gen'l.	320

Acres.

Toby scrip, No. 864, to Almanzo Houston, dated Oct. 10, 1836. 640

(Signed duplicate.)

(Sign'd) M. T. Johnson.

Endorsed: 'Henry Beaumont land matters.'"

A duplicate of this receipt was found amongst Johnson's papers after his death by J. P. Smith, his administrator.

It is somewhat difficult to reconcile this evidence with that of the other witnesses. There is evidently wanting some undiscovered explanation of the discrepancy. Beaumont says that he only had the certificate for location, and that Johnson was to divide with him the emoluments thereof, — which were always one-third of the land located. From the testimony of J. P. Smith, Johnson's administrator, it appears that Beaumont and Johnson had had dealings together in the location of land certificates for some years prior to the date of the receipt, to wit, in 1850 and 1851. The certificates mentioned in the receipt were probably received by Johnson at some time, or at different times, previous to the giving of the receipt. One of the certificates was that of Wm. P. Milby, for 640 acres, class 3, No. 24, issued 4th of March, 1845. This certificate was located June 25th, 1850, — a year and nine months before the date of the receipt. The certificate in question, that of Rutledge, was located January 8th, 1852, two months before the date of the receipt. The suggestion of the complainants that the survey was antedated has no evidence to support it. That, in some way, Johnson had become entitled to these certificates (especially to the Rutledge certificate) is corroborated by strong circumstances. Smith, Johnson's administrator, says that Beaumont never asserted any claim to the land mentioned in the receipt. He had correspondence and communications with Beaumont after Johnson's death. He says that there was an agreement between them that Johnson should locate the certificates placed in his hands by Beaumont, and was to have for doing so one-half of such interest as Beaumont had in them; yet no claim for any accounting was ever made after Johnson's death. It is quite

possible that Beaumont obtained the Rutledge certificate from Gill, who used it as a "lariat" for improperly locating land; and that Johnson bought it of Brinson on ascertaining that it belonged to him. This would explain why Beaumont never asserted any claim to the land located under it, although it subsequently became so valuable.

Be all this as it may, it is clear that Johnson, either as owner of the certificate or as an agent employed for locating it, and as such having, according to usage, an interest in the lands to be surveyed, was fully authorized to make the location under it which he did make, and to take possession of the lands either for his own use (if he was the owner) or for the use and benefit of himself and the actual owner; and that his title and possession thus acquired was good against all the world, except those who could produce a better title than that which the certificate and the location under it secured. The legal title, it is true, was in Rutledge's heirs; but the equitable title was in Johnson, (if he did in fact purchase the certificate,) and, in any event, one-third of such equitable title belonged to him, as the authorized locator of the certificate, and the residue was in his hands and possession for the use of the owners whom he represented. The location and survey were good as against the State, and all other persons claiming by inferior title. E. M. Daggett as purchaser from Johnson, and obtaining possession from him, and the defendants as successors of Daggett, became entitled to the benefit of the Rutledge survey as a protection against all persons claiming under a title inferior thereto.

But this is not the whole case. There are other points which go to fortify the position of the defendants, which it is proper to notice.

After the Childress certificate was located by Dr. Worrall in 1868, E. M. Daggett, who had then been in possession under the Rutledge title for the space of fourteen years, purchased in, as he supposed, the entire Childress claim. In 1868 or 1869 George R. Childress, the second son of John Childress, appeared at Fort Worth, having returned from California, where he had been residing for many years. He did not know

that his brother John was living, but supposed him dead, and that he, George, was his father's sole heir. He claimed the land in question, and Daggett compromised with him for about three hundred dollars, and George gave a deed selling and relinquishing all his right and title to Daggett in fee, with a general warranty against himself, his heirs, and all others. He afterwards went to Austin, saw Green, learned of his brother's being alive, and confirmed the arrangement made by the latter with Green, who acted therein for the benefit of Dr. Worrall.

In September, 1869, Daggett also compromised the claim of Dr. Worrall and procured a deed from him and his wife, Adaline S. Worrall. This deed is in the usual form of deeds of bargain and sale. It is dated 30th of September, 1869, recites a consideration of three hundred dollars, conveys to Daggett the land in dispute by metes and bounds, as in the Childress patent, and recites that the land was the separate property of the said Adaline S. Worrall, referring to the deeds from John W. Childress to Green and from Green to the said Adaline. The deed concluded with this habendum and warranty, to wit: "To have and to hold to him, the said E. M. Daggett, his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever, claiming or to claim the same." The deed was acknowledged before a notary public, and a certificate of said acknowledgment was made in due form, with one exception; it contains no statement that Adaline S. Worrall, the wife, was privily examined by the officer apart from her husband. This is necessary in order to validate a conveyance of the wife's separate property in Texas, and its absence cannot be supplied by showing that she was actually privily examined. *Berry* v. *Donley*, 26 Texas, 737; *Fitzgerald* v. *Turner*, 43 Texas, 79; *Looney* v. *Adamson*, 48 Texas, 619; *Johnson* v. *Bryan*, 62 Texas, 623. To the same effect see *Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Hitz* v. *Jenks*, 123 U. S. 297, 303. This seems to be a fatal defect; and it is on this defect that the complainants in the cross-bills rely. Their position is, that the land was Mrs. Worrall's separate property, that she never executed any conveyance of it accord-

ing to law, and that it was hers when she died in November, 1870, and descended, one-half to her husband, Dr. I. R. Worrall, and one-half to her brothers and sisters, represented by William Dunlap and others. The complainants in the other cross-bill, Martha R. Worrall and others, claim the other half of the property as heirs of Dr. Worrall, being his mother and his brothers and sisters. They contend that Dr. Worrall had no interest to convey when he executed the deed with his wife in 1869, and hence the one-half part which he inherited from his wife in November, 1870, was unaffected by that conveyance. It is true, if the deed contained a warranty, he would be estopped from claiming the land; but it is contended that the clause above recited does not amount to a warranty. It has been decided, however, by the Supreme Court of Texas that words substantially such as those contained in the deed do import a general warranty. In *Rowe* v. *Heath*, 23 Texas, 614, the following words were so construed, to wit: "For him the said R. H., his heirs and assigns, to have and to hold forever, as his own right, title and property, free from the claim or claims of me, my heirs, or creditors, and all other persons whomsoever, to claim the same or any part thereof lawfully." In our judgment the deed of Worrall and his wife did contain a general warranty, and the one-half part of Adaline S. Worrall's interest which descended to Dr. Worrall was carried by estoppel to Daggett when Dr. Worrall inherited the same from his wife.

The other questions arise on the statute of limitations. The defendants pleaded the limitations of three years and of five years, and also peaceable possession for thirty years. The act of February 5th, 1841, first created the limitations referred to. The 15th section created that of three years, declaring that: "Every suit, to be instituted to recover real estate, as against him, her or them, in possession under title, or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" not computing the duration of disability from minority, coverture or insanity; and by *title* meaning regular claim of transfer from or under the sovereignty of the soil; also reserving the right of the government.

The 16th section created the limitation of five years, declaring that: "He, she or they who shall have had five years like peaceable possession of real estate, cultivating, using or enjoying the same, and paying tax thereon, if any, and claiming under a deed, or deeds, duly registered, shall be held to have full title, precluding all claims; but shall not bar the government;" and saving disabilities for non-age, coverture or insanity.

Now supposing that the prerogative of the government prevented the statute from running until after the patent issued to the heirs of John Childress in June, 1868, it certainly commenced to run at that time against those who claimed under the patent; and the facts present a strong case of adverse possession on the part of E. M. Daggett and his grantees. They were in full, continuous and peaceable possession for a period, altogether, of thirty years, namely, from 1854 to 1885, when William Dunlap and others appeared as intervenors in this suit; and from 1854 to 1886, when the Worralls intervened. This possession was complete in the use, cultivation and enjoyment of the land in dispute, and the payment of taxes thereon. It was claimed and exercised under a regular deed of conveyance from M. T. Johnson, dated 23d June, 1855, which granted and conveyed, not only the certificate of Rutledge, but the land located under it, describing and identifying the same; and which was duly registered in the records of Tarrant County on the 30th of March, 1857. It is difficult to see why the plea of limitation of five years at least is not a good bar against the heirs of Adaline S. Worrall. She died November 4th, 1870, and one-half of her estate descended to her husband, I. R. Worrall, who survived to the 22d September, 1871. The statute having commenced to run against him, was not suspended by his death, and had been running more than fourteen years at the commencement of the suit. The other half of Adaline S. Worrall's estate descended to her brother, John Cook, and her two sisters, Alizannah, wife of William Dunlap, and Matilda, wife of Dr. Jonas Fell. John Cook was living at Adaline's death, and survived to August, 1873. The sisters were married women when Adaline S. Worrall died, but as

her disability as a married woman had already prevented the statute from running during her lifetime, their disability, according to the law of Texas, cannot be added to hers. It was decided by the Supreme Court of Texas in the cases of *White* v. *Latimer*, 12 Texas, 61, and *McMasters* v. *Mills*, 30 Texas, 591, that one disability cannot be tacked to another so as to prolong the disabilities beyond the continuance of that which existed when the cause of action accrued. See, also, Wood on Limitations, § 251, and notes. According to this rule the statute commenced to run at the death of Adaline S. Worrall, on the 4th of November, 1870. If this be so, as we think it is, the complainants in the cross-bills are barred by the statute of limitations.

The new statute of limitations contained in the Revised Statutes, which went into effect on the 1st day of September, 1879, does not materially differ, so far as its application to the present case is concerned, from the old statute of 1841; and it is explicit in declaring that "the period of limitation shall not be extended by the connection of one disability with another." Rev. Stats. Texas, 1879, Art. 3225.

In our judgment, the statute of limitations is a complete bar to the claims set up by the complainants both in the original and in the cross-bills, whether we are right or not in regard to the validity of the Rutledge title.

The decree of the Circuit Court is affirmed.

HILL *v.* WOOSTER.

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

No. 10. Argued November 19, 20, 1889. — Decided January 13, 1890.

In a suit in equity, brought under § 4915 of the Revised Statutes, in a Circuit Court of the United States, there was a decree in favor of the plaintiff, that he was entitled to receive a patent for certain claims. The decision rested solely on the fact that he was the prior inventor, as between

him and the defendant. On appeal by the defendant to this court; *Held*, that this court must consider the question of the patentability of the inventions covered by the claims, and that, as they were not patentable, the decree must be reversed, and the bill be dismissed.

In equity. The suit was brought under section 4915 of the Revised Statutes of the United States to determine to whom a certain patent, yet to be issued, covering certain improvements in milk-setting apparatus, belonged. Decree in favor of the plaintiff, from which the defendants appealed. The case is stated in the opinion.

Mr. William Edgar Simons for appellants.

Mr. Stephen C. Shurtleff for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of Vermont, by Daniel B. Wooster against Samuel Hill, Benjamin B. Prentice, and The Vermont Farm Machine Company, under section 4915 of the Revised Statutes, which reads as follows: "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The substance of the allegations of the bill is as follows:

Wooster, on the 17th of January, 1879, filed in the Patent Office an application for a patent for an "improvement in milk-coolers." The Commissioner of Patents declared an interference between that application and letters patent No. 207,738, granted September 3, 1878, to said Hill and Prentice, for an "improvement in milk-coolers," an interest in which patent had been assigned to the defendant The Vermont Farm Machine Company. Testimony was taken, and priority of invention was adjudged by the Patent Office in favor of Wooster, in respect to the claim in issue in the interference; and Wooster, by a separate application for that purpose, was granted a patent containing that claim, on the 14th of June, 1881, No. 242,805, for an "improvement in milk-coolers." On the 30th of March, 1880, Hill and Prentice filed an application for a patent for an "improvement in milk-setting apparatus." They also, on the 10th of November, 1880, filed an application for a reissue of their patent No. 207,738. Both of the last-mentioned two applications were declared to be in interference with the application of Wooster, of January 17, 1879. Testimony was taken by both parties, and the Commissioner of Patents decided to grant a patent for certain of the claims to Hill and Prentice, or to The Vermont Farm Machine Company as their assignee, and refused to grant a patent for them to Wooster. Four of those claims arose on the application filed by Hill and Prentice on the 30th of March, 1880, and were as follows:

"1. The combination, with a cabinet provided at its top with a cover or lid and having a door in its side, of an ice receptacle located in the upper portion of the cabinet, and an elongated milk receptacle, the upper portion of which is located within the ice receptacle and its discharge conduit arranged to extend below the ice receptacle.

"2. In a milk-cooling apparatus, the combination, with a cabinet or box having its top and side provided with covers or doors, of a vertically elongated milk receptacle provided with a discharge-regulating valve or stop-cock at its lower end, and an ice receptacle having an open top and surrounding the upper portion of the milk receptacle.

"3. A milk-cooling apparatus consisting essentially of a vertically elongated milk receptacle, provided with a discharge opening at its lower end, an ice receptacle having an open top and surrounding the upper portion of the milk receptacle, and a cabinet having a cover which extends over the milk and ice receptacles, and with a side door for preventing admission of the outer air to the lower portion of the milk receptacle, when desired.

"4. A milk-cooling apparatus, consisting of a cabinet provided with an upper and lower compartment, an ice receptacle having an open top and located in the upper compartment of the cabinet, a vertically elongated milk receptacle, the upper portion of which is located in the ice receptacle and its lower end constructed to project downward into the lower compartment of the cabinet, and a valve or stop-cock connected with the lower end of the milk receptacle."

The decision against Wooster and in favor of Hill and Prentice covered three other claims, which arose on Hill and Prentice's application for a reissue, filed November 10, 1880; but it is not necessary further to allude to them, as there is no contest in this court in regard to them.

The bill contains the following statement as to the invention of Wooster:

"The object of your orator's invention being to provide a milk-cooler of such construction that a milk receptacle of a depth greater than its width may have its upper portions only subjected to cold, and thus cause the contained milk to rise and descend in reverse vertical currents. The upper strata of milk, being subjected to cold, will part in whole or in part with its cream, and then descend, its place being supplied by an ascending current of warmer milk from the lower portion of the vessel. And, further, to provide the milk-cooler with a combined ventilator and filter, whereby the milk may be thoroughly ventilated. And, further, to provide a milk-cooler with a transparent eduction tube, to be attached to the lower portion of the cooling vessel, whereby the milk can be easily or readily inspected while being drawn from the cooler and the milk and cream accurately separated and deposited in separate vessels."

Opinion of the Court.

The bill prays for a decree adjudging Wooster to be the first inventor "of the invention embraced in the claims hereinbefore set forth, and entitled, according to law, to receive a patent for said invention."

The answer of the defendants denies that Wooster was the first inventor of either of the claims marked 1, 2, 3 and 4, and avers that Hill and Prentice were the first inventors thereof, and are entitled to a patent for those claims.

The cause was put at issue by a replication, voluminous proofs were taken, and the case was heard by Judge Wheeler. His opinion is reported as *Wooster* v. *Hill*, 22 Fed. Rep. 830.

In the Patent Office, the examiner of interferences awarded priority of invention to Hill and Prentice, in regard to the above claims 1, 2, 3 and 4. On appeal to the examiners-in-chief by Wooster, they affirmed such decision of the examiner of interferences. On an appeal by Wooster to the Commissioner of Patents, the latter affirmed the decision of the examiners-in-chief, and afterwards denied a motion for a reconsideration of his decision.

The opinion of the Circuit Court discusses the questions involved solely as questions of fact as to priority of invention, as between Wooster on the one side and Hill and Prentice on the other, and states that considerable evidence was produced before the court which was not before the Patent Office. The court was of opinion that Hill and Prentice were the first inventors of an open-box creamery standing on legs, with the lower part of the cans extending through the bottom of the box downward, and the upper part surrounded by water in the box, for cooling the top of the milk in the cans, as shown in the patent No. 207,738, granted to them on September 3, 1878. The "cabinet" mentioned in the four claims before recited applied to a cabinet creamery closed all the way down, but having a door in front, for access to the lower part of the can, in contradistinction to an open-box creamery standing on legs. The court was of opinion, on the evidence, that Wooster was the first inventor "of the cabinet creamery as an improvement upon the box creamery, as that is shown in the patent of Hill and Prentice." It thereupon entered a decree

adjudging that Hill and Prentice were not the original, first and joint inventors of the improvements set forth in the four claims before recited, and that Wooster was the original and first inventor of the improvement called a cabinet creamery, set forth in those four claims, and was entitled to receive a patent therefor, as set forth in his application filed January 17, 1879. From this decree the defendants have appealed to this court.

The provision of section 4915 is that the Circuit Court may adjudge that the applicant "is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear;" and that, if the adjudication is in favor of the right of the applicant, it shall authorize the Commissioner to issue the patent. It necessarily follows that no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention. The litigation between the parties on this bill cannot be concluded by solely determining an issue as to which of them in fact first made a cabinet creamery. A determination of that issue alone, in favor of the applicant, carrying with it, as it does, authority to the Commissioner to issue a patent to him for the claims in interference, would necessarily give the sanction of the court to the patentability of the invention involved.

The parties to the present suit appear to have been willing to ignore the question as to patentability in the present case, and to have litigated merely the question of priority of invention, on the assumption that the invention was patentable. But neither the Circuit Court nor this court can overlook the question of patentability. The bill claims a patent for what it alleges was invented by Wooster as a patentable invention; and the answer of the defendants is founded upon the view that Hill and Prentice were the first inventors of the improvements covered by the four claims in question, as patentable inventions.

We are of opinion that nothing in those four claims constitutes a patentable invention. A cabinet constitutes an element in each of the combinations covered by the four claims. This

cabinet is nothing more than a boxing or covering in of the open space forming the lower part of the prior open-box creamery standing on legs. In the application of Wooster, filed January 17, 1879, in an amendment filed by him March 29, 1879, he says: "I am aware that long rectangular milk receptacles have been provided with a water-chamber extending around the upper portion thereof; also, that water-coolers have been enclosed within a box or casing, and their upper ends enclosed within an ice receptacle having a perforated bottom; also, that a milk receptacle has been provided with an ice receptacle extending through the centre of the same, and hence I would have it understood that I do not claim the construction above referred to."

In the application of Hill and Prentice, filed March 30, 1880, they say in the specification: "The lower chamber or compartment serves to protect that part of the milk vessel which is in contact with this chamber from free contact with the outer air, preventing the temperature from unduly varying; and it also serves as a suitable place wherein to store butter, milk, or dairy appliances, this being practically a refrigerating chamber."

In the decision of the examiners-in-chief on appeal, made July 12, 1882, they say: "The idea of applying a cooling medium to the top of milk cans while the bottom should be exposed to the ordinary temperature of the dairy-room was old, and Wooster expressly disclaims any broad pretension to such method, and says that he is aware that milk receptacles have been provided with a water-chamber around the upper portion, and that water-coolers have been boxed and their upper parts enclosed in ice receptacles and the lower end perforated, and milk receptacles been provided with an ice receptacle extending through the centre of the same. So, to start with, we find that whatever either has done is merely to improve upon means for more effectually carrying out this mode of treating milk, to obtain the best results in raising and securing cream. As a structure, the cabinet would seem almost anticipated by the water-cooler of which the parties made a double use; but this is not before us, except so far as

showing us to what a limited extent the examiner conceded patentability of matter included in the claims allowed and put in interference." The examiners-in-chief seem, therefore, not to have considered that the question of patentability was before them, but that they were limited to considering the question as to which of the two parties first made the structure in the form in which it was presented.

