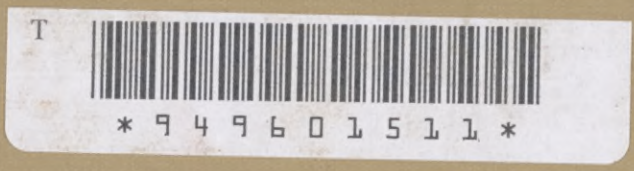

UNITED STATES REPORTS

VOLUME 136

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1889

J. C. BANCROFT DAVIS

REPORTER

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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.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases.

Table of Cases.

[1] These cases being arranged in alphabetical order, no other list of them is necessary.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1889.

THE LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* UNITED STATES.

ROMNEY *v.* UNITED STATES

Nos. 1031, 1054. Argued January 16, 17, 18, 1889. — Decided May 19, 1890.

The Church of Jesus Christ of Latter-Day Saints was incorporated February, 1851, by an act of assembly of the so-called State of Deseret, which was afterwards confirmed by act of the territorial legislature of Utah, the corporation being a religious one, and its property and funds held for the religious and charitable objects of the society, a prominent object being the promotion and practice of polygamy, which was prohibited by the laws of the United States. Congress, in 1887, passed an act repealing the act of incorporation, and abrogating the charter; and directing legal proceedings for seizing its property and winding up its affairs: *Held* that,

(1) The power of Congress over the Territories is general and plenary, arising from the right to acquire them; which right arises from the power of the government to declare war and make treaties of peace, and also, in part, arising from the power to make all needful rules and regulations respecting the territory or other property of the United States;

(2) This plenary power extends to the acts of the legislatures of the Territories, and is usually expressed in the organic act of each by an express reservation of the right to disapprove and annul the acts of the legislature thereof;

Syllabus.

(3) Congress had the power to repeal the act of incorporation of the Church of Jesus Christ of Latter-Day Saints, not only by virtue of its general power over the Territories, but by virtue of an express reservation in the organic act of the Territory of Utah of the power to disapprove and annul the acts of its legislature;

(4) The act of incorporation being repealed, and the corporation dissolved, its property, in the absence of any other lawful owner, devolved to the United States, subject to be disposed of according to the principles applicable to property devoted to religious and charitable uses; the real estate, however, being also subject to a certain condition of forfeiture and escheat contained in the act of 1862;

(5) The general system of common law and equity, except as modified by legislation, prevails in the Territory of Utah, including therein the law of charitable uses;

(6) By the law of charitable uses, when the particular use designated is unlawful and contrary to public policy, the charity property is subject to be applied and directed to lawful objects most nearly corresponding to its original destination, and will not be returned to the donors, or their heirs or representatives, especially where it is impossible to identify them;

(7) The court of chancery, in the exercise of its ordinary powers over trusts and charities, may appoint new trustees on the failure or discharge of former trustees; and may compel the application of charity funds to their appointed uses, if lawful; and, by authority of the sovereign power of the State, if not by its own inherent power, may reform the uses when illegal or against public policy by directing the property to be applied to legal uses, conformable, as near as practicable, to those originally declared;

(8) In this country the legislature has the power of *parens patriæ* in reference to infants, idiots, lunatics, charities, etc., which in England is exercised by the crown; and may invest the court of chancery with all the powers necessary to the proper superintendence and direction of any gift to charitable uses;

(9) Congress, as the supreme legislature of Utah, had full power and authority to direct the winding up of the affairs of the Church of Jesus Christ of Latter-Day Saints as a defunct corporation, with a view to the due appropriation of its property to legitimate religious and charitable uses conformable, as near as practicable, to those to which it was originally dedicated. This power is distinct from that which may arise from the forfeiture and escheat of the property under the act of 1862;

(10) The pretence of religious belief cannot deprive Congress of the power to prohibit polygamy and all other open offences against the enlightened sentiment of mankind.

Statement of the Case.

On behalf of the court Mr. Justice Bradley stated the case as follows:[1]

The church of the Mormons, or, as they call themselves, the Church of Latter-Day Saints, was first organized as a corporation under an act of assembly of the provisional government which they set up in Utah under the name of the State of Deseret. The act was dated February 8, 1851, and was in the usual form of acts of incorporation. The title and first three sections were as follows:

"An ordinance incorporating the Church of Jesus Christ of Latter-Day Saints.

"Sec. 1. *Be it ordained by the General Assembly of the State of Deseret*, That all that portion of the inhabitants of said State which now are or hereafter may become residents therein, and which are known and distinguished as 'the Church of Jesus Christ of Latter-Day Saints,' are hereby incorporated, constituted, made and declared a body corporate, with perpetual succession, under the original name and style of 'The Church of Jesus Christ of Latter-Day Saints,' as now organized, with full power and authority to sue and be sued, defend and be defended, in all courts of law or equity in this State; to establish, order and regulate worship, and hold and occupy real and personal estate, and have and use a seal, which they may alter at pleasure.

"Sec. 2. *And be it further ordained*, That said body or church, as a religious society, may, at a general or special conference, elect one 'trustee in trust,' and not to exceed twelve assistant trustees, to receive, hold, buy, sell, manage, use and control the real and personal property of said church, which said property shall be free from taxation; . . . said trustee or assistant trustees may receive property, real or personal, by gift, donation, bequest, or in any manner not incompatible

[1] The order of arrangement of the statutes and ordinances varies in this statement from that adopted in the opinion on file; the matter in the two statements being identical. The new arrangement was made, on behalf of the Court, by Mr. Justice Bradley, and is adopted by the reporter under his directions.

with the principles of righteousness or the rules of justice, inasmuch as the same shall be used, managed or disposed of for the benefit, improvement