The examiners-in-chief proceed: "When the parties came to the office they undoubtedly supposed, each for himself, that they had made a great discovery in keeping the top of the milk cool and the bottom warm. So we find that both of them seem to have obtained new light in regard to the state of the art, and, by repeated amendments, came down to quite restricted claims. We now come down to the material matter: Which of the parties devised and first reduced to practice the box, with lid, enclosing the cooler tank, having the elongated can extending through the bottom, etc. The idea of drawing off the milk from the bottom was old, and the glass to afford inspection was old. And which of them conceived of and first reduced to practice the cabinet form, or the above box and tank and can construction, with the lower part of the can also enclosed? It is certainly a very small matter of invention, this enclosing the bottom part, after the enclosing of the cooler tank, and after what has been done in refrigerators and water-coolers."

In the brief of the defendants, who are the appellants here, it is stated that the four claims in question "are confined to a cabinet creamery," and "are simply for adding the lower compartment to a box creamery on legs." We are of opinion that they are entitled to have the decree below reversed, on the ground that it was not a patentable invention to add a lower compartment to a box creamery on legs. The only allusion to this question in the brief for Wooster, the plaintiff and appellee, is the remark that no question is made in the answer but that one party or the other is entitled to a patent, and that, therefore, evidence which does not tend to show which party is entitled to the patent is irrelevant and should be suppressed. This court, however, has repeatedly held that, under the Con-

stitution and the acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof, and that "it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery." The cases on this subject are collected in *Thompson* v. *Boisselier*, 114 U. S. 1, 11, 12. To them may be added *Stephenson* v. *Brooklyn Railroad*, 114 U. S. 149; *Yale Lock Co.* v. *Greenleaf*, 117 U. S. 544; *Gardner* v. *Herz*, 118 U. S. 180; *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370, 375; *Holland* v. *Shipley*, 127 U. S. 396; *Pattee Plow Co.* v. *Kingman*, 129 U. S. 294; *Brown* v. *District of Columbia*, 130 U. S. 87; *Day* v. *Fair Haven and Westville Railway Co.*, *ante*, 98; *Watson* v. *Cincinnati, Indianapolis &c. Railway Co.*, *ante*, 161; *Marchand* v. *Emken*, *ante*, 195; *Royer* v. *Roth*, *ante*, 201.

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to dismiss the bill, with costs.

APPENDIX

ADDRESS

IN COMMEMORATION OF THE INAUGURATION OF

GEORGE WASHINGTON

AS

FIRST PRESIDENT OF THE UNITED STATES

DELIVERED BEFORE THE

TWO HOUSES OF CONGRESS

DECEMBER 11, 1889

BY

MELVILLE WESTON FULLER, LL.D.

CHIEF JUSTICE OF THE UNITED STATES

NEW YORK AND ALBANY
BANKS AND BROTHERS, LAW PUBLISHERS
1890

ADDRESS.

Mr. President, Mr. Speaker, and gentlemen of the Senate and House of Representatives: By the terms of that section of the act of Congress under which we have assembled in further commemoration of the historic event of the inauguration of the first President of the United States, George Washington, the 30th of April, A.D. 1889, was declared a national holiday, and in the noble city where that event took place its centennial anniversary has been celebrated with a magnificence of speech and song, of multitudinous assembly, and of naval, military and civic display, accompanied by every manifestation of deep love of country, of profound devotion to its institutions and of intense appreciation of the virtues and services of that illustrious man, whose assumption of the Chief Magistracy gave the assurance of the successful setting in motion of the new Government.

By the sundry civil appropriation bill of March 2, 1889, it was enacted as follows: "SEC. 4. That in order that the centennial anniversary of the inauguration of the first President of the United States, George Washington, may be duly commemorated, Tuesday, the thirtieth day of April, anno Domini eighteen hundred and eighty-nine, is hereby declared to be a national holiday throughout the United States. And in further commemoration of this historic event, the two Houses of Congress shall assemble in the Hall of the House of Representatives on the second Wednesday of December, anno Domini eighteen hundred and eighty-nine, when suitable ceremonies shall be had under the direction of a joint committee composed of five Senators and five Representatives, members of the Fifty-first Congress, who shall be appointed by the presiding officers of the respective Houses. And said joint committee shall have power to sit during the recess of Congress; and it shall be its duty to make arrangements for the celebration in the Hall of the House of Representatives on the second Wednesday of December next, and may invite to be present thereat such officers of the United States and of the respective States of the Union, and (through the Secretary of State) representatives of foreign governments. The committee shall invite the Chief Justice of the United States to deliver a suitable address on the occasion. And for the purpose of defraying the expenses of said joint committee and of carrying out the arrangements which it may make, three thousand dollars, or so much thereof as may be necessary." 25 Stat. 980, c. 411, § 4.

This joint committee, as organized, consisted of MR. HISCOCK of New York, MR. SHERMAN of Ohio, MR. HOAR of Massachusetts, MR. VOORHEES of Indiana and MR. EUSTIS of Louisiana, on the part of the Senate; and of MR. BAYNE of Pennsylvania, MR. HITT of Illinois, MR. CARTER of Montana, MR. CULBERSON of Texas and MR. CUMMINGS of New York on the part of the House of Representatives. It agreed upon and issued the following as the order of arrangements at the Capitol.

Nothing on the occasion of that celebration could be more full of encouragement and hope than the testimony so overwhelmingly given that Washington still remained first in the hearts of his countrymen, and that the example afforded by his career was still cherished as furnishing that guide of public conduct which had kept and would keep the nation upon the path of glory for itself and of happiness for its people.

The majestic story of that life — whether told in the pages of Marshall or Sparks, of Irving or Bancroft, or through the eloquent utterances of Ames or Webster, or Everett or Winthrop, or the matchless poetry of Lowell or the verse of Byron — never grows old.

We love to hear again what the great Frederick and Napoleon, what Erskine and Fox and Brougham and Talleyrand and Fontanes and Guizot said of him, and how crape enshrouded the standards of France, and the flags upon the victorious ships of England fell fluttering to half-mast at the tidings of his death.

The passage of the century has not in the slightest degree impaired the irresistible charm; and whatever doubts or fears assail us in the turmoil of our impetuous national life, that story comes to console and to strengthen, like the shadow of a great rock in a weary land.

Washington had become first in war, not so much by reason of victories over the enemy, though he had won such, or of success

---

The Capitol will be closed on the morning of the 11th to all except the members and officers of Congress; invited guests will be admitted by tickets.

At 11 o'clock the east door leading to the Rotunda will be opened to those holding tickets of admission to the floor of the House and its galleries.

The floor of the House of Representatives will be opened for the admission of Senators and Representatives, and to those having tickets of admission thereto, who will be conducted to the seats assigned to them.

The President and ex-Presidents of the United States will be seated in front and on the right of the Presiding Officer.

The Justices of the Supreme Court will occupy seats next to the President, in front and on the right of the Presiding Officer.

The Cabinet Officers, the Hon. George Bancroft, the General of the Army (retired), the Admiral of the Navy, the Major-General commanding the Army and the officers of the Army and Navy who, by name, have received the thanks of Congress, will occupy seats directly in rear of the President and Supreme Court.

The Chief Justice and Judges of the Court of Claims and the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia will occupy seats directly in rear of the Cabinet.

The Diplomatic Corps will occupy seats in front and on the left of the Presiding Officer.

International American Congress and Marine Conference will occupy seats in rear of the Diplomatic Corps. Cards of admission will be delivered to the Secretary of State.

Ex-Vice-Presidents and Senators will occupy seats in rear of the Judiciary.

Representatives will occupy seats behind the Senators and the representatives of foreign governments.

in strategy, though that had been his, as of the triumphs of a constancy which no reverse, no hardship, no incompetency, no treachery could shake or overcome.

And because the people comprehended the greatness of their leader and recognized in him an entire absence of personal ambition, an absolute obedience to convictions of duty, an unaffected love of country, of themselves and of mankind, he had become first in the hearts of his countrymen.

Because thus first, he was to become first in peace, by bringing to the charge of the practical working of the system he had participated in creating, on behalf of the people whose independence he had achieved, the same serene judgment, the same sagacity, the same patience, the same sense of duty, the same far-sighted comprehension of the end to be attained, that had marked his career from its beginning.

From the time he assumed command, he had given up all idea of accommodation, and believed that there was no middle ground between subjugation and complete independence, and that independence the independence of a nation.

He had demanded national action in respect of the Army; he had urged, but a few weeks after Bunker Hill, the creation of a Federal court with jurisdiction coextensive with the colonies; he had during the war repeatedly pressed home his deep conviction of the indispensability of a strong central government, and partic-

---

Commissioners of the District, Governors of States and Territories and guests invited to the floor, will occupy seats behind the Representatives.

The Executive Gallery will be reserved exclusively for the families of the Supreme Court, the families of the Cabinet and the invited guests of the President.

The Diplomatic Gallery will be reserved exclusively for the families of the members of the Diplomatic Corps. Cards of admission will be delivered to the Secretary of State.

The Reporters' Gallery will be reserved exclusively for the use of the reporters of the press. Tickets thereto will be delivered to the Press Committee.

The Official Reporters of the Senate and of the House will occupy the Reporters' desk, in front of the Clerk's table.

The Marine Band will occupy the south corridor, in rear of the Presiding Officer.

The Diplomatic Corps, International American Congress and Marine Conference and other foreign guests will assemble in the Marble Room of the Senate; the Judiciary at the Supreme Court Room; the President, ex-Presidents, the Cabinet and the ex-Vice-Presidents will meet at the President's Room at 12.30 P.M.

The house being in session, and notification to that effect having been given to the Senate, the Vice-President and the Senate in a body, preceded by the President, ex-Presidents, ex-Vice-Presidents, the Cabinet, the Judiciary, the Diplomatic Corps, International American Congress and Marine Conference will proceed to the Hall of the House of Representatives.

The Vice-President will occupy the Speaker's chair, and will preside.

The Speaker of the House will occupy a seat at the left of the Vice-President.

The other officers of the Senate and of the House will occupy seats on the floor at the right and the left of the Presiding Officer.

The Architect of the Capitol, the Sergeant-at-Arms of the Senate, the Sergeant-at-Arms and the Doorkeeper of the House are charged with the execution of these arrangements.

ularly at its close, in his circular to the governors of the States and his farewell to his comrades. He had advocated the promotion of commercial intercourse with the rising world of the West, so that its people might be bound to those of the seaboard by a chain that could never be broken. Appreciating the vital importance of territorial influences to the political life of a commonwealth, he had approved the cessions by the landed States, none more significant than that by his own, and had made the profound suggestion — which was acted on — of a line of conduct proper to be observed for the government of the citizens of America in their settlement of the western country which involved the assertion of the sovereign right of eminent domain. He had advised the commissioners of Virginia and Maryland, in consultation at Mount Vernon in relation to the navigation of the Potomac, to recommend a uniform currency and a uniform system of commercial regulations, and this led to the calling of the conference of commissioners of the thirteen States. At the proper moment he had thrown his immense personal influence in favor of the convention and secured the ratification of the Constitution.

It remained for him to crown his labors by demonstrating in their administration the value of the institutions whose establishment had been so long the object of his desire.

"It is already beyond doubt," wrote Count Moustier, in June, 1789, "that in spite of the asserted beauty of the plan which has been adopted, it would have been necessary to renounce its introduction if the same man who presided over its formation had not been placed at the head of the enterprise. The extreme confidence

---

Accordingly, on the 11th of December, at 1 o'clock P.M. the President of the United States, with the members of his Cabinet and the Chief Justice and Associate Justices of the Supreme Court, entered the Hall of the House of Representatives and occupied the seats reserved for them in front and on the right of the Presiding Officer.

Next the members of the Senate, following the Vice-President and their Secretary, preceded by their Sergeant-at-Arms, entered the Hall and took the seats reserved for them on the right and left of the main aisle.

The Vice-President occupied the Speaker's chair; the Speaker of the House sitting at his left.

The Major-General commanding the Army, the Diplomatic Corps, the International American Congress and Marine Conference, and the other persons designated in the order of exercise, were seated in accordance with the arrangements of the joint committee.

The Vice-President announced the object of the meeting, and, after prayer by the Chaplain of the Senate, said "an oration will now be delivered by Melville W. Fuller, Chief Justice of the United States."

At the close of the address a benediction was said by the Chaplain of the House of Representatives. The President of the United States, with the members of his Cabinet, the Supreme Court, the Senate and the invited guests then retired from the Hall, while the Marine Band played "Washington's Grand March."

in his patriotism, his integrity and his intelligence forms to-day its principal support."

There were obvious difficulties surrounding the first President. Eleven States had ratified, but the assent of some had been secured only after strenuous exertion, considerable delay, and upon close votes.

So slowly did the new Government get under way that the first Wednesday of March, the day designated for the Senate and House to assemble, came and went, and it was not until the 1st of April that the House obtained a quorum, and not until the 6th that the electoral vote was counted in joint convention.

An opposition so intense and bitter as that which had existed to the adoption of the Constitution could not readily die out, and the antagonisms which lay at its base were as old as human nature.

Jealousies existed between the smaller and the larger, between the agricultural and the commercial States, and these were rendered the keener by the rivalries of personal ambition.

Those who admired the theories of the French philosophical school and those who preferred the British model could not readily harmonize their differences, while the enthusiastic believers in the capacity of man for self-government denounced the more conservative for doubting the extent of the reliance which could be placed upon it.

The fear of arbitrary power took particular form in reference to the presidential office, which had been fashioned in view of the personal government of George the Third, rather than on the type of monarchy of the English system as it was in principle, and as it is in fact.

And this fear was indulged notwithstanding the frequency of elections, since no restriction as to re-eligibility was imposed upon the incumbent.

But no fear, no jealousy, could be entertained of him who had indignantly repelled the suggestion of the bestowal of kingly power; who had unsheathed the sword with reluctance and laid it down with joy; who had never sought official position, but accepted public office as a public trust, in deference to so unanimous a demand for his services as to convince him of their necessity; whose patriotism embraced the whole country, the future grandeur of which his prescience foresaw.

Nevertheless, while there could be no personal opposition to the unanimous choice of the people, and while his availability at the crisis was one of those providential blessings which, in other in-

stances, he had so often insisted had been bestowed upon the nation, the fact remained that the situation was full of trial and danger, and demanded the application of the highest order of statesmanship.

Nor are we left to conjecture Washington's feelings in this regard.

Indeed, it may be said that at every period of his public life, though he possessed the talent for silence and did his work generally with closed lips, yet it is always possible to gather from his remarkable letters the line of his thought upon current affairs, and his inmost hopes, fears and aspirations as to the public weal.

Take for illustration that, in which, on the 9th of January, 1790, little more than eight months after his inauguration, he says: —

"The establishment of our new Government seemed to be the last great experiment for promoting human happiness by a reasonable compact in civil society. It was to be, in the first instance, in a considerable degree a government of accommodation as well as a government of laws. Much was to be done by prudence, much by conciliation, much by firmness. Few, who are not philosophical spectators, can realize the difficult and delicate part which a man in my situation had to act. All see and most admire the glare which hovers round the external happiness of elevated office. To me there is nothing in it beyond the lustre which may be reflected from its connection with a power of promoting human felicity. In our progress towards political happiness my station is new, and, if I may use the expression, I walk on untrodden ground. There is scarcely an action the motive of which may not be subject to a double interpretation. There is scarcely any part of my conduct which may not hereafter be drawn into precedent. If, after all my honorable and faithful endeavors to advance the felicity of my country and mankind, I may indulge a hope that my labors have not been altogether without success, it will be the only compensation I can receive in the closing scenes of life."

Here he admits with a certain suppressed sadness that he realizes that private life has ceased to exist for him, and that from his previous participation in public affairs, the exalted character of the new office and the fact that he is the first to fill it, his every act and word thereafter may be referred to in guidance or control of others, and as bearing upon the nature of the Government of which he was the head. It is borne in upon him that in this instance, in a greater degree than ever before, his conduct is to become an historical example. Questions of etiquette, questions

pertaining to his daily life, unimportant in themselves, cease to be so under the new conditions, and this interruption of the domestic tenor of his way, to which he was of choice and ardently attached, finds no compensation in the gratification of a morbid hunger and thirst for applause, whether of the few or of the many.

But in the consciousness of having contributed to the advancement of the felicity of his country and of mankind lies the true reward for these renewed labors.

The promotion of human happiness was the key-note of the century within which Washington's life was comprised.

It was the century of Franklin and Turgot; of Montesquieu and Voltaire and Rousseau; of Frederick the Great and Joseph the Second; of Pitt and Fox and Burke and Grattan; of Burns and Cowper and Gray; of Goethe and Kant; of Priestly and Hume and Adam Smith; of Wesley and Whitefield and Howard, as well as of the long line of statesmen and soldiers, and voyagers over every sea; of poets and artists and essayists and encyclopædists and romancers, which adorned it.

It was the century of men like Condorcet, who, outlawed and condemned by a revolutionary tribunal, the outcome of popular excesses, calmly sat down, in hiding, to compose his work upon the progress of the human mind.

It was a century instinct with the recognition of the human soul in every human being, and alive with aspirations for universal brotherhood.

With this general longing for the elevation of mankind Washington sympathized, and in expressing a hearty desire for the rooting out of slavery considered this not only essential to the perpetuation of the Union, but desirable on the score of human dignity. Nevertheless, with the calm reason in reference to government, of the race from which he sprang, he regarded the promotion of human happiness as to be best secured by a reasonable compact in civil society, and that established by the Federal Constitution as the last great experiment to that end.

Washington and his colleagues were familiar with prior forms of government and their operation, and with the speculations of the writers upon that subject. They were conversant with the course of the Revolution of 1688, the then triumph of public opinion, and the literature of that period. They accepted the thesis of Locke that, as the true end of government is the mutual preservation of the lives, liberties and estates of the people, a government which invades these rights is guilty of a breach of trust,

and can lawfully be set aside; and they were persuaded of the soundness of the views of Montesquieu, that the distribution of powers is necessary to political liberty, which can only exist when power is not abused, and in order that power may not be abused it must be so distributed that power shall check power.

It is only necessary to consult the pages of the Federalist — that incomparable work on the principles of free government — to understand the acquaintance of American statesmen with preceding governmental systems, ancient and modern, and to comprehend that the Constitution was the result, not of a desire for novelty, but of the effort to gather the fruit of that growth which, having its roots in the past, could yield in the present and give promise for the future.

The colonists possessed practically a common nationality, and took by inheritance certain fundamental ideas upon the development of which their growth had proceeded. Self-government by local subdivisions, a legislative body of two houses, an executive head, a distinctive judiciary, constituted the governmental methods.

Magna Charta, the Petition and Declaration of Right, the habeas corpus act, the act of settlement, all the muniments of English liberty, were theirs, and the New England Confederation of 1643, the schemes of union of 1754 and 1765, the revolutionary Congress, the Articles of Confederation, the colonial charters and constitutions furnished a vast treasury of experience upon which they drew.

Their work in relation to what had gone before was in truth but in maintenance of that continuity of which Hooker speaks: "We were then alive in our predecessors and they in their successors do live still." They did not seek to build upon the ruins of older institutions, but to develop from them a nobler, broader and more lasting structure, and in effecting this upon so vast a scale and under conditions so widely different from the past, the immortal instrument was indeed the product of consummate statesmanship.

Of the future greatness of the new nation Washington had no doubt. He saw, as if face to face, that continental domain which glimmered to others as through a glass darkly.

The great West was no sealed book to him, and no one knew better than he that no foreign power could long control the flow of the Father of Waters to the Gulf.

He is said to have lacked imagination, and if the exhilaration of the poet, the mystic, or the seer is meant, this may be true.

His mind was not given to indulgence in dreams of ideal com-

monwealths like the republic of Plato or of Cicero, the City of God of Augustine, or the Utopia of Sir Thomas More, but it grasped the mighty fact of the empire of the future, and acted in obedience to the heavenly vision.

But the question was, could that empire be realized and controlled by the people within its vast boundaries in the exercise of self-government?

Could the conception of a central government, operating directly upon citizens, who at the same time were subject to the jurisdiction of their several States, be carried into practical working operation so as to reconcile imperial sway with local independence?

Would a scheme work which was partly national and partly federal, and which aimed at unity as well as union?

And could the rule of the majority be subjected with binding force to such restraints through a system by representation, that of a republic rather than that of a pure democracy, that the violence of faction could not operate in the long run to defeat a common government by the many, throughout so immense an area?

Could the restraints essential to the preservation of society, the equilibrium between progress and order, be so guarded as to allow of that sober second thought which would secure their observance, and thus the liberty and happiness of the people and the enduring progress of humanity?

While the general genius of the Government was thoroughly permeated with the ideas of freedom in obedience, yet time was needed to commend the form in which it was for the future to exert itself.

Hence administration in the first instance required accommodation as well as adherence to the letter, and prudence and conciliation as well as firmness.

The Cabinet of the first President illustrates his sense of the nature of the exigency.

All its members were friends and supporters of the Constitution, but possessed of widely different views as to the scope of its powers and the probabilities of its successful operation in the shape it then bore.

Between Jefferson and Hamilton there seemed to be a great gulf fixed, yet a common patriotism bridged it, and a common purpose enabled them for these critical years to act together. And this was rendered possible by the fact that the leadership of Washington afforded a common ground upon which every lover of a united country could stand. And as the first four years were

nearing their close, Hamilton and Jefferson severally urged Washington to consent to remain at the helm for four years longer, that the Government might acquire additional firmness and strength before being subjected to the strain of the contention of parties.

Undoubtedly Hamilton desired this also, because of nearer coincidence of thought on some questions involving serious difference of opinion, but both concurred in urging it upon the ground that the confidence of the whole Union was centred in Washington, and his being at the helm would be more than an answer to every argument which could be used to alarm and lead the people in any quarter into violence or secession.

Appointments to the Supreme Bench involved less reason for accommodation, but equal prudence and sagacity.

The great part which that tribunal was to play in the development of our institutions was yet to come, but the importance of that branch of the Government to which was committed the ultimate interpretation of the Constitution was appreciated by Washington, who characterized it as the keystone of the political fabric.

To the headship of the court, Washington called the pure and great-minded Jay of New York, and associated with him John Rutledge of South Carolina, who, from the stamp-act Congress of 1765, had borne a conspicuous part in the history of the country and of his State; James Wilson of Pennsylvania, who, like Rutledge, had been prominent in the Continental Congress and in the Federal convention, a signer of the Declaration of Independence, and one of the most forcible, acute and learned debaters on behalf of the Constitution, as the records of the Federal and his State conventions show; Cushing, chief-justice of Massachusetts, experienced in judicial station, and the only person holding office under the Crown who adhered to his country in the Revolution; Harrison of Maryland, Washington's well-known secretary; Blair of Virginia, a judge of its court of appeals, and one of Washington's fellow-members in the convention; and in place of Rutledge and Harrison, who preferred the highest judicial positions in their own States, Thomas Johnson of Maryland and James Iredell of North Carolina.

It will be perceived that the distribution was made with tact, and the selections with consummate wisdom.

The part the appointees had taken in the cause of the country, and especially in laying the foundations of the political edifice, their eminent qualifications and recognized integrity, commended the court to the confidence of the people, and gave assurance that

this great department would be so administered as to effectuate the purposes for which it had been created.

As to appointments generally, he did not recognize the rule of party rewards for party work, although, when party opposition became clearly defined, he wrote Pickering that to "bring a man into any office of consequence knowingly, whose political tenets are adverse to the measures which the General Government is pursuing," would be, in his opinion, "a sort of political suicide." To integrity and capacity, as qualifications for high civil office, he added that of "marked eminence before the country, not only as the more likely to be serviceable, but because the public will more readily trust them." As in appointments, so in the conduct of affairs, prudence, conciliation and accommodation carried the experiment successfully along, while firmness in essentials was equally present, as when, at a later day, the suppression of the whiskey rebellion and the maintenance of neutrality in the war between France and England gave information at home that there existed a central Government strong enough to suppress domestic insurrection, and abroad, that a new and self-reliant power had been born into the family of nations.

The course taken in all matters, whether great or small, was the result of careful consideration and the exercise of deliberate judgment as to the effect of what was done, or forborne to be done, upon the success of the newly constructed fabric. Thus, the regulation of official behavior was deemed a matter of such consequence, that Adams, Jay, Hamilton and Madison were consulted upon it, for although republican simplicity had been substituted for monarchy and titles, and was held inconsistent with concession of superiority by reason of occupancy of official station, yet the transition could not be violently made, and the people were, in any event, entitled to expect their agents to sustain with dignity the high positions to which they had been called.

During the entire Presidency of Washington, upon the details of which it is impracticable here to dwell, time for solidification was the dominant thought. The infant giant could defend himself even in his cradle; but to become the Colossus of Washington's hopes, the gristle must have opportunity to harden.

After more than seven years of devotion to the interests committed to his charge and intense watchfulness over the adjustment and working of the machinery of the new system, having determined upon his own retirement, thereby practically assigning a limit to the period during which the office could with propriety be

occupied by his successors, still regarding the problem as not solved, and still anxiously desiring to contribute to the last to the welfare of the constant object of his veneration and love, he gives to his countrymen in the farewell of "an old and affectionate friend," the results of his observations and of his reflections on the operation of the great scheme he had assisted in creating and had so far commended to the people by his administration of its provisions.

Punctilious as he was in official observances, and dear as his home and his own State were to him, this address was one that rose above home, and State, and official place, that brought him near, not simply to the people to whom it was immediately directed, but to that great coming multitude whom no man could number, and towards which he felt the pathetic attachment of a noble and prophetic soul. And so he dates it, not from Mount Vernon nor from his official residence, but from the "United States."

Hamilton, Madison and Jay had, in the series of essays in advocacy of the Constitution, largely aided in bringing about its ratification, and displayed wonderful comprehensiveness of view, depth of wisdom and sagacity of reflection in their treatment of the topics involved. Throughout Washington's administration they had to the utmost assisted in the successful carrying on of the Government, in the Cabinet, in Congress, upon the bench, or in diplomatic station, and to them as tried and true friends and men of a statesmanship as broad as the country, Washington turned at one time and another for advice in the preparation of these closing words.

Notwithstanding that innate modesty which had always induced a certain real diffidence in assuming station, he was conscious of his position as founder of the state; he felt that every utterance in this closing benediction would be cherished by coming generations as disinterested advice, based on experience and knowledge and illuminated by the sincerest affection, and he invited the careful scrutiny of his friends that it might "be handed to the public in an honest, unaffected, simple garb." But the work was his own, as all his work was. The virtue went out of him, even when he used the hand of another.

If we turn to this remarkable document and compare the line of conduct therein recommended with the course of events during the century — the advice given with the results of experience — we are amazed at the wonderful sagacity and precision with which it lays down the general principles through whose application the

safety and prosperity of the Republic have been secured. To cherish the public credit and promote religion, morality and education were obvious recommendations. Economy in public expense, vigorous exertion to discharge debt unavoidably occasioned, acquiescence in necessary taxation, and candid construction of governmental action in the selection of its proper objects, were all parts of the first of these. The increase of net ordinary expenditures from three millions to two hundred and sixty-eight millions of dollars, and of net ordinary receipts from four and one-half to three hundred and eighty millions of dollars, renders the practice of economy, as contradistinguished from wastefulness, as commendable to-day as then, but it must be a judicious economy; for, as Washington said, timely disbursements frequently prevent much larger.

The extinction of the public debt at one time, and the marvellous reduction, within a quarter of a century of its creation, of a later public debt of more than twenty-five hundred millions of dollars, demonstrate practical adherence to the rule laid down. It is true that the great material prosperity which has attended our growth has enabled us to meet an enormous burden of taxation with comparative ease, but it is nevertheless also true that the general judgment has never wavered upon the question of the sacred observance of plighted faith; and if at any moment the removal of the bars designed to imprison the powerful giant of a paper currency seemed to imperil the preservation of the public honor, the sturdy common sense of the people has checked through their representatives the dangerous tendency before it has gone too far.

Education was one of the two hooks (the other was local self-government) upon which the continuance of republican government was considered as absolutely hanging.

The action of the Continental Congress in respect to the western territory was next in importance to that on independence and union. Apart from its political significance we recall the familiar fact that one section out of every township was reserved under the ordinances of 1785 and 1787 for the maintenance of schools, because religion, morality and knowledge were considered essential to good government and the happiness of mankind. The one section has been made two, and many millions of acres have been granted for the endowment of universities, of normal, scientific and mining schools, and institutions for the benefit of agriculture and the mechanic arts, including from three hundred and fifty to

four hundred and fifty thousand acres for educational and charitable institutions, to each of the new States recently admitted, by an act appropriately passed into law on the birthday of Washington. A thousand universities, colleges and institutions of learning, twelve millions of children attending two hundred thousand public schools, with three hundred and sixty thousand teachers, at an expenditure of one hundred and twenty-five millions and with property worth two hundred millions, and sixty-two million dollars in private benefactions for education in the decade of the last census, testify that the importance of education is not underestimated in a country whose institutions are dependent upon the intelligence of the people.

Washington insists that national morality cannot prevail in exclusion of religious principle, though the influence of refined education on minds of a peculiar structure may have induced an opposite conclusion.

History accords with this view. Plutarch said, "You may travel over the world and you may find cities without walls, without king, without mint, without theatre or gymnasium, but you will never find a city without God, without prayer, without oracle, without sacrifice;" and the eighteen centuries since his day confirm the truth of his words.

"Take from me," said Bismarck, "my faith in a divine order which has destined this German nation for something good and great, and you take from me my fatherland."

Washington declares that "the mere politician, equally with the pious man, ought to respect and cherish religion and morality as the firmest props of the duties of men and citizens." He did not mean that the value of trust and faith has no relation to the reality of the objects of that trust and faith, nor that those to whom he referred should indulge in religious observances as mere mummeries to deceive, while smiling among themselves, as Cicero with his fellow-augurs, nor that faith should be betrayed by accommodation to superstition, as in the action of the town clerk of Ephesus, but he demanded that they should recognize in fact the indispensability of these supports of political prosperity.

And here again the answer of the century's watchman tells that the night is passing.

Crime, drunkenness, pauperism have steadily decreased in proportion as population has increased, philanthropic agencies have multiplied, moral sensitiveness has become keener, and higher standards of personal and official conduct have come to be required,

while at the same time the statistics of religious progress exhibit wonderful and most gratifying results.

Washington had never permitted his public action to be influenced by personal affection or personal hostility, and in urging the avoidance of political connections or personal alliances with any portion of the foreign world, he characteristically condemned indulgence in an inveterate antipathy towards particular nations and a passionate attachment for others, while observing good faith and justice towards all. No reason existed for becoming implicated in the ordinary vicissitudes of the politics of Europe, or the ordinary combinations and collisions of her friendships or enmities. Intervention meant war, not arbitration; the assumption of obligation meant force, not words. No field was to be opened here for foreign intrigues, and no necessity created here for standing armies and the domination of the civil by the military authority.

So scrupulous was Washington's abstinence from the slightest appearance of interference, that, notwithstanding his tender friendship for La Fayette, he would not make official application for his release from Olmutz. So absolute was his conviction that this country must not become a make-weight in Europe's balances of power, that he sternly held it to neutrality under circumstances which would have rendered it impossible for any other man to do so. Such has been the policy unchangeably pursued, but it has not required the concealment of our sympathy with all who have wished to put American institutional ideas into practical operation, or our confidence in their ultimate prevalence. Nor has the rule prevented the Republic from the declaration that it should take its own course in case of the interference by other nations with the primary interests of America.

In the lapse of years international relations have been constantly assuming larger importance with the growth of the country and the world and the increasing nearness of intercommunication. We are justified in claiming that the delicate and difficult function of government involved has been from the first discharged in so admirable a manner that the solution of the grave questions of the future may be awaited without anxiety.

It is matter of congratulation that the first year of our second century witnesses the representatives of the three Americas engaged in the effort to increase the facilities of commercial intercourse, "consulting the natural course of things, diffusing and diversifying by gentle means the streams of intercourse, but forcing nothing," success in which must knit closer the ties of fraternal

friendship, and bring the peoples of the two American continents into harmonious control of the hemisphere.

The course of events has equally shown the profound wisdom of the propositions of the Farewell Address bearing directly on the form of government delineated in the Federal Constitution.

First of these is the necessity of the preservation of the distribution of powers, and of resistance to any encroachment by one department upon another.

The executive power was vested in the President, but he had a voting power in the right to veto, and the power of initiation as to treaties, which became binding with the advice and consent of the Senate.

The interposition of the latter was also permitted by the requisition of assent in the confirmation of appointments, and it could sit in judgment on the President if articles of impeachment were presented. In some particulars, therefore, the two departments approached each other in the exercise of functions appropriate to each.

This made it all the more important that there should be no invasion of the one by the other. No effort to diminish the executive authority or to interfere with the exercise of its legitimate discretion has commanded the support of the public voice, and impeachment has not been considered a proper resort to reconcile differences of judgment, however serious.

The right to initiate and to pass laws having been lodged in Congress, the balance of power was actually there reposed, and the danger of encroachment would naturally present itself from that quarter.

And here the Federal judiciary was interposed as a coördinate department, with power to determine when the limitations of the fundamental law were transgressed. Without an exact precedent, the creation of a tribunal possessed of that power was the natural result of the existence of a written constitution; for to leave to the instrumentalities by which governmental power is exercised the determination of boundaries upon it, would dispense with them altogether.

In England the executive and legislative powers are practically vested in Parliament and exercised by the Cabinet, which amounts to a committee of the Commons, acting with the additional power which secret agreement on a given course imparts. The constitution is what Parliament makes it, and the judicial tribunals only interpret and apply the action of that body, being necessarily des-

titute of the power to hold such action void by reference to any higher law than its own enactments.

Not so with us. Every act of Congress, every act of the state legislatures, every part of the constitution of any State, if repugnant to the Constitution of the United States, is void, and to be so treated. The Supreme Court by the decision of cases in which such acts or provisions are drawn in question, and in the exercise of judicial functions, renders the Constitution in reality as well as in name the supreme law of the land.

Its judgments command the assent of Congress and the Executive, the States and the people, alike, and it is this unique arbitrament that has challenged the admiration of the world.

The court cannot be abolished by Congress, but the number of its judges may be increased, or diminished on the occurrence of vacancies, and so, while its jurisdiction cannot be impaired, the exercise of it may be curtailed.

Nevertheless, no legislation to control it in any way has ever been approved by definite public opinion, and the tribunal remains in the complete discharge of the vital and important functions it was created to perform.

Scrupulously abstaining from the decision of strictly political questions and from the performance of other than judicial duties; never grasping an ungranted jurisdiction and never shrinking from the exercise of that conferred upon it, it commands the reverence of a law-abiding people.

Again, Washington urges not only that his countrymen shall steadily discountenance irregular opposition to the acknowledged authority of the Government, and resist with care the spirit of innovation upon its principles, but shall oppose any change in the system except by amendment in the mode provided, particularly warning them, as fearful of objection to the pressure of the Government, that the energy of the scheme must not be impaired, as vigor is not only required to manage the common interests throughout so extensive a country, but is necessary to protect liberty itself.

In no part of the Constitution was greater sagacity displayed than in the provision for its amendment. No State, without its consent, could be deprived of its equal suffrage in the Senate, but otherwise (with an exception now immaterial) the instrument might be amended upon the concurrence of two-thirds of both Houses, and the ratification of the legislatures or conventions of three-fourths of the several States, or through a Federal conven-

tion when applied for by the legislatures of two-thirds of the States, and upon like ratification.

It was designed that the ultimate sovereignty thus reposed should not be called into play, except through this slow and deliberate process, which would give time for mere hypothesis and opinion to exhaust themselves, and the conclusion reached to be the result of gravity of thought and judgment, and of the concurrence of substantially every part of the country.

The first ten amendments hardly come within the application of the principle, as they were in substance requested by many of the States at the time of ratification. In the Pennsylvania convention, James Wilson declared that the subject of a bill of rights was not mentioned in the constitutional convention until within three days of its adjournment, and even then no direct motion upon the subject was offered; and that such a bill was entirely unnecessary in a government having none but enumerated powers; but Jefferson urged from Paris that a bill of rights was "what the people are entitled to against every government on earth, general or particular," and that one ought to be added, "providing clearly and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations." This view prevailed, but in order that the affirmance of certain rights might not disparage others or lead to implications in favor of the possession of other powers, it was added that the enumeration of certain rights should not be construed to deny or disparage others retained by the people, and that the powers not delegated were reserved.

Congress, in the preamble to these amendments, and Washington, in his inaugural, commend their adoption out of regard for the public harmony and a reverence for the characteristic rights of freemen.

The eleventh inhibited the extension by construction, in the particular named, of the Federal judicial power, and the twelfth related to matters of detail in the election of President and Vice-President. No one of the twelve was in restraint of state action.

Sixty years elapsed before the ratification of the thirteenth, fourteenth and fifteenth amendments. These definitively disposed of the subject of slavery, that Serbonian bog 'twixt the extreme views of the two schools of political thought dividing the country

— views, which, except for the existence of that institution, might never have been pushed to an extreme, but might have continued peacefully to operate in the production of a golden mean between the absorption of power by the central and its diffusion among the local governments. And by the fourteenth an additional guaranty was furnished against the arbitrary exercise by the States of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Undoubtedly the effect of these later amendments was to increase the power of Congress, but there was no revolutionary change. It is as true of the existing government, as it was of the proposed government, that it must stand or fall with the state governments.

Added provisions for the protection of personal rights involved to that extent additional powers, but the essential elements of the structure remained unchanged.

In other words, while certain obstructions to its working have been removed the clock-work has not been thrown out of gear, but the pendulum continues to swing through its appointed arc and the vast machinery to move noiselessly and easily to and fro, marking the orderly progress of a great people in the achievement of happiness by the exercise of self-government.

But while direct alterations have been few, the fundamental law has been developed in the evolution of national growth, as Washington, indeed, anticipated. "Time and habit," said he, "are at least as necessary to fix the true character of government as of other human institutions;" and "experience is the surest standard by which to fix the real tendency of the existing constitution of a country."

In this he applies the language of Hume, and speaks in the spirit of the observation of Bacon, that "rightly is truth called the daughter of time, not of authority."

Time, habit, experience, legislation, usage may have assisted in expanding the Constitution in the quiet, imperceptible manner in which nature adapts itself to new conditions, though remaining still the same.

Yet its chief growth is to be found in the interpretation of its provisions by the tribunal upon which that delicate and responsible duty was imposed. And in that view what "a debt immense of endless gratitude" is owed to those luminous decisions of John Marshall, which placed the principles of the Constitution upon an impregnable basis and rendered an experimental system permanent.

Renowned and venerable name! It was he who liberated the spirit which lived within the Constitution — the mind infused "through every member of the mighty mass" — so that it might "pervade, sustain and actuate the whole."

The fact that the conclusions reached by the court and set forth by the persuasive and logical reasoning of the great Chief Justice did not at the moment move in the direction of public opinion, but finally met with the entire approval of the matured judgment of the people, furnishes an impressive illustration of the working of our system of government.

Doubtless, in many instances, the Constitution has been subjected to strains which have tested its elasticity without breaking the texture, but the watchfulness of party has aided to keep the balance true, absolute infraction has been deprecated or denied, and a law-loving and law-abiding people has welcomed the rebound which restored the rigid outline and even tenor of its way.

The departing statesman dwells with insistence, on the grounds both of interest and sensibility, upon the paramount importance of the Union and of that unity of government which makes of those who live under it one people and one nation, and will, he hopes, induce all its citizens, whether by birth or choice, to glory in the name "American."

Here, the ideal which influenced his conduct may be read between the lines — the ideal of a powerful and harmonious people, possessed of freedom because capable of self-restraint, and working out the destinies of an ocean-bound republic, whose example should be a message of glad tidings to all the earth.

And the realization of that ideal involved a patriotism not based upon the dictates of interest, but springing from devotion of the heart, and pride in the object of that devotion.

What Washington desired, as Lodge's fine biography makes entirely clear, was, that the people should become saturated with the principles of national unity and love of country, should possess an "American character," should never forget that they were "Americans." Hence he opposed education abroad, lest our youth might contract principles unfriendly to republican government; and discouraged immigration, except of those who, by "an intermixture with our people," could themselves, or their descendants, "get assimilated to our customs, measures and laws; in a word, soon become one people."

To be an American was to be part and parcel of American ideas, institutions, prosperity and progress. It was to be like-minded

with the patriotic leaders who have served the cause of their native or adopted land, from Washington to Lincoln. It was to be convinced of the virtues of republican government as the bulwark of the true and genuine liberties of mankind, which would ultimately transmute suffering through ignorance into happiness through light.

Who would not glory in the name American, when it carries with it such illustrative types as Washington, and Franklin, and Samuel Adams, and Jefferson, and such a type as Lincoln, whose very faults were American, as were the virtues of his sad and heroic soul?

As the lust for domination is in perpetual conflict with the longing to be free, so the tendency to concentration struggles perpetually with the tendency to diffuse.

It is in the maintenance of the equilibrium that the largest liberty consistent with the greatest progress has been found. And this is as true between the States and the Federal Government as between the individual and the State.

But while the play of the two forces is a natural one, the gravitation is to the centre, with human nature as it is.

The passage of the century, with the vast material development of the country, has brought this strikingly home to us in the increased importance of the Federal Government in prestige and power, as compared with that of the state governments in the time of Washington. Position on the Supreme Bench or Cabinet place might still be declined for personal reasons, but not because of preference for the headship of a state government, or of a state tribunal, and no punctilio would cause the governor of to-day to hesitate upon a question of official etiquette when the President visits a state capital.

Rapidity and ease of communication by railroad, telegraph and post; the handling of the vast income and expenditure of the Federal treasury, and the knitting together of the innumerable ties of family, social and business relations, have created a solidarity which demands, in the regulation of commerce, the management of financial affairs and the like, the interposition of Federal authority. The National Banking system, the Interstate Commerce Commission, the Agricultural Department, the Labor and Educational Bureaux, the National Board of Health, indicate the drift toward the exertion of the national will, a natural and perhaps inevitable result of that unity which formed the object of Washington's desire.

But what he wished was solidarity without centralization in destruction of local regulation, for it must not be assumed that he did not realize the vital importance of the preservation of local self-government through the States. To realize its great destiny the country must oppose externally a consolidated front and contain within itself a single people only; but popular government must be preserved, and the doubt was whether a common government of the popular form could embrace so large a sphere.

Hence the earnestness with which Washington invoked the spirit of essential unity through pride and affection to move upon the face of the waters. When the new political world had fairly taken form and substance other considerations would resume their due importance. He was profoundly disturbed by the apprehension that different portions of the population might become, through contradictory interests, in effect rival peoples, and the Union be destroyed by the contention for mastery between them. His sagacious mind perceived the danger arising from the social and economic condition produced by an institution with which the framers of the Constitution had found themselves unable to deal, and he deprecated an appeal to the last reason of kings in preservation of one government over our whole domain.

Yet that appeal was fortunately so long delayed that when it came the civil war determined the perpetuity and indissolubility of the Union, without the loss of distinct and individual existence or of the right of self-government by the States.

This conflict demonstrated that no part of the country was destitute of that old fighting spirit, which rouses at the invocation of force through arms, and which long years of prosperity could not weaken or destroy, and, at the same time, that gigantic armies drawn from the ranks of a citizen soldiery, however skilled they may become in the arts of war, on the cessation of hostilities at once resume the normal cultivation of the arts of peace.

And from an apparent invasion of the carefully constructed scheme to secure popular government, popular government has obtained a wider scope and renewed power, and from an apparent industrial overthrow has come an unexampled industrial development. "Out of the eater came forth meat, and out of the strong came forth sweetness."

The waste of war is always rapidly replaced, and in its effect on institutions time may repair its injuries without weakening its benefits.

Is it possible to conceive of a more searching test of the wisdom

and lasting quality of our form of government than that applied by the civil war? Is it possible to conceive of a more convincing demonstration than the reconciliation which has followed the conclusion of the struggle, and the complete reinstatement of the system in harmonious operation over the entire national domain? No conquered provinces perpetuated personal animosities and by the fact of their existence, through despotic rule over part, changed the government over all. On the contrary, the States, vital parts of the system, and in whose annihilation the system perishes, resumed the relations temporarily suspended, and the continuance of local self-government on its accustomed course prevented the old connection from carrying with it the bitterness of enforced change. It was the triumph of the machinery that its practical working so speedily assumed its normal movement, substantially uninjured by the convulsion that had shaken it.

And as the wheels within the wheels revolve, the aspiration finds a response in every heart: "Come from the four winds, O breath, and breathe upon these slain that they may live" — live with their reunited brethren, one in the hand of God.

Finally, the country is warned against the baleful effects of the spirit of party as the worst enemy of governments of the popular form.

Franklin wrote that all great affairs are carried on by parties, but that as soon as a party has gained its general point each member becomes intent upon his particular interest; that few in public affairs act from a mere view of the good of their country, and fewer still with a view to the good of mankind. But these observations would, in the light of the history of our country, be regarded as too sweeping, although they suggest grounds for the objection of Washington to the domination of party spirit.

Parties based on different opinions as to the principles on which the Government is to be conducted must necessarily exist. To them we look for that activity in the advocacy of opposing views; that watchfulness over the assertion of authority; that keen debate as to the course most conducive to well-being; essential to the successful growth of popular institutions. That voice of the people which, when duly given and properly ascertained, directs the action of the State is largely brought to declare itself through the instrumentality of party. It is this which corrects that general apathy rightly regarded by De Tocqueville as a serious menace to popular government because conducive to its complete surrender to the domination of its agents if they will but relieve responsibility and

gratify desire. But if the spirit of party is so extreme that party itself becomes a despotism, or, if government itself becomes nothing but organized party, then the danger apprehended by Washington is upon us.

With the increase of population and wealth and power; with the spoils of office dependent upon the elections; with vast interests affected by legislation, as in the care and disposition of public property, the raising of public revenue, the grant or regulation of corporate powers and monopolistic combinations, the danger is that corruption, always insidious, always aggressive, and always dangerous to popular government, will control party machinery to effect its ends, tempt public men into accepting favors at its hands by taking office purchased by its influence, and flourish in rank luxuriance under the shelter of a system which confounds the honest and the patriotic with the cunning and the profligate. An intelligent public opinion ceases to exist when it cannot assert itself, and great measures and great principles are lost when elections degenerate into the mere registration of the decrees of selfishness and greed.

Whenever party spirit becomes so intense as to compass such results it will have reached the height denounced by Washington, and will realize in the action it dictates the terrible definition of despotic government, "When the savages wish to eat fruit they cut down a tree and pluck the fruit."

However difficult it may be to fully appreciate the influence of great men upon the cause of civilization, it is impossible to overestimate that of Washington, thus exerted through precept, as well as by example. In the general recognition of to-day of the effect of that which he did, that which he said, that which he was, upon the public conscience, is found the justification of the confident claim that popular government under the form prescribed by the fundamental law has ceased to be an experiment. Neither foreign wars, nor attacks upon either of the coördinate departments, nor the irritation of a disputed national election, nor territorial aggrandizement, nor the addition of realm after realm to the empire of States, nor sectional controversies, nor the destruction of a great economical, social and political institution, nor the shock of arms in internecine conflict, have impaired the structure of the Government or subverted the orderly rule of the people.

But the deliverance vouchsafed in time of tribulation is as earnestly to be sought in time of prosperity, when material acquisition may deaden the spiritual sense and impede the progress of human elevation.

In the growth of population; in the expansion of commerce, manufactures, and the useful arts; in progress in scientific discovery and invention; in the accumulation of wealth; in material advancement of every kind, the century has indeed been marvellous. Steam, electricity, gas, telegraphy, photography, have multiplied the instrumentalities for the exercise of human power. Science, philosophy, literature and art have moved forward along the lines of prior achievement. But wants have multiplied as civilization has advanced, and with multiplied wants and the increased freedom of the individual have come the antagonisms inevitably incident to inequality of condition, even though there is widely extended improvement upon the whole, and often because of it, and added to them the more serious discontents arising from the existence, notwithstanding the immense results of stimulated production, of privation and distress.

The Declaration asserted political equality and the possession of the inalienable rights of life, liberty and the pursuit of happiness, and the future of the individual was assumed to be secured in securing through government that equality and those rights.

In spite of the violent overthrow of institutions in the French revolution, that great convulsion carried within it the same salutary principles, while a quickening outburst of spiritual energy marked the commencement of the industrial development of England, and all Europe glowed with the fires of sympathy with the wretched and oppressed.

Throughout the hundred years thus introduced, aspiration for the elevation of humanity has not diminished in intensity, and hope of the general attainment of a more exalted plane has gained new strength in the effort to remove or mitigate the ills which have oppressed mankind. The enhanced valuation of human life, the abolition of slavery, the increase of benevolent and charitable institutions, the large public appropriations and private benefactions to the cause of education, the wide diffusion of intelligence, perceptible growth in religion, morality and fraternal kindness, encourage the effort and give solid ground for the hope. And since the protection and regulation of the rights of individuals, as between themselves and as between them and the community, ultimately come to express the will of the latter, it is not unreasonable to contend that the perfectibility of man is bound up in the preservation of republican institutions.

Where the pressure upon the masses has been intense, the drift has been towards increased interference by the State in the attempt

to alleviate inequality of condition. So long as that interference is enabling and protective only to enable, and individual effort is not so circumscribed as to destroy the self-reliance of the people, they move onward with accelerated speed in intellectual and moral as well as material progress; but where man allows his beliefs, his family, his property, his labor, each of his acts, to be subjected to the omnipotence of the state, or is unmindful of the fact that it is the duty of the people to support the government and not of the government to support the people, such a surrender of independence involves the cessation of such progress in its largest sense.

The statement that popular outbreaks were often as beneficial in the political world as storms in the physical was defended upon the ground that, although evils, they were productive of good by preventing the degeneracy of government and nourishing that general attention to public affairs, the absence of which would be tantamount to the abdication of self-government.

But while the rights to life, to use one's faculties in all lawful ways, and to acquire and enjoy property, are morally fundamental rights antecedent to constitutions, which do not create, but secure and protect them, yet it is within the power of the State to promote the health, peace, morals, education and good order of the people by legislation to that end, and to regulate the use of property in which the public has such an interest as to be entitled to assert control. In this wide field of regulation by law, and in the reformation of laws which are found to promote inequality, as well as in the patient efforts of mutual forbearance which the education of conflict produces, the direction of the rule of the people is steadily towards an amelioration not to be found in the dead level of despotism, nor in the destruction of society proposed by the anarchist.

It is but little more than thirty years since the well-known prophecy was uttered, that with the increase of population and the taking up of the public lands, our institutions then being really put to the test, either some Cæsar or Napoleon would seize the reins of government, or our Republic would be plundered and laid waste as the Roman Empire had been, but by Huns and Vandals engendered within our own country and by our own institutions.

The brilliant essayist did not comprehend the character of our fundamental law, the securities carefully devised to prevent facility in changing it, and the provisions which inhibit the subversion of individual freedom, the impairment of the obligation of contracts, and the confiscation of property, nor realize the practical operation of a governmental scheme intended to secure that sober second

thought which alone constitutes public opinion in this country, and which makes of government by the people a government strong enough, in the language of the address, to "withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property," without which "liberty is little else than a name."

Undoubtedly to this people, who from four have become seventy millions in the passage of their first century, to reach by the close of the second, perhaps, seven hundred millions, with resources which can feed and clothe and render happy more than twice that number, the solution of grave problems is committed.

How shall the evils of municipal government, the poverty, the vice, engendered by the disproportionate growth of urban populations, be dealt with as that growth continues? How shall immigration be regulated so that precious institutions may not be threatened by too large an influx of those lacking in assimilative power and inclination? How shall the full measure of duty towards that other race, to which in God's providence this country has been so long a home, be discharged so that participation in common blessings and in the exercise of common rights may lead to and rest upon equal education and intelligence? How shall monopoly be checked, and the pressure of accumulation yield to that equitable distribution, which shall "undo excess, and each man have enough?" How shall the individual be held to the recognition of his responsibility for government, and to meet the demand of public obligations? How shall corruption in private and public life be eradicated?

These and like questions must be answered, and they will be by the nation of Washington, which in the exercise of the sagacity and prudence and self-control born of free institutions, and the cultivation of the humanities of Christian civilization will hallow the name, American, by making it the synonym of the highest sense of duty, the highest morality, the highest patriotism, and so become more powerful and more noble than the powerful and noble Roman nation, which stood for centuries the embodiment of law and order and government, but fell when the gods of the fireside fled from hearthstones whose sanctity had been invaded, and its citizens lost the sense of duty in indulgence in pleasure.

And so the new century may be entered upon in the spirit of optimism, the natural result, perhaps, of a self-confidence which has lost nothing in substance by experience, though it has gained in the moderation of its impetuosity; yet an optimism essential to

the accomplishment of great ends, not blind to perils, but bold in the fearlessness of a faith whose very consciousness of the limitations of the present asserts the attainability of the untravelled world of a still grander future.

No ship can sail forever over summer seas. The storms that it has weathered test and demonstrate its ability to survive the storms to come, but storms there must be until there shall be no more sea.

But as amid the tempests in which our ship of state was launched, and in the times succeeding, so in the times to come, with every exigency constellations of illustrious men will rise upon the angry skies, to control the whirlwind and dispel the clouds by their potent influences, while from the "clear upper sky" the steady light of the great planet marks out the course the vessel must pursue, and sits shining on the sails as it comes grandly into the haven where it would be.

In Memoriam.

ORLOW W. CHAPMAN.

DIED JANUARY 19, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

MONDAY, January 20, 1890.

MR. ATTORNEY GENERAL addressed the court as follows:

MAY IT PLEASE THE COURT: A decree of Nature, as distressing as it was unexpected, makes it my duty to announce to the court the death of the Solicitor General of the United States. In the Sabbath quiet of yesterday morning, after an illness, painful, but until near the end not believed to be fatal, Orlow W. Chapman rested forever from earthly duty and earthly suffering.

The shock and the grief of this event are to-day, I am sure, too fresh and strong upon all of us to admit of fitting words of eulogy upon the character of this eminent lawyer and good man. Let that grateful duty await some future occasion.

My mission this morning is only to make this sad announcement, and to ask the court to take such action as may be due to the memory of our loved associate and now departed brother.

THE CHIEF JUSTICE responded as follows:

The court receives the melancholy intelligence of the death of the Solicitor General with profound regret.

There is a case now under argument and near its conclusion in which the counsel engaged are from a distant State. We feel compelled, therefore, to continue our session until the argument of that case is closed, but will then adjourn as a deserved mark of

respect to the memory of the lamented deceased, and also in order to enable the members of the court to attend his funeral in a body.

From the New York Daily Tribune of January 20, 1890.

Mr. Chapman was born in Ellington, Connecticut, on January 7th, 1832, and was graduated at Union College in 1854. After leaving college he was for some time professor of languages at Fergusonville Academy. In 1856 he began the study of law with Robert Parker, and in 1858 he entered upon the practice of his own profession at Binghamton. In September, 1862, he was appointed District Attorney of Broome County. In the following November he was elected to the office, which he held until January, 1868. In 1867 he was elected to the State Senate from the Twenty-fourth District as a Republican, and was reëlected in 1869. While in the Senate he served as chairman of the Committees on Literature, and Erection of Towns and Counties, and was a member of the Committees on Claims, Judiciary, Roads and Bridges, and Erie Investigation. He was appointed Superintendent of the Insurance Department of this State in December, 1872, and held the office until January, 1876, when he resigned. His administration of the office was above criticism. After his retirement he resumed his place as leader of the bar of Broome County. He was appointed Solicitor General on May 29, 1889. He was held in high esteem by the members of the Supreme Court and the bar. Attorney General Miller, who had not known him prior to his appointment, became greatly attached to him and valued him highly. He was careful, painstaking and conscientious in the discharge of his public duties, and the Attorney General has frequently been congratulated by the Justices of the court upon having secured a gentleman of so much intelligence, industry and ability as his chief assistant. The Solicitor General is the legal adviser of the Government, and his place is considered inferior only to that of a Cabinet officer.

Mr. Chapman was over six feet in height. He was of a sunny, genial temperament, and his uniform kindliness and courtesy endeared him to all who were acquainted with him, while his culture and travels made him a delightful companion. His wife, to whom he had been married many years, survives him.

INDEX.

ACTION.

See ASSUMPSIT.

ADVERSE POSSESSION.

See DEED.

ALABAMA.

See CONSTITUTIONAL LAW, A, 9.

AMENDMENT.

See APPEAL, 1.

APPEAL.

1. Where the certificate of authentication of a record transmitted to this court on appeal begins by setting out the name and office of the clerk of the court below as the maker of the certificate, and has appended to it the seal of the court, but lacks the signature of the clerk, this court has jurisdiction of the appeal; and, if no motion to dismiss is made until it is too late to take a new appeal, will permit the certificate to be amended by adding the clerk's signature. *Idaho and Oregon Land Improvement Co.* v. *Bradbury*, 509.
2. Under the act of April 7, 1874, c. 80, § 2, an appeal, and not a writ of error, lies to this court from the decree of a territorial court in a proceeding in the nature of a suit in equity, although issues of fact have been submitted to a jury. *Ib.*

See EVIDENCE, 2; JURISDICTION, A, 2; INJUNCTION, 1, 3; PRACTICE, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. In the absence of a statute forbidding it, an assignment for the benefit of creditors may be made to an assignee who is not a citizen or resident of the State where the assignment is made or the debtor resides. *Bachrack* v. *Norton*, 337.
2. It having been held in *Cunningham* v. *Norton*, 125 U. S. 77, that the act of Texas of March 24, 1879, was intended to favor general assignments by insolvents for the benefit of their creditors, and to sustain them notwithstanding technical defects; it is now *held*, that there is noth-

ing in the sixth section of the act, directing the assignee's bond to be filed with the county clerk of "*his*" county, to indicate a legislative intent that an assignee under such an assignment must necessarily be a citizen or resident of the State. *Ib.*

3. *Cunningham* v. *Norton*, 125 U. S. 77, affirmed to the point that the act of the legislature of Texas of March 24, 1879, in regard to assignments by insolvent debtors for the benefit of their creditors was intended to favor such assignments; and that a provision in such an assignment, void in itself, did not necessarily vitiate the assignment, or prevent its execution for the benefit of creditors. *Muller* v. *Norton*, 501.
4. A provision in an assignment for the benefit of creditors that the assignee shall at once take possession of all the assigned property "and convert the same into cash" as soon as and upon the best terms possible, can hardly be construed into a discretionary authority to sell on credit. *Ib.*
5. In Texas an assignment for the benefit of creditors, under the statute, may be made to more than one assignee. *Ib.*

ASSUMPSIT.

An action by a municipal corporation to recover from a street railroad company the cost of maintaining pavements in the street which the company was, by its charter, bound to maintain, is not an action upon the statute, but one in assumpsit. *Metropolitan Railroad Co.* v. *District of Columbia*, 1.

BANKER.

See INTERNAL REVENUE.

BANKRUPTCY.

1. The right of action of a plaintiff under a title derived from an assignee in bankruptcy, to redeem from a sale under a deed of trust, was held in this case to be barred by the two years' limitation contained in § 5057 of the Revised Statutes. *Greene* v. *Taylor*, 415.
2. That section does not apply only to a suit to which the assignee in bankruptcy is a party; but it applies to a case where nearly a year of the two years had run against the right while the assignee owned it, after his appointment, and the rest of the two years ran against it in the hands of the plaintiff, his transferee, so that more than two years elapsed between such appointment and the bringing of the suit to redeem, and the property covered by the trust deed was held adversely by the defendant, under a sale under the trust deed, for more than two years before the bringing of that suit. *Ib.*
3. On the facts of this case there was no fraudulent concealment by the defendants from the assignee in bankruptcy or the plaintiff. *Ib.*
4. Sufficient information as to the trust deed, and its contents, was given in the bankruptcy schedule, filed more than eleven months before the assignee was appointed, and more than one month before the sale

under the trust deed, to put the assignee in bankruptcy and the plaintiff on inquiry. *Ib.*

5. Moreover it appeared that, two days before the sale under the deed of trust, the plaintiff knew of the contents of the schedule in bankruptcy and who held the debt secured by the deed of trust. *Ib.*
6. The plaintiff having, by a petition to the bankruptcy court, procured the sale of the property by the assignee in bankruptcy, and the application of its proceeds on the debt on which his suit to redeem was founded, waived any right to redeem arising under a judgment before recovered by him for his debt. *Ib.*
7. On the facts as stated in the opinion of the court it is *held*, that this suit is one between an assignee in bankruptcy and one claiming an adverse interest touching the property which is the subject of controversy, within the meaning of Rev. Stat. § 5057, prescribing a limitation for the commencement of such an action. *Avery* v. *Cleary*, 604.
8. The omission by a bankrupt to put upon his schedules, or the omission by him or by his administrator to disclose to his assignee in bankruptcy the existence of policies of insurance on his life which had been taken out by him, and had, before the bankruptcy, been assigned to a trustee for the benefit of his daughters, does not amount to a fraudulent concealment of the existence ot the policies, so as to take an action against the administrator (who was also such trustee and guardian of the daughters) to recover from him the amount of insurance paid to him as trustee, out of the operation of the limitation prescribed in Rev. Stat. § 5057. *Ib.*
9. Mere ignorance of the existence of a cause of action by an assignee in bankruptcy does not remove the bar against such action prescribed by a statute of limitation; but, in order to set aside such bar, within the rule as announced in *Bailey* v. *Glover*, 21 Wall. 342, there must be no laches on the part of the assignee in coming to the knowledge of the fraud which is the foundation of the suit. *Ib.*

See EVIDENCE, 1.

CALIFORNIA.

See CONSTITUTIONAL LAW, A, 7.

CASES AFFIRMED OR APPROVED.

Vicksburg, Shreveport & Pacific Railway Co. v. *Dennis*, 116 U. S. 665, approved and applied. *Yazoo & Mississippi Valley Railroad* v. *Thomas*, 174.

Yazoo & Mississippi Valley Railroad Co. v. *Thomas*, 132 U. S. 174, affirmed and applied. *Yazoo & Mississippi Valley Railroad Co.* v. *Board of Levee Commissioners*, 190.

Dahl v. *Raunheim*, 132 U. S. 260, affirmed and applied. *Dahl* v. *Montana Copper Co.*, 264.

Feibelman v. *Packard*, 109 U. S. 421. Affirmed in *Bachrack* v. *Norton*, 337.

Taylor v. *Ypsilanti*, 105 U. S. 60. Affirmed in *Young* v. *Clarendon Township*, 340.

Cunningham v. *Norton*, 125 U. S. 77. Affirmed in *Bachrack* v. *Norton*, 337; and in *Muller* v. *Norton*, 501.

Avery v. *Cleary*, 132 U. S. 604. Affirmed in *Cleary* v. *Ellis Foundry Co.*, 612.

The present case is controlled by that of *Hartranft* v. *Langfeld*, 125 U. S. 128. *Robertson* v. *Edelhoff*, 614.

Clayton v. *Utah*, 132 U. S. 632, affirmed and applied to this case. *Jack* v. *Utah Territory*, 643.

CASES DISTINGUISHED.

McArthur v. *Scott*, 113 U. S. 340, distinguished from this case. *Miller* v. *Texas and Pacific Railway Co.*, 662.

CLAIMS AGAINST THE UNITED STATES.

See CONTRACT, 4, 5.

COMMON CARRIER.

See RAILROAD.

CONFLICT OF LAW.

See JURISDICTION, B, 2, 3, 4.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. The statutes of the State of Texas of July 14, 1879, and March 11, 1881, providing for the sale of a portion of the vacant and unappropriated public lands of the State, did not operate to confer upon a person making application under them for a survey of part of said lands and paying the fees for filing and recording the same, a vested interest in such lands which could not be impaired by the subsequent withdrawal of them from sale under the provisions of the statute of January 22, 1883. *Campbell* v. *Wade*, 34.

2. Neither the charter of the Pennsylvania Railroad Company, contained in an act of the legislature of Pennsylvania, passed April 13, 1846, (Laws of 1846, No. 262, p. 312,) nor the acts supplementary thereto, nor the act of that legislature, passed May 16, 1857, (Laws of 1857, No. 579, p. 519,) constituted such a contract between the State and the company as exempted the latter from the operation of § 8 of Article 14 of the constitution of Pennsylvania of 1873, requiring that corporations invested with the privilege of taking private property for public use should make compensation for property injured or destroyed by the construction or enlargement of their works, highways or improve-

ments; nor did such constitutional provision, as applied to the company, in respect to cases afterwards arising, impair the obligation of any contract between it and the State. *Pennsylvania Railroad Co.* v. *Miller*, 75.

3. The company took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions and future general legislation, since there was no prior contract with it exempting it from liability to such future general legislation, in respect of the subject matter involved. *Ib.*
4. Exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. *Ib.*
5. If, in a trial in a state court of a person accused of crime, the jury is brought into court; and, on being polled it is disclosed that they were agreed upon a verdict of guilty under two counts in the indictment, but could not agree as to the other counts; and, in the presence of the jury, the prosecuting attorney proposes to enter a *nolle prosequi* as to those counts; and, the jury having retired, the court permits this to be done; and the jury, being then instructed to pass only upon the remaining counts, return a verdict of guilty as charged in the indictment; all this, however irregular, does not amount to a deprivation of the liberty of the defendant without due process of law. *Cross* v. *North Carolina*, 131.
6. The constitutionality of the act of the legislature of Michigan of March 22, 1869, which is considered in this case was fully settled in the case of *Taylor* v. *Ypsilanti*, 105 U. S. 60, to which the court adheres. *Young* v. *Clarendon Township*, 340.
7. The legislature of California, in 1878, enacted a statute which provided for the payment of the police force of San Francisco at a rate "which should not exceed $102 a month for each one," subject to the condition that the treasurer of the city and county "should retain from the pay of each police officer the sum of two dollars per month to be paid into a fund to be known as the police life and health insurance fund." The act further provided that upon the death of any member of the police force after June 1, 1878, there should be paid by said treasurer out of said life and health insurance fund to his legal representative the sum of $1000. On the 4th of March, 1889, this act was repealed and another statute enacted creating "a police relief and pension fund," and transferring to it the police life and health insurance fund, which had been created under the other act, and making new and different provisions for the distribution of the new fund. W. was a police officer of the city and county from 1869 until his death on March 13, 1889, after the repealing act had gone into operation. His administrator sued to recover $1000 from the police life and health

insurance fund, which then amounted to $40,000; *Held*, that this fund was a public fund, subject to legislative control, and that W. had no vested interest in it, which could not be taken away by the legislature during his lifetime. *Pennie* v. *Reis*, 464.

8. No tax can be imposed by a State upon telegraphic messages sent by a company which has accepted the provisions of Rev. Stat. §§ 5263–5268, or upon the receipts derived therefrom, where the communication is carried, either into the State from without, or from within the State to another State. *Western Union Telegraph Co.* v. *Alabama*, 472.
9. A statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this State." The Western Union Telegraph Company reported to the board of assessors only its gross receipts received from business wholly transacted within the State. The board required of the company a further return of its gross receipts from messages carried partly within and partly without the State. The company made such further return and the tax was imposed upon its gross receipts as shown by the two returns; *Held*, that the statute of Alabama thus construed was a regulation of commerce, and that the tax imposed upon the messages comprised in the second return was unconstitutional. *Ib.*
10. The provision in the Revised Statutes of Texas that when service is made in an action against a partnership upon one of the firm the judgment may be rendered against the partnership and against the member actually served, (§ 1224,) and the provision directing the manner of the service of process upon a non-resident or an absent defendant (§ 1230) are not repugnant to the Constitution of the United States. *Sugg* v. *Thornton*, 524.
11. Under the power of Congress, reserved in the organic acts of the Territories, to annul the acts of their legislatures, the absence of any action by Congress is not to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created. *Clayton* v. *Utah Territory*, 632.

See CORPORATION;
CRIMINAL LAW, 2.

B. OF A STATE.

See CONSTITUTIONAL LAW, A, 1;
CORPORATION.

CONTINGENT REMAINDER.

See JUDGMENT;
WILL.

CONTRACT.

1. When a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of or sell it," it is obvious that the words "dispose of" are not synonymous with the word "sell;" and their meaning must be determined by considering the remainder of the contract. *Hill* v. *Sumner*, 118.
2. In this case an agreement by the owner of the property which formed the subject of the dispute that he would not dispose of or sell it, was held to have been violated by a lease of it for a term of two years. *Ib.*
3. When a contract is so extortionate and unconscionable on its face as to raise a presumption of fraud or to require but slight additional evidence to justify such presumption, fraud may be set up as a defence in an action at law with the same effect with which it could be set up in equity as a ground for affirmative relief; and if articles delivered in performance of such an unconscionable contract have been accepted in ignorance, and under circumstances excusing their non-return, and they have some value, the amount sued for will be reduced to that value in the judgment. *Hume* v. *United States*, 406.
4. Persons dealing with public officers are bound to inquire about their authority to bind the government, and are held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principals. *Ib.*
5. The plaintiff contracted in writing to sell to the government a quantity of shucks at 60 cents a pound at a time when the market value was $1\frac{3}{4}$ cents a pound. He delivered them and they were consumed in the government service. He then claimed to be paid at the contract price, which, being refused, he sued therefor in the Court of Claims; *Held*, that he could only recover the market value of the shucks. *Ib.*
6. A contract between the parties as to the sale of, and payment for, a ranch and cattle, interpreted as to the mode of payment provided for. *McGillin* v. *Bennett*, 445.

See DAMAGES, 1, 2;
FRAUD, 1, 4;
RAILROAD.

CORPORATION.

The constitution of Colorado provided that no foreign corporation should do business in the State without having a known place of business and an agent upon whom process might be served. A statute of the State made provision for the filing by such corporation with the Secretary of State of a certificate showing its place of business and designating such agent or agents, and also a copy of its charter of incorporation, or of its certificate of incorporation under a general incorporation law; and, in case of failure to do so, that each and every officer, agent and stockholder of the corporation should be jointly and severally personally liable on its contracts made while in default.

Said act further provided that no corporation, foreign or domestic, should purchase or hold real estate except as provided in the act. The act did not indicate a mode by which a foreign corporation might acquire real estate in Colorado. G., being the owner in fee of a tract of realty in that State, conveyed it by deed of warranty to a corporation organized under the laws of Missouri, which had not then attempted, and did not afterwards attempt, to comply with those provisions of the constitution or laws of Colorado. F., the defendant below, claimed through this corporation. Some months after his deed to the corporation, G. executed, acknowledged and delivered a quit-claim deed of the premises to the grantor of P., the plaintiff below; *Held*, (1) That perhaps the reasonable interpretation of the statute was that a foreign corporation should not purchase or hold real estate in Colorado until it should acquire, in the mode prescribed by the local law, the right to do business in that State; (2) That these constitutional and statutory provisions were valid so far as they did not directly affect foreign or interstate commerce; (3) That the company violated the laws of the State when it purchased the property without having previously designated its place of business and an agent; (4) But that the deed was not thereby necessarily made absolutely void as to all persons and for every purpose, inasmuch as the constitution and laws of Colorado did not prohibit foreign corporations from purchasing and holding real estate within its limits; (5) That the penalty of personal liability of officers, agents and stockholders in case of non-compliance with the provisions of the statute, having apparently been deemed by the state legislature sufficient to effect its object, it was not for the judiciary to enlarge that penalty, by forfeiting the estate for the benefit of parties claiming under a subsequent deed from the same grantor; (6) That the grantee under the subsequent quit-claim deed could occupy no better position than the grantor, common to both parties, would have occupied if he had himself brought the action; and that, in that case, it could not have been maintained. *Fritts* v. *Palmer*, 282.

See JURISDICTION A, 6;
MASTER AND SERVANT.

COUNTERCLAIM.

See MOTION TO DISMISS OR AFFIRM, 2 (3) (4) (5) (7).

COURT AND JURY.

See PRACTICE, 4.

COURTS OF THE UNITED STATES.

In regard to motions for a new trial, and bills of exceptions, the courts of the United States are independent of any statute or practice pre-

vailing in the courts of the State in which the trial is had. *Missouri Pacific Railway Co.* v. *Chicago & Alton Railroad Co.*, 191.

See EJECTMENT;
EQUITY, 1;
JURISDICTION, A, B.

CRIMINAL LAW.

1. The false making or forging of a promissory note in a State, purporting to be executed by an individual, and made payable at a national bank, is not a fraud upon the United States, or an offence described in Rev. Stat. § 5418. *Cross* v. *North Carolina*, 131.
2. The same act or series of acts may constitute an offence equally against the United States and against a State, and subject the guilty party to punishment under the laws of each government. *Ib.*

CUSTOMS DUTIES.

1. The payment of money to a customs official to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one. *Robertson* v. *Frank Brothers Co.*, 17.
2. The compulsory insertion by an importer of additional charges upon the entry and invoice, which necessarily involve the payment of increased duties, makes the payment of those duties involuntary. *Ib.*
3. The general rule that the valuation of merchandise made by a customs appraiser is conclusive if no appeal be taken therefrom to merchant appraisers, is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement may be impeached. *Ib.*
4. A statute which requires the dutiable value of imported goods to be reached by adding to the market value of the goods the cost of transportation, and other defined charges, does not authorize an appraiser to reach the amount of such cost and charges by an estimate or percentage; and an importer who pays duties on an importation thus calculated may, in an action brought to recover such as were illegally exacted, show wherein such estimate or percentage was illegal and excessive. *Ib.*
5. When an article is designated in a tariff act by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it. *Robertson* v. *Glendenning*, 158.
6. Under the act of March 3, 1883, 22 Stat. 489, embroidered linen handkerchiefs are subject to a duty of thirty-five per cent ad valorem as "handkerchiefs;" and not to thirty per cent ad valorem as "embroideries." *Ib.*
7. The "professional productions of a statuary or of a sculptor only," as that phrase is used in the tariff act, (§ 2504, Rev. Stat. 2d ed. p. 478,)

embraces such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of the manufacturer or mechanic. *Merritt* v. *Tiffany*, 167.

8. Dyes or colors called napthylamine red, orange II, orange IV, and resorcine red J, imported in 1879, were liable to a duty of fifty cents per pound and thirty-five per cent ad valorem under the provision of Schedule M of § 2504 of the Revised Statutes, 2d ed. p. 479, imposing that rate of duty on "Paints and dyes — aniline dyes and colors, by whatever name known," although none of them were known in commerce before 1875, if, according to the understanding of commercial dealers in and importers of them, they would, when imported, be included in the class of articles known as aniline dyes, by whatever name they had come to be known; or if, under § 2499 of the Revised Statutes, they bore a similitude, either in material, quality, or the use to which they might be applied, to what were known as aniline dyes at the time the Revised Statutes were enacted, in 1874. *Pickhardt* v. *Merritt*, 252.
9. Pieces of ivory for the keys of pianos and organs, matched to certain octaves, sold to manufacturers, who scrape them to make them adhere to wood, and then glue them to wood, were charged with duty as manufactures of ivory, under Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 474, and under Schedule N of section 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 511. The importer claimed that they were liable to a less duty, as musical instruments, under Schedule M of section 2504 of the Revised Statutes of 1874, 2d ed. p. 478, and under Schedule N of section 2502 of the Revised Statutes as enacted by said act of March 3, 1883, 22 Stat. 513. In a suit by him against the collector to recover the alleged excess of duty paid, the court charged the jury that if the articles were made on purpose to be used in pianos and organs, and were used exclusively in them, they were dutiable as musical instruments and not as manufactures of ivory; *Held*, that this was error; and that the articles as imported were manufactures of ivory. *Robertson* v. *Gerdan*, 454.
10. Ordinary headless hair-pins, made of steel wire and iron wire, when imported into the United States, are subject to a duty of 45 per cent as "manufactures, articles or wares, not specially enumerated or provided for," "composed wholly or in part of iron, steel, copper," etc., and not as "pins, solid-head, or other." *Robertson* v. *Rosenthal*, 460.
11. Section 7 of the act of March 3, 1883, 22 Stat. 488, c. 121, repealing Rev. Stat. §§ 2907, 2908, took effect immediately upon the passage of the act. *Robertson* v. *Bradbury*, 491.
12. Contemporaneous construction by the Treasury Department of a repealing clause in the customs-laws is entitled to weight in favor of importers. *Ib.*

13. Prior to March 3, 1883, a collector of customs in the United States was required by law, under penalty for non-performance, to ascertain the dutiable value of imported goods by adding to their cost at the place of production the cost of transporting them to the place of shipment to the United States and of the box or case in which they were enclosed. This aggregate was called their price or value "free on board," which, in the absence of fraud, was taken to be their dutiable value. The act of March 3, 1883, 22 Stat. 488, c. 121, § 7, repealed this provision of law. Shortly after this section took effect, and in ignorance of its passage, a shipment of goods produced in Switzerland was made at Antwerp, the consular invoice of which contained in detail the original cost of the goods in Switzerland, the cost of transportation separately stated, and the aggregate "free on board at Antwerp." On their arrival at the port of New York the consignee cabled for a new invoice, to conform to the changed law. One was sent, but without a consular certificate. The consignee presented both invoices at the custom-house and asked to use the second as explanatory of the first, and to enter the goods at their net value, charges off. The weigher's return at the custom-house showed a less quantity of goods than that stated in the invoice. The custom-house officers required the importer to enter the goods at their dutiable value according to the first invoice and gave him to understand that that was all he could do. The collector decided and the Secretary of the Treasury affirmed the decision on appeal, that the cost of transportation, etc., was not to be deducted from the dutiable value of the goods, and that the duties were to be collected on the quantity as shown by the invoice; *Held*, (1) that the levy of duties after March 3, 1883, on a valuation including the charges of transportation from the place of production to the place of shipment was contrary to law; (2) that under the circumstances the importer was not bound to ask for an appraisement under Rev. Stat. § 2926; (3) that the collector was not entitled to exact a duty upon a deficiency in weight arising from loss of goods and not from shrinkage; (4) that the payment of the duties under these circumstances was not voluntary. *Ib.*

14. Ribbons, composed of silk and cotton, in which silk is the component material of chief value, used exclusively as trimmings for ornamenting hats and bonnets, and having a commercial value only for that purpose, are liable to only twenty per cent duty, under the following provision in "Schedule N. — Sundries," in § 2502 of Title 33 of the Revised Statutes, as enacted by the act of March 3, 1883, 22 Stat. 512: "Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow-sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem;" and are not liable to fifty per cent duty, under the

following clause in "Schedule L. — Silk and Silk Goods," in the same section, Id. 510: "All goods, wares and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." *Robertson* v. *Edelhoff*, 614.

15. Plaintiff imported into the United States a quantity of iron advertising or show cards of various sizes. They were sold here for advertising purposes, to hang on walls, or in windows, in public places, and contained generally the name of the person or of the article advertised, and some picture or ornament, which were printed from lithographic stones upon the plates of sheet iron in the same way that lithographing is done upon paper or cardboard. The principal part of the value of the completed card was in the printing done upon the material, and not in the material itself; *Held*, that they were subject to a duty of forty-five per cent ad valorem as manufactures, etc., not specially enumerated or provided for, composed wholly or in part of iron, under the last paragraph of Schedule C, Rev. Stat. § 2502, as enacted March 3, 1883, 22 Stat. 501, c. 121; and not as printed matter not specially enumerated or provided for, under the first paragraph of Schedule M in the same amending act. *Forbes Lithograph Manufacturing Co.* v. *Worthington*, 655.

DAMAGES.

1. In an action in the nature of an action on the case to recover from the defendant damages which the plaintiff has suffered by reason of the purchase of stock in a corporation which he was induced to purchase on the faith of false and fraudulent representations made to him by the defendant, the measure of damages is the loss which the plaintiff sustained by reason of those representations — such as the money which he paid out and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct; but it does not include the expected fruits of an unrealized speculation. *Smith* v. *Bolles*, 125.
2. In applying the general rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of" those results are to be considered proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract. *Ib.*

DEED.

A deed of land sold for non-payment of taxes, which recites that the sale was made on a day which was not the day authorized by law, is void on its face, and is not admissible in evidence to support an adverse possession under a statute of limitations. *Redfield* v. *Parks*, 239.

See LOCAL LAW, 15, 16.

DEMURRER.

See PLEADING.

DEPUTY MARSHAL.

See EXECUTIVE.

DISTRICT OF COLUMBIA.

1. The District of Columbia is a municipal corporation, having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons. *Metropolitan Railroad Co.* v. *District of Columbia*, 1.
2. The Maryland statute of limitations of 1715, which is in force in the District of Columbia, embraces municipal corporations. *Ib.*
3. The sovereign power of the District of Columbia is lodged in the government of the United States, and not in the corporation of the district. *Ib.*

EJECTMENT.

In the courts of the United States an action of ejectment is an action at law, and the plaintiff must recover on the legal title. *Redfield* v. *Parks*, 239.

EQUITY.

1. A decision of a District Court, in equity, on a question of fact, affirmed by the Circuit Court, will not be disturbed by this court unless the error is clear. *Dravo* v. *Fabel*, 487.
2. A suit to enforce a mechanic's lien under a territorial statute authorizing the court to order the real estate subject to the lien to be sold, and any deficiency to be paid by the owner, as in suits for the foreclosure of mortgages, is in the nature of a suit in equity. *Idaho and Oregon Land Improvement Co.* v. *Bradbury*, 509.
3. A court of equity need not formally set aside the verdict of a jury upon issues submitted to it, before making a decree according to its own view of the evidence. *Ib.*
4. In a suit in the nature of a suit in equity, a territorial court, after a jury has found upon special issues submitted to it, and has also returned a general verdict, may set aside the general verdict, and substitute its own findings of fact for the special findings of the jury. *Ib.*

See EVIDENCE, 5, 6; JURISDICTION A, 1, 7; LOCAL LAW, 2; MUNICIPAL CORPORATION, 9 (7); REMOVAL OF CAUSES, 4.

ERROR.

Where a defendant, on a trial, introduced under the objection of the plaintiff, parol evidence of what occurred in negotiations between the parties prior to the making of a contract between them, with a view to the construction of the contract, he cannot on a writ of error to review a judgment against him, allege as error the admission of such evidence. *McGillin* v. *Bennett*, 445.

EVIDENCE.

1. The petition of a bankrupt in bankruptcy, in which he states under oath that he owns no real estate and holds no interest in real property is evidence of the execution and validity of a prior deed of his real estate in a suit in which he contests both. *Dent* v. *Ferguson*, 50.
2. After a suit in equity for the infringement of a patent has been heard and decided in favor of the defendant on the merits, the plaintiff cannot put in evidence a disclaimer, except at a rehearing granted upon such terms as the court sees fit to impose. *Roemer* v. *Bernheim*, 103.
3. Before former declarations of a witness can be used to impeach or contradict his testimony, his attention must be drawn to what may be brought forward, with particularity as to time, place and circumstance, so that he can deny it, or make an explanation tending to reconcile what he formerly said with what he is testifying. *Ayers* v. *Watson*, 394.
4. After a witness' testimony has been taken, committed to writing and used in the court, and by death he is placed beyond the power of explanation, then, in another trial had after his death, former declarations by him, whether by deposition or otherwise, contradictory to those made by him in that testimony, cannot for the first time be brought forward and used to impeach it. *Ib.*
5. When the plaintiff in a suit in equity does not waive an answer under oath, the defendant's answer, directly responsive to the bill, is evidence in his behalf. *Dravo* v. *Fabel*, 487.
6. The statute of Pennsylvania providing that a party in a suit in equity may be examined as a witness by the other party as if under cross-examination, and that his evidence may be rebutted by counter testimony, has no application to suits in equity in courts of the United States held within the State. *Ib.*
7. The party offering in a court of the United States in Pennsylvania a deposition taken under that statute, makes the witness his own, and is not at liberty to contend that he is not entitled to credit. *Ib.*
8. In an action to recover damages for the taking of ore from a mine by the proprietor of an adjoining mine, who had broken in, a witness for defendant was asked whether he had a model of the mine, but was not asked whether it was correct, and did not say that it would illustrate the subject about which he was testifying. Plaintiff objected to its production and the objection was sustained. At the hearing in error in this court no copy of the model was produced; *Held*, that it was properly rejected. *Patrick* v. *Graham*, 627.
9. The evidence of a person who did not personally know about the amount of ore taken from the mine was properly rejected at the trial of such action, and cannot be held to have been admissible under a stipulation which does not form part of the record. *Ib.*

See DEED; ERROR; PATENT FOR INVENTION, 12; POST-OFFICE DEPARTMENT, 7.

EXCEPTION.

1. An exception to the refusal of the presiding judge at a jury trial to instruct the jury in language prayed for by counsel is of no avail, if the refusal be followed by instructions in the general charge, substantially to the same effect, but in the language of the court. *Anthony* v. *Louisville & Nashville Railroad Co.*, 172.
2. A general exception to the whole of a charge to the jury will not avail a plaintiff in error if the charge contains distinct propositions and any one of them is free from objections. *Ib.*
3. An exception to the refusal to give instructions in the language of counsel is of no avail if the court substantially gives the same instructions although in different language. *Patrick* v. *Graham*, 627.

See MOTION TO DISMISS OR AFFIRM, (6).

EXECUTIVE.

A regulation by the President to fix the length of service and compensation of special deputy marshals, or supervisors of elections, appointed in pursuance of the provisions in Rev. Stat. §§ 2012, 2016 and 2021, if it has any validity, cannot have a retroactive effect. *United States* v. *Davis*, 334.

See POST-OFFICE DEPARTMENT;
PUBLIC LAND, 4.

EXECUTORY DEVISE.

See JUDGMENT;
WILL.

FINDING OF FACTS.

See EQUITY, 1, 4;
PRACTICE, 2.

FORGERY.

See CRIMINAL LAW, 1.

FRAUD.

1. An executed agreement by one party to cause the debts of the other to be cancelled by his creditors, valid in its inception, is not invalidated as to the debtor by reason of the settlements being effected for a small percentage, or even by the employment of improper means to effect them. *Dent* v. *Ferguson*, 50.
2. The proof in this case fails to show imbecility, dotage or loss of mental capacity on the part of the appellee at the time when the contract in dispute was made. *Ib.*
3. The maxim "*in pari delicto, potior est conditio defendentis,*" is decisive of this case. *Ib.*
4. A creditor made a compromise with his debtor for sixty cents on the

dollar, and subsequently sued him to recover the balance of the claim, on the ground of fraudulent action by the debtor in obtaining the compromise, and that the debtor had violated his agreement not to voluntarily pay any other creditor more than sixty per cent: *Held*, that he could not recover because (1) there was no breach of good faith on the part of the debtor, and no misrepresentation as to his assets, and no false answer made by him to any question; (2) the payment of more than sixty per cent to another creditor having been made when the latter had an attachment suit against the debtor, which was about to be tried, was not a voluntary payment within the meaning of the agreement. *Cleaveland* v. *Richardson*, 318.

5. The evidence in this case fails to establish any fraud in the making of the notes and mortgage which are the subject of controversy, or in the use afterwards made of the notes. *Rio Grande Railroad Co.* v. *Vinet*, 565.

See BANKRUPTCY, 3, 4, 5, 8;
CONTRACT, 3, 5;
FRAUDULENT CONVEYANCE;
INSOLVENT DEBTOR;
POST-OFFICE DEPARTMENT, 2.

FRAUDULENT CONVEYANCE.

1. A conveyance by a debtor, deeply indebted, and in anticipation of decrees and judgments which, added to existing incumbrances, will amount to the value of the property conveyed, will lead a court of equity to presume that the instrument was executed in fraud of the creditors. *Dent* v. *Ferguson*, 50.

2. If a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for many years acquiesces and concurs in devices, collusive suits and impositions upon the court in furtherance of that purpose, without taking any step to annul such conveyance or stop such proceedings, a court of equity will not aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished. *Ib.*

See EVIDENCE, 1;
FRAUD, 2, 4.

GARNISHEE.

See INSOLVENT DEBTOR.

HIGHWAY.

See MUNICIPAL CORPORATION, 4, 5.

HUSBAND AND WIFE.

See LOCAL LAW, 2, 3, 4.

INJUNCTION.

1. An appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect. *Knox County* v. *Harshman*, 14.

2. When an injunction has been dissolved it cannot be revived except by a new exercise of judicial power. *Ib.*

3. The prosecution of an appeal cannot operate as an injunction where none has been granted. *Ib.*

See JURISDICTION, A, 4;
SUPERSEDURE.

INSOLVENT DEBTOR.

A creditor of an insolvent debtor, having full knowledge of the insolvency, secured for himself a transfer of a large part of the notes, book accounts and debts of the insolvent. Other creditors, by a proceeding which was part of the same transaction, secured their debts by attachments sufficient to absorb all the property of the debtor. A creditor not included in the arrangement sued the debtor and, by garnishee process, brought in the creditor who had obtained the notes, etc.; *Held*, (1) that the garnishee was bound to establish, as against the pursuing creditor, that his claim against the debtor was just, and that he will receive from the assets no more than is reasonably necessary to pay it; and (2) if he is found liable at all as garnishee, he is liable to account not only for the money collected on the notes, accounts, etc., but also for the value of those which remain in his hands, at least to a sufficient amount to satisfy the debt of the pursuing creditor. *Klein* v. *Hoffheimer*, 367.

See ASSIGNMENT FOR BENEFIT OF CREDITORS;
FRAUD, 4.

INSURANCE.

In Iowa it is provided by statute that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding;" *Held*, (1) That a person procuring an application for life insurance in that State became by the force of the statute the agent of the company in that act, and could not be converted into the agent of the assured by any provision in the application; (2) That, if he filled up the application (which he was not bound to do) or made representations or gave advice as to the character of the answers to be given by the applicant, his acts in these respects were the acts of the insurer; (3) That a "provision and requirement" (printed on the back of the policy issued on the application) that none of its terms could be modified or forfeitures waived except by an agreement in writing signed by the president or secretary, "whose authority for this purpose will not be delegated" did not change the relation established by the statute of Iowa between the solicitor and the insured. *Continental Life Insurance Co.* v. *Chamberlain*, 304.

INTEREST.

See MUNICIPAL CORPORATION, 3.

INTERNAL REVENUE.

The plaintiff had a place of business, indicated by a sign over the door, where his mail matter was received, and where he could be met by his clients, and where the latter could deliver to him stocks to be sold by him or under his supervision, and he was engaged there in the business of buying and selling stocks for his customers, in which business he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers; *Held*, that he was a "banker" within the meaning of that term as used in Rev. Stat. § 3407, and subject to taxation as such under the provisions of § 3408. *Richmond* v. *Blake*, 592.

INVOLUNTARY PAYMENT.

See CUSTOMS DUTIES, 1, 2, 13 (4);
FRAUD, 4.

JUDGMENT.

A contingent interest in real estate or an executory devise is bound by judicial proceedings affecting the real estate, where the court has before it all parties that can be brought before it in whom the present estate of inheritance is vested, and the court acts upon the property, according to the rights that appear, without fraud. *Miller* v. *Texas & Pacific Railway Co.*, 662.

See JURISDICTION, A, 1;
PRACTICE, 1;
WILL.

JURISDICTION.

A. JURISDICTION OF THIS COURT.

1. A bill in equity prayed for an injunction restraining the defendant from trespassing on the land of the plaintiff and taking mineral and ore therefrom, and that he account to the plaintiff for the value of the ore already taken therefrom. After a hearing on pleadings and proofs, the Circuit Court made a decree granting a perpetual injunction, and ordering an account before a master; *Held*, that the decree was not final or appealable. *Keystone Manganese and Iron Co.* v. *Martin*, 91.
2. The granting or refusal, absolute or conditional, of a rehearing in equity, rests in the discretion of the court, and is not a subject of appeal. *Roemer* v. *Bernheim*, 103.
3. This court has jurisdiction to review, on writ of error, a decision of the highest court of a State, in which it is decided that a provision in a tax act of the State that it shall not apply to railroad corporations exempted from taxation by their charters is not applicable to a par-

ticular corporation, party to the suit, although its charter contains a provision respecting exemption from taxation. *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas*, 174.

4. A complaint in a suit in a District Court in Idaho Territory prayed for an injunction restraining the defendant from interfering with the possession of a mining claim which the plaintiff had, by a written agreement, licensed the defendant to work, for a compensation, the agreement also containing a provision for the conveyance of the claim to the defendant, on certain terms. The complaint also prayed for an accounting concerning all ore taken from the mine by the defendant, and the payment to the plaintiff of the amount due to the plaintiff under the agreement. The defendant filed a cross complaint praying for a specific performance by the plaintiff of the contract to convey. The District Court, by one judgment, granted to the plaintiff the injunction asked, and ordered an accounting before a referee, and dismissed the cross complaint. On appeal by the defendant the judgment was affirmed by the Supreme Court of the Territory, and the defendant appealed to this court; *Held*, (1) The judgment was not final or appealable; (2) It made no difference that the judgment dismissed the cross complaint; (3) The right of the defendant to appeal from the judgment, so far as the cross complaint is concerned will be preserved; and time will run against him, as to all parts of the present judgment of the District Court only from the time of the entry of a final judgment after a hearing under the accounting. *Winters* v. *Ethell*, 207.

5. The rulings upon a motion for a new trial are not open to consideration in this court. *Dahl* v. *Raunheim*, 260.

6. The objection that a corporation cannot sue in a territorial court, on the ground that it does not appear that the corporation has complied with the conditions imposed by a statute of the Territory upon its transacting business there, cannot be urged for the first time in this court. *Dahl* v. *Montana Copper Co.*, 264.

7. On appeal from the decree of a territorial court in a proceeding in the nature of a suit in equity, this court cannot consider the weight or sufficiency of evidence, but only whether the facts found by the court below support the decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence. *Idaho and Oregon Land Improvement Co.* v. *Bradbury*, 509.

8. Where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the Federal question. *Hale* v. *Akers*, 554.

9. This court has jurisdiction to hear and determine, irrespective of the amount involved, an appeal from a decree of the Supreme Court of the Territory of Utah, in which the power of the governor of the Ter-

ritory, under the organic act, to appoint a person to be the auditor of public accounts is drawn in question. *Clayton* v. *Utah*, 632.

See APPEAL, 1, 2; EQUITY, 1; EVIDENCE, 6; EXCEPTION; MOTION TO DISMISS OR AFFIRM; PRACTICE, 5; REMOVAL OF CAUSES.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. An action on a marshal's bond, to recover damages for the wrongful taking of goods under an attachment issued out of a Circuit Court of the United States, is a case arising under the laws of the United States, and is within the jurisdiction of a Circuit Court of the United States without averment of citizenship of the parties. *Feibelman* v. *Packard*, 109 U. S. 421, affirmed and applied. *Bachrack* v. *Norton*, 337.
2. Property of a debtor, brought within the custody of the Circuit Court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of its judgment, notwithstanding the subsequent death of the debtor before the sale under execution. *Rio Grande Railroad Co.* v. *Gomila*, 478.
3. The jurisdiction of a court of the United States, once obtained over property by its being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings subsequently commenced in a state court. *Ib.*
4. Probate laws of a State which, upon the death of a party to a suit in a Federal Court, withdraw his estate from the operation of the execution laws of the State, and place it in the hands of his executor or administrator for the benefit of his creditors and distributees, do not apply when, previous to the death of the debtor, his property has been seized upon execution, and thus specifically appropriated to the satisfaction of a judgment in that court. *Ib.*

See COURTS OF THE UNITED STATES; CRIMINAL LAW, 2; REMOVAL OF CAUSES.

C. JURISDICTION OF STATE COURTS.

A State is not deprived of jurisdiction over a person who criminally forges a bill of exchange or promissory note with intent to defraud, in violation of its statutes, or of its power to punish the offender committing such offence, by the fact that he follows this crime up by committing against the United States the further crime of making false entries concerning such bill or note on the books of a national bank, with intent to deceive the agent of the United States designated to examine the affairs of the bank, and in violation of the statute of the United States in that behalf. *Cross* v. *North Carolina*, 131.

See CRIMINAL LAW, 2; JURISDICTION, B, 4.

LETTERS PATENT.

See PATENT FOR INVENTION.

LEGAL MAXIMS.

See FRAUD, 3.

LEX LOCI.

See MUNICIPAL CORPORATION, 3.

LIEN.

1. The doctrine that a vendor not taking security for the price of real estate sold by him holds in equity a lien upon the property for such price has no application to this case. *Thompson* v. *White Water Valley Railroad Co.*, 68.
2. In Indiana, a person who contracts with a telegraph corporation to do the specified work of putting up certain lines of wire on poles, is not an "employé" of the corporation, within the meaning of the act of the legislature of Indiana, approved March 13, 1877, (Laws of Indiana 1877, Special Session, 27, c. 8; also, Rev. Stats. Indiana, §§ 5286–5291,) giving a first and prior lien on the corporate property and earnings of a corporation to its employés, for all work and labor done and performed by them for the corporation, from the date of their employment by the corporation. *Vane* v. *Newcombe*, 220.
3. Such a lien is not given to him by virtue of the mechanics' lien act of Indiana, of March 6, 1883, (Laws of 1883, 140; Elliott's Supplement of 1889, §§ 1688 and 1690,) unless he complies with that act in regard to describing, in his notice of lien, the lot or land on which the structure stands on which he claims a lien. *Ib.*
4. By perfecting a claim to his lien under the act of 1877, he waived the right, if any, which he had to a common law lien, as to the personal property and earnings of the corporation. *Ib.*
5. The poles and wires were real estate on which he could have no lien at common law. *Ib.*
6. Moreover he gave up any right he had to a common law lien, as to the wires, by giving up possession of them. *Ib.*

LIMITATION, STATUTES OF.

1. This court expresses no opinion upon the question whether, when the right of property in highways and public places is vested in a municipality, an assertion of that right against purprestures or public nuisances is subject to the law of limitations. *Metropolitan Railroad Co.* v. *District of Columbia*, 1.
2. An action by a municipal corporation to recover from a street railroad company the cost of maintaining pavements in a street, which the company is, by its charter, bound to maintain, is not an action upon

the statute, but one in assumpsit, liable to be barred by a statute of limitation. *Ib.*

See BANKRUPTCY, 1, 2, 7, 8, 9; DEED; LOCAL LAW, 17; PUBLIC LAND, 1.

LOCAL LAW.

1. The defendant in a possessory action in the nature of ejectment, brought in a court of Washington Territory where the laws permitted a mingling of common law and equity jurisdictions, pleaded the general issue, and also set up four defences, one of which was the statute of limitations, and one of which was an equitable defence. The plaintiff filed a general demurrer to the second, third and fourth defences. The demurrer being overruled, the plaintiff elected to stand upon it, and the case was thereupon dismissed; *Held*, that the final judgment was one dismissing the action at law, and was not a judgment in the exercise of chancery jurisdiction. *Brown* v. *Rank*, 216.
2. In Louisiana, as in the States in which the English system of equitable jurisprudence prevails, a creditor who has received from his debtor the legal title to real estate, may institute other proceedings against the debtor in relation to the same property, in order to strengthen his title or establish his lien, if he deems it his interest to do so. *Bradley* v. *Claflin*, 379.
3. In Louisiana a married woman, who has received from her husband a conveyance of real estate as a *dation en paiement* of a debt against him arising out of her paraphernal property which came into his control, may cause a mortgage of the same property to secure the same debt to be recorded in the manner provided by law, and the mortgage may become valid if the title under the conveyance fails. *Ib.*
4. In Louisiana a mortgage or lien on real estate of the husband in favor of the wife is created by Art. 3319 [3287] of the code when the husband receives her dotal or paraphernal property, which mortgage though not registered, is not merged in a simulated and fraudulent title conveyed to her by her husband as a *dation en paiement*, and its registry by the wife makes it valid against creditors of the husband asserting title under liens subsequent thereto. *Ib.*
5. A judgment in Texas against a partnership, and against one member of it upon whom process has been served, no process having been served upon another member who is non-resident and absent, binds the firm assets so far as the latter is concerned, but not his individual property. *Sugg* v. *Thornton*, 524.
6. In Texas an equitable claim of title to real estate is equally available with a legal one. *Miller* v. *Texas and Pacific Railway*, 662.
7. In Texas, the holder of a head-right-certificate could locate it upon a tract of public land, and then abandon the location and locate it upon another tract, and, in such case the abandoned tract became thereby again public land, subject to location by other parties. *Ib.*

8. From the evidence it would appear that the Rutledge certificate which is in controversy in this case was in the land office in Texas on or before August 1, 1857, in compliance with the requirements of the act of the Legislature of Texas of August 1, 1856. 1 Paschal's Digest, 701, art. 4210. *Ib.*
9. By the act of the legislature of Texas of April 25, 1871, 2 Paschal's Digest, 1453, arts. 7096–7099, it was provided that a certificate of location and survey of public lands, not on file at the passage of that act, and not withdrawn for locating an unlocated balance, should be returned to and filed in the office within eight months thereafter, or the location and survey should be void; *Held*, that in the absence of clear proof that a valid located certificate was not on file there within the statutory time, the court would not raise such a presumption in favor of another title, superimposed upon the land at a time when the certificate was valid and possession was enjoyed under it. *Ib.*
10. The practice of locating land certificates upon prior rightful locations is not favored by the laws of Texas. *Ib.*
11. The failure of the holder of a head-right-certificate in Texas to complete his title, by complying with statutory provisions in regard to the filing of his certificate, enures to the benefit of the State alone. *Ib.*
12. In Texas the rights of a subsequent locator, having actual notice of a prior location, are postponed to the superior rights of the prior locator, although the subsequent location may have passed into a patent. *Ib.*
13. The provisions in the constitution and laws of Texas respecting the location of land certificates, reviewed. *Ib.*
14. In Texas land certificates are chattels, and may be sold by parol agreement and delivery, the purchaser and grantee thereby acquiring the right to locate a certificate and to take out a patent in his own name and to his own use. *Ib.*
15. The failure in the certificate of acknowledgment of a deed of the separate property of a married woman in Texas, to state that she was examined apart from her husband, cannot be supplied by proof that such was the fact. *Ib.*
16. In Texas an habendum to a deed running "to have and to hold to him the said" grantee, "his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever, claiming or to claim the same," imports a general warranty and estops the grantor and his heirs from setting up an adverse title against the grantee. *Ib.*
17. On the facts as stated in the opinion the court holds that the statute of limitations of Texas is a complete bar to the claims set up by the complainants, both in the original bill and in the cross-bills. *Ib.*

Alabama. *See* CONSTITUTIONAL LAW, 9.
California. *See* CONSTITUTIONAL LAW, 7.
Colorado. *See* CORPORATION.
Indiana. *See* LIEN, 2, 3, 4, 5, 6.

Iowa. *See* INSURANCE.
Michigan. *See* CONSTITUTIONAL LAW, 6.
MUNICIPAL CORPORATION, 9.
Ohio. *See* MUNICIPAL CORPORATION, 4, 5.
Pennsylvania. *See* CONSTITUTIONAL LAW, A, 2.
EVIDENCE, 6, 7.
Texas. *See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3, 4.
CONSTITUTIONAL LAW, A, 1, 10.
MOTION TO DISMISS OR AFFIRM, 2.
Utah. *See* CONSTITUTIONAL LAW, A, 11.

MANDAMUS.

A judgment for damages and costs was recovered in a Circuit Court of the United States, on bonds and coupons issued by a municipal corporation. In answer to an alternative writ of mandamus issued three and one-half years afterwards, for the levy of a tax to satisfy the judgment, it was set up, in bar, that the original judgment was void because the Circuit Court had no jurisdiction of the subject matter of the action on the ground that the bonds were not payable to order or bearer. A peremptory writ was granted by a judgment to review which a writ of error was taken. A motion to dismiss the writ was made, united with a motion to affirm; *Held*, (1) Although there was no ground for contending that this court had no jurisdiction, yet the reasons assigned for taking the writ of error were frivolous, and it was taken for delay only; (2) The principal of the bonds was payable to bearer; (3) The judgment ought to be affirmed; (4) The proceeding by mandamus being in the nature of execution, if the prosecution of writs of error to the execution of process to enforce judgments were permitted when no real ground existed therefor, such interference might become intolerable, and this court in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below; (5) No different interpretation is put on that subdivision from that which has hitherto prevailed. *Chanute City* v. *Trader*, 210.

MASTER AND SERVANT.

A person employed by a corporation under a written contract to sell sewing-machines, and to be paid for his services by commissions on sales and collections; the company furnishing a wagon, and he furnishing a horse and harness, to be used exclusively in canvassing for such sales and in the general prosecution of the business; and he agreeing to give his whole time and best energies to the business, and to employ himself under the direction of the company and under such rules and instructions as it or its manager shall prescribe; is a servant of the company, and the company is responsible to third persons injured by

his negligence in the course of his employment. *Singer Manufacturing Co.* v. *Rahn*, 518.

MECHANICS' LIEN.

See EQUITY, 2;
LIEN, 2, 3, 4.

MICHIGAN.

See CONSTITUTIONAL LAW, A, 6.

MINERAL LAND.

1. An applicant for a placer patent, who has complied with all the proceedings essential for the issue of a patent for his location, but whose patent has not issued, may maintain an action to quiet title against a person asserting title to a portion of the placer location under a subsequent location of a lode claim. *Dahl* v. *Raunheim*, 260.
2. If on the trial of such an action the court instruct the jury that if they believe that the premises were located by the grantors and predecessors in interest of the plaintiff as a placer mining claim in accordance with law and they continued to hold the premises until conveyed to the plaintiff, and the plaintiff continued to hold them up to the time of the application of a patent therefor, and at the time of the application there was no known lode or vein within the boundaries of the premises claimed, and there is a general verdict for the plaintiff, the jury must be deemed to have found that the lode claimed by the defendant did not exist when the plaintiff's application for a patent was filed. *Ib.*
3. When a person applies for a placer patent in the manner prescribed by law, and all the proceedings in regard to publication and otherwise are had thereunder which are required by the statutes of the United States, and no adverse claims are filed or set up, and it appears that the ground has been surveyed and returned by the Surveyor General to the local land office as mineral land, the question whether it is placer ground is conclusively established and is not open to litigation by private parties seeking to avoid the effect of the proceedings. *Ib.*

See EVIDENCE, 8, 9;
JURISDICTION, A, 1, 4.

MISTAKE OF FACT.

See POST-OFFICE DEPARTMENT, 3.

MORTGAGE.

A mortgage by a railroad company, which covers its entire property and also all property appertaining to its road which it might afterwards acquire, is valid as to such after-acquired property; and the bonds issued under it are a prior encumbrance on a part of the chartered line constructed, after the funds realized from the mortgage bonds had

been exhausted, out of moneys subsequently furnished by parties who took from the company a special lien upon the rents and profits of the section so constructed with their money. *Thompson* v. *White Water Valley Railroad Co.*, 68.

See LOCAL LAW, 2, 3, 4.

MOTION FOR NEW TRIAL.

See JURISDICTION, A, 5.

MOTION TO DISMISS OR AFFIRM.

1. There is color for a motion to dismiss a writ of error to a state court for want of jurisdiction if it appear that no Federal question was raised on the trial of the case, but that it was made for the first time in the highest appellate court of the State sitting to review the decision of the case in the trial court. *Sugg* v. *Thornton*, 524.
2. Plaintiffs sued defendant in a state court in Texas to recover $5970, the alleged value of goods destroyed by a fire charged to have been caused by defendant's negligence. Defendant pleaded and excepted to the petition. The cause was then removed to the Circuit Court of the United States on defendant's motion, who there answered further, pleading the general issue, excepting to the petition among other things for insufficiency and vagueness in the description of the goods, and charging contributory negligence on plaintiffs' part. Plaintiffs filed an amended petition more precise in statement and reducing the damage claimed to $4656.71. To this defendant answered, again charging contributory negligence and setting up, "by way of set-off, counterclaim and reconvention," injuries to himself to the extent of $8000, resulting from plaintiffs' negligence, for which he asked judgment. Plaintiffs excepted to the cross-demand. On the 6th October, 1888, the cause coming to trial, defendant's exceptions were overruled, except the one for vagueness, and as to that plaintiffs were allowed to amend; plaintiffs' exceptions to the counterclaim were sustained; and the jury rendered a verdict for $4300 principal, and $792.15 interest. It appeared by the record that plaintiffs on the same day remitted $435.50, and judgment was entered for $4656.65; but it further appeared that on the 8th October, plaintiffs moved for leave to remit that amount of the judgment and leave was granted the remittitur to be as of the day of the rendition of the judgment, and the judgment to be for $4656.65 and costs. On the same 8th of October, defendant filed a bill of exceptions in the cause "signed and filed herein and made a part of the record in this cause this 8th day of October, 1888." On the 9th October, a motion for a new trial was overruled. On a motion to dismiss the writ of error or to affirm the judgment, *Held*, (1) That the remittitur was properly made, and that it was within the power of the Circuit Court to order it as it was ordered; (2) That if no other question were raised in the case, the

motion to dismiss would be granted; (3) That the counterclaim, being founded on a "cause of action arising out of, or incident to, or connected with the plaintiffs' cause of action," was properly set up, and conferred upon this court jurisdiction to examine further into the case; (4) That the plaintiffs' exception to the counterclaim was properly sustained; (5) That if the counterclaim could be maintained, a recovery could be had only for damages which were the natural and proximate consequences of the act complained of; (6) That the defendant's exceptions to the charge of the court having been taken two days after the return of the verdict, were taken too late; (7) That the facts furnished ground for maintaining that the counterclaim was set up only for the purpose of giving jurisdiction to this court; (8) But whether that were so or not, the judgment ought to be affirmed on the case made. *Pacific Express Co.* v. *Malin*, 531.

MUNICIPAL CORPORATION.

1. The negotiable security of a municipal corporation, invalid in the hands of the original holder by reason of an irregularity in its issue to which he was a party, but which becomes valid in the hands of an innocent purchaser for value without knowledge or notice of the irregularity, remains valid when acquired by another purchaser for value, who was no party to the irregularity, but who, at the time of his purchase, had knowledge of the infirmity, and of a pending suit against the original holder and others to have the whole issue declared invalid by reason thereof. *Scotland County* v. *Hill*, 107.
2. The litigations respecting the Scotland County bonds in the state courts and in the courts of the United States reviewed. *Ib.*
3. In the absence of a provision to the contrary, overdue coupons on bonds of a municipal corporation bear interest at the legal rate in the place where they are payable. *Ib.*
4. In Ohio it is the duty of a municipal corporation to keep the streets of the municipality in order; and a person receiving injuries in consequence of its neglect so to do, has a right of action at the common law for the damage caused thereby. *Cleveland* v. *King*, 295.
5. A building-permit by municipal authorities authorizing the occupation of part of a public street as a depository for building materials, and requiring proper lights at night to indicate their locality, does not relieve the municipality from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the street in such a way as to endanger passers-by in their proper use of it. *Ib.*
6. It is settled law that a municipality has no power to issue its bonds in aid of a railroad, except by legislative permission. *Young* v. *Clarendon Township*, 340.
7. The legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose. *Ib.*

8. Where authority is granted to a municipality to aid a railroad and incur a debt in extending such aid, that power does not carry with it authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act. *Ib.*

9. The act of the legislature of Michigan of March 22, 1869, "to enable any township, city or village to pledge its aid by loan or donation to any railroad company, etc.," provided that the bonds when "issued" should be "delivered by the person . . . having charge of the same to the treasurer of this State;" that the treasurer should "hold the same as a trustee for the municipality issuing the same and for the railroad company for which they were issued;" that whenever the railroad company should "present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this act . . . such of said bonds as said company shall be entitled to receive shall be delivered to said company;" that the treasurer should endorse upon each bond delivered the date of its delivery and to whom it was delivered; and that in case the bonds were not demanded in compliance with the terms of the act within three years from the date of delivery to the treasurer, "the same shall be cancelled by said treasurer and returned to the proper officers of the township or city issuing the same." The township of Clarendon, in Michigan, having complied with the requirements of the act on its part, delivered to the state treasurer its bonds to the amount of $10,000, dated July, 1869, for the benefit of the Michigan Air Line Railroad Company. The company completed its railroad before February, 1871, and became entitled to the governor's certificate under the act; but on May 26, 1870, the Supreme Court of the State had declared the act to be unconstitutional, and the governor in consequence thereof refused to give the certificate. On the 28th May, 1872, before the expiration of three years from their delivery, the treasurer returned the bonds to the township. November 12, 1884, the appellant obtained judgment against the railroad company and an execution was issued, which was returned *nulla bona.* On the 24th February, 1885, he filed a bill in equity against the township and the company, claiming that the township was equitably indebted to the company to the amount of the bonds and coupons with interest, and that he was entitled to receive the amount of that indebtedness, and to apply it on his judgment debt; *Held*, (1) that the municipal authorities had no power to deliver the bonds, after their execution, except to the state treasurer, and that the word "deliver" as used in the statute with reference to this act, was used in its ordinary and popular sense, and not in its technical sense; (2) that to the governor alone was given the power to determine whether the bonds should ever in fact issue, and, if issued, when they should issue; (3) that the endorsement by the treasurer upon each bond of the date of its delivery and of the person to whom it was

delivered, was necessary to make it a completed bond and that this could not be done until the governor's authorization was made; (4) that as the bonds were never endorsed and delivered by the treasurer they never became operative; (5) that the rules in regard to escrows could not be applied to these instruments because they were never executed in compliance with the peremptory requirements of the statute; (6) that if the railroad company had any cause of action against the township by reason of these facts, it was barred by the statute of limitations of the State of Michigan; (7) that there was no equitable reason why the bar at law should not be set up and maintained in equity. *Ib.*

See DISTRICT OF COLUMBIA, 1, 2;
LIMITATION STATUTES OF, 1, 2;
MANDAMUS.

NATIONAL BANK.

1. The exemption of national banks from suits in state courts in counties other than the county or city in which the association was located, granted by the act of February 18, 1875, 18 Stat. 316, c. 80, was a personal privilege which could be waived by appearing to such a suit brought in another county, but in a court of the same dignity, and making defence without claiming the immunity granted by Congress. *Charlotte First National Bank* v. *Morgan*, 141.
2. The provision in the act of July 12, 1882, 22 Stat. 163, c. 290, § 4, respecting suits by or against national banks, refers only to suits brought after the passage of that act. *Ib.*
3. A national bank was sued to recover interest alleged to have been usuriously exacted. The complaint which was sworn to January 13, 1883, charged that the usurious transactions took place "after the 12th day of February, 1877, and before the commencement of this action, to wit: on the 25th day of May, 1878, and at other times and dates subsequent thereto." The defendant answered generally and set up the statute of limitations. The jury found that usurious interest had been taken during the two years next before the commencement of the action, and rendered a verdict for plaintiff on which judgment was entered. The defendant moved in arrest of judgment, and also for a new trial, on the ground of a variance between the pleadings and proof; *Held*, that, although the complaint might have been more specific, enough was alleged to sustain the judgment. *Ib.*

See CRIMINAL LAW, 1;
JURISDICTION, C.

NEGOTIABLE SECURITY.

See MUNICIPAL CORPORATION, 1, 3.

NUISANCE.

See LIMITATION, STATUTES OF, 1.

PARTNERSHIP.

1. In the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses; but it is competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience to the common stock. *Paul* v. *Cullum*, 539.

2. L. and W., the owners of a stock of goods, made a written agreement with H. reciting that the latter was "taken into partnership," that the stock should be inventoried and delivered to H. "as a capital stock" "to be sold with his entire direction and supervision under the name" of the L. and W. Company; that a new set of books should be opened, showing the business of the new firm; that the profits and losses should be shared in the proportion of eight-tenths for L. and W. and of two-tenths for H.; and that the "partnership" should pertain only to merchandising and have no connection with any outside business L. and W. might have jointly or separately. After this agreement was made, L. constituted H. his attorney in fact, with power "to bargain, and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession, or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises;" *Held*, (1) That by this agreement L., W. and H. became partners and as between themselves established a community of property as well as of profits and losses in respect to said goods and the business of the L. and W. Company; (2) That in the absence of L. this power of attorney authorized H. to represent him in a general assignment of the property of the L. and W. Company for the benefit of its creditors. *Ib.*

See CONSTITUTIONAL LAW, A, 10.

PATENT FOR INVENTION.

1. Claims 1, 3, 5 and 6 of reissued letters patent No. 8718, granted May 20, 1879, to Charles F. Brush for "improvements in electric lamps," the original patent, No. 203,411, having been granted to said Brush May 7, 1878, are invalid by reason of their prior existence as perfected

inventions in a lamp made in June, 1876, by one Hayes. *Brush* v. *Condit*, 39.

2. Although claims 5 and 6 speak of an "annular clamp," and the apparatus of Hayes had a rectangular clamp, the latter embodied the principle of the invention, carried out by equivalent means, the improvement, if any, in the use of the circular clamp over the rectangular clamp being only a question of degree in the use of substantially the same means. *Ib.*
3. The first five claims of letters patent No. 288,494, granted to Joseph Aron, as assignee of William W. Rosenfield, the inventor, November 13, 1883, for an "improvement in railway car gates," are invalid, because what Rosenfield did did not require invention. *Aron* v. *Manhattan Railway Co.*, 84.
4. The same devices employed by him existed in earlier patents; all that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application. *Ib.*
5. The fourth claim in the reissued letters patent No. 8388, granted August 27, 1878, to Augustus Day for an improvement in track clearers, viz., "The combination with the draw-bar C and scraper A of the diagonal brace E, as and for the purpose set forth," would naturally suggest itself to any mechanic, and involves no patentable novelty. *Day* v. *Fairhaven & Westville Railway Co.*, 98.
6. A claim in letters patent must be held to define what the Patent Office has determined to be the patentee's invention, and is not to be enlarged in construction beyond the fair interpretation of its terms. *Ib.*
7. Letters patent No. 208,541 granted to William Roemer, September 1, 1878, for improvements in locks for satchels, are void for want of novelty. *Roemer* v. *Bernheim*, 103.
8. The improvement in grain-car doors, as claimed by Chauncey R. Watson and patented to him by letters patent No. 203,226, dated April 30, 1878, may have been new and useful, but did not involve the exercise of the inventive faculty, and embraced nothing that was patentable. *Watson* v. *Cincinnati, Indianapolis &c. Railway Co.*, 161.
9. Claim 1 of letters patent No. 273,569, granted to Charles Marchand, March 6, 1883, for an improvement in the manufacture of hydrogen peroxide, namely, "1. The method of making hydrogen peroxide by cooling the acid solution, imparting thereto a continuous movement of rotation, as well in vertical as in horizontal planes — such for example, as imparted by a revolving screw in a receptacle — and adding to said acid solution the binoxide in small quantities, while maintaining the low temperature and the rotary or eddying movements, substantially as described," is invalid, as not covering any patentable subject matter. *Marchand* v. *Emken*, 195.

10. The claim of letters patent No. 172,346, granted to Herman Royer, January 18, 1876, for an improvement in machines for treating rawhides, namely, "In combination with the drum A of a rawhide fulling machine, operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous, substantially as described," does not cover any patentable combination, it being a mere aggregation of parts. *Royer* v. *Roth*, 201.

11. The automatic shifting device was old, as attached to a washing machine, and there was no modification of its action produced by attaching it to the fulling machine. Therefore, its application to that machine did not require the exercise of invention. *Ib.*

12. Where a complaint in an action at law for the infringement of a reissued patent for an invention, avers that the reissue is "for the same invention," as the original patent, and the answer denies "each and every, all and singular, the allegations" of the complaint, it is error, on the trial, to exclude the original patent from being put in evidence by the defendant. *Oregon Improvement Co.* v. *Excelsior Coal Co.*, 215.

13. The claim of letters patent No. 195,233, granted to William Roemer, September 18, 1877, for an improvement in a combined lock and handle for travelling-bags, namely, "The lock-case made with the notched sides *a a*, near its ends to receive and hold the handle-rings B," substantially as herein shown and described, having been inserted by amendment, after his application for a broader claim was rejected, and after he had amended his specification by stating that he dispensed with an extended bottom-plate, cannot be so construed as to cover a construction which has an extended bottom-plate. *Roemer* v. *Peddie*, 313.

14. When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed, if such limitations and restrictions were not contained in it. *Ib.*

15. In a suit in equity, brought under § 4915 of the Revised Statutes, in a Circuit Court of the United States, there was a decree in favor of the plaintiff, that he was entitled to receive a patent for certain claims. The decision rested solely on the fact that he was the prior inventor, as between him and the defendant. On appeal by the defendant to this court; *Held*, that this court must consider the question of the patentability of the inventions covered by the claims, and that, as they were not patentable, the decree must be reversed and the bill be dismissed. *Hill* v. *Wooster*, 693.

See EVIDENCE, 2.

PENNSYLVANIA.

See CONSTITUTIONAL LAW, A, 2.

PLEADING.

When a pleading misstates the effect and purpose of a statute upon which the party relies, a demurrer to it does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges. *Pennie* v. *Reis*, 464.

See PATENT FOR INVENTION, 12;
PRACTICE, 1.

POST-OFFICE DEPARTMENT.

1. When a part of an established post-route is found to be impracticable by reason of being almost impassable, that portion of it may be changed by the Post-Office Department without thereby creating a new route, requiring a new advertisement and bid. *United States* v. *Barlow*, 271.
2. In order to maintain an action brought to recover moneys alleged to have been fraudulently obtained from the Post-Office Department for expediting mail service, it is not necessary to show that a subordinate officer of the Department participated in the fraud. *Ib.*
3. Money paid by the Post-Office Department to a contractor for carrying the mails under a clear mistake of fact, and not through error in judgment, may be recovered back. *Ib.*
4. The Postmaster General, in the exercise of the judgment and discretion reposed in him in regard to matters appertaining to the postal service, is not at liberty to act upon mere guesses and surmises, without information or knowledge on the subject. *Ib.*
5. When a sum of money has been voluntarily paid by the United States to a mail contractor, by mistake of fact, or under circumstances to bring the payment within the provisions of Rev. Stat. § 4057, the amount may be applied by the government towards the payment of any balance that may be found due him, in the settlement of his accounts, for other services under his contract. *United States* v. *Carr*, 644.
6. A contract to carry the mails from one station to another station, by way of two intervening specified stations, a stated number of miles and back, is not performed by carrying them over that route one way, returning from the terminal station to the place of beginning by a shorter route, avoiding the intermediate stations. *Ib.*
7. When a contractor for carrying the mails seeks to recover the full contract price, for a service which as actually performed was less than that contracted for, the burden of proof is on him to show knowledge or information by the Department of his conduct in the premises. *Ib.*
8. Knowledge by the Post-Office Department of the failure of a mail contractor to perform the full service required by his contract is not to be presumed from reports of the local postmaster to the Department that the service had been performed. *Ib.*

PRACTICE.

1. When the answer, in an action at law, both denies the plaintiff's allegations and sets up matters in avoidance, and the jury returns a general verdict for the defendant upon all the issues, he is entitled to judgment, notwithstanding any error in rulings upon the matters in avoidance, or any statements of fact in that part of the answer setting up those matters, or in a bill of exceptions to such rulings. *Glen* v. *Sumner*, 152.
2. Either a statement of facts by the parties, or a finding of facts by the Circuit Court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred. *Raimond* v. *Terrebone Parish*, 192.
3. *Avery* v. *Cleary*, *ante*, 604, affirmed; but as the defendant did not prosecute a writ of error, the judgment below is affirmed on the ground that no error was committed to the plaintiff's prejudice. *Cleary* v. *Ellis Foundry Co.*, 612.
4. It was proper for the Circuit Court to direct a verdict for the plaintiff. *Robertson* v. *Edelhoff*, 614.
5. Where a case has gone to a hearing, testimony been submitted to the jury under objections but without stating any reason for the objection, and a verdict rendered with judgment on the verdict, the losing party cannot, in the appellate court, state for the first time a reason for that objection which would make it good. *Patrick* v. *Graham*, 627.

See COURTS OF THE UNITED STATES;
EQUITY, 3, 4;
EXCEPTION;
JURISDICTION A, 2, 6, 7;
MANDAMUS;
MOTION TO DISMISS OR AFFIRM.

PROBATE COURT.

See JURISDICTION, B, 4.

PUBLIC LAND.

1. While the title to public land is still in the United States, no adverse possession of it can, under a state statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States, against the legal title under a patent from the United States. *Redfield* v. *Parks*, 239.
2. So long as a homestead entry, valid upon its face, remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and

precludes it from a subsequent grant by Congress. *Hastings & Dakota Railway Co.* v. *Whitney*, 357.

3. A defect in a homestead entry on public land in Minnesota, made by a soldier in active service in Virginia during the war, which was caused by want of the requisite residence on it, was cured by the act of June 8, 1872 "to amend an Act relating to Soldiers' and Sailors' Homesteads," 17 Stat. 333, c. 338, § 1 (Rev. Stat. § 2308). *Ib.*
4. While the decisions of the Land Department on matters of law are not binding on this court, they are entitled to great respect. *Ib.*

See CONSTITUTIONAL LAW, A, 1;
LOCAL LAW, 7 to 14;
MINERAL LAND.

PUBLIC OFFICERS.

See CONTRACT, 4.

PURPRESTURE.

See LIMITATION, STATUTES OF, 1.

QUIET TITLE.

See MINERAL LAND, 1.

RAILROAD.

The purchaser from a railroad company, at a reduced rate of fare, of a ticket for a passage to a certain station and back, containing a contract signed by him, by which he agrees that the ticket is not good for a return passage unless stamped by the agent of the company at that station, and that no agent or employé of the company is authorized to alter, modify or waive any condition of the contract, is bound by those conditions, whether he knew them or not; and if without having attempted to have the ticket so stamped, but upon showing it to the baggage-master and gateman at the station, he has his ticket punched and his baggage checked, and is admitted to the train, and upon being told by the conductor that his ticket is not good for want of the stamp, refuses either to leave the train or to pay full fare, and is forcibly put off at the next station, he cannot maintain an action sounding in contract against the company, or except to the exclusion, at the trial of such an action, of evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business. *Boylan* v. *Hot Springs Railroad Co.*, 146.

See CONSTITUTIONAL LAW, A, 2;
MORTGAGE.

REMITTITUR.

See MOTION TO DISMISS OR AFFIRM, 2 (1).

REMOVAL OF CAUSES.

1. When it appears from the record in this court in a cause commenced in a state court, and removed to a Circuit Court of the United States on the ground of diverse citizenship, and proceeded in to judgment there, that the citizenship of the parties at the time of the commencement of the action, as well as at the time of filing the petition for removal, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested, the defect cannot be cured by amendment, and the judgment of the Circuit Court will be reversed at the cost of the plaintiff in error, and the cause remitted to that court with directions to remand it to the state court. *Jackson* v. *Allen*, 27.

2. On the facts stated in the opinion it is *held*, that there is no separable controversy in this case; but that if there were, the provision as to the removal of such a controversy has no application to a removal on the ground of local prejudice. *Young* v. *Parker*, 267.

3. In order to the removal of a cause from a state court on the ground of local prejudice, under Rev. Stat. § 639, it is essential, where there are several plaintiffs, or several defendants, that all the necessary parties on one side be citizens of the State where the suit is brought, and all on the other side be citizens of another State or other States; and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed. *Ib.*

4. A bill in equity was filed in a state court by a creditor of a partnership to reach its entire property. The prayer of the bill was that judgments confessed by the firm in favor of various defendants, some of whom were citizens of the same State with the plaintiff, might be set aside for fraud. On the allegations of the bill there was but a single controversy, as to all of the defendants. One of the defendants, who was a citizen of a different State from the plaintiff, removed the entire cause into a Circuit Court of the United States. After a final decree for the plaintiff, and on an appeal therefrom, this court held that the case was not removable under § 2 of the act of March 3, 1875, 18 Stat. 470, and reversed the decree, and remanded the case to the Circuit Court, with a direction to remand it to the state court, the costs of this court to be paid by the petitioner for removal. *Graves* v. *Corbin*, 571.

5. Under the act of March 3, 1875, c. 137, § 2, one of two corporations sued jointly in a state court for a tort, although pleading severally, cannot remove the case into the Circuit Court of the United States, upon the ground that there is a separable controversy between it and the plaintiff because the other corporation was not in existence at the time of the tort sued for — without alleging and proving that the two corporations were wrongfully made joint defendants for the purpose of preventing a removal into the federal court. *Louisville & Nashville Railroad Co.* v. *Wangelin*, 599.

SERVICE OF PROCESS.

See CONSTITUTIONAL LAW, A, 10.

STATEMENT OF FACTS.

See PRACTICE, 2.

STATUTE.

See TABLE OF STATUTES CITED IN OPINIONS.

A. CONSTRUCTION OF STATUTES.

The preamble to a statute is no part of it, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas*, 174.

See CUSTOMS DUTIES, 4, 11, 12, 13;
TAX AND TAXATION, 1.

B. STATUTES OF THE UNITED STATES.

See APPEAL, 2;
BANKRUPTCY, 1, 2, 7, 8;
CONSTITUTIONAL LAW, A, 8;
CRIMINAL LAW, 1;
CUSTOMS DUTIES, 6, 7, 8, 9, 10, 11, 13, 14, 15;
EXECUTIVE;
INTERNAL REVENUE;
NATIONAL BANKS, 1, 2;
PATENT FOR INVENTION, 15;
POST-OFFICE DEPARTMENT, 5;
PUBLIC LAND, 3;
REMOVAL OF CAUSES, 3, 4, 5.

C. STATUTES OF STATES AND TERRITORIES.

Alabama. *See* CONSTITUTIONAL LAW, A, 9.
California. *See* CONSTITUTIONAL LAW, A, 7.
Colorado. *See* CORPORATION.
Indiana. *See* LIEN, 2, 3, 4.
Iowa. *See* INSURANCE.
Louisiana. *See* LOCAL LAW, 4.
Maryland. *See* DISTRICT OF COLUMBIA, 2.
Michigan. *See* CONSTITUTIONAL LAW, A, 6; MUNICIPAL CORPORATION, 9.
Mississippi. *See* TAX AND TAXATION, 2.
Pennsylvania. *See* CONSTITUTIONAL LAW, A, 2; EVIDENCE, 6, 7.
Texas. *See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3, 4, 5; CONSTITUTIONAL LAW, A, 1, 10; LOCAL LAW, 8, 9.
Utah. *See* CONSTITUTIONAL LAW, A, 11.

STATUTE OF LIMITATIONS.

See LIMITATION, STATUTES OF.

STREETS.

See MUNICIPAL CORPORATION, 4, 5.

SUPERSEDURE.

Although a bill to impeach a judgment at law is regarded as auxiliary or dependent, and not as an original bill, the supersedure of process on the decree dismissing the bill does not operate to supersede process on the judgment at law. *Knox County* v. *Harshman*, 14.

SUPERVISOR OF ELECTIONS.

See EXECUTIVE.

TAX AND TAXATION.

1. Exemptions from taxation, being in derogation of the sovereign authority and of common right, are not to be extended beyond the express requirements of the language used, when most rigidly construed. *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas*, 174.
2. The appellant's charter provided that it should "be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this act;" *Held*, that the exemption was intended to commence from and after the completion of a railroad to the Mississippi River, and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the act, but liable to be diminished by whatever time beyond five years was consumed by the completion of the road to the river. *Ib.*

See CONSTITUTIONAL LAW, A, 8, 9; INTERNAL REVENUE; DEED; JURISDICTION, A, 3.

TEXAS.

See CONSTITUTIONAL LAW, A, 1, 10; LOCAL LAW, 5 to 17.

UNITED STATES.

See CONTRACT, 3, 4; DISTRICT OF COLUMBIA, 3; POST-OFFICE DEPARTMENT.

UTAH.

1. Under the organic act of that Territory the power to appoint an auditor of public accounts is vested exclusively in the governor and council. *Clayton* v. *Utah*, 632.
2. So much of the acts of the legislature of Utah of January 20, 1852, and February 22, 1878, as relates to the mode of appointing an auditor of

public accounts is in conflict with the organic act, and is invalid; but so much as relates to the creation of the office is valid. *Ib.*

See CONSTITUTIONAL LAW, A, 11;
JURISDICTION, A, 9.

VENDOR AND VENDEE.

See LIEN, 1.

VERDICT.

See PRACTICE, 1.

VOLUNTARY PAYMENT.

See FRAUD, 4.

WILL.

R., a citizen of Texas, made his will there June 7, 1848, by which he devised all his property including the real estate in controversy, (1) to his wife for twenty-one years after his death; (2) after that to his offspring, child or children by his said wife; (3) in the event of the death of his wife without offspring by him, to the children of M. by M.'s then wife, who was a sister of R.'s wife; (4) in the event of the death of the offspring which he might have by his wife, to his wife for life. M. was named as executor of the will. R. died January 10, 1850, leaving surviving his wife and an infant son. This son was born after the making of the will and died in 1854. The will was duly proved by the executor shortly after R.'s death. About six months after R.'s death his widow married F., by whom she had several children. Two years after the probate of the will F. and his wife commenced proceedings to have the will declared null and void on the ground that the property was communal property. In these proceedings the executor was defendant, and a guardian *ad litem* was appointed for the infant, and such proceedings were had therein that in October, 1852, a decree was entered, declaring the will to be null and void, and setting it aside; *Held*, (1) That the devise to the children of M. was a contingent remainder, to vest only in case of the death of the testator's wife without offspring by him, and limited after the fee which was primarily given to the testator's child; (2) That the executor being a defendant and appearing and answering, and the infant son being represented by a guardian *ad litem*, and the executor being interested on behalf of his own children that the will should stand, (if that was of any consequence,) all the necessary parties were before the court to sustain the decree; (3) That the decree could not be attacked collaterally, and was binding on the children of M. *Miller* v. *Texas & Pacific Railway Co.*, 662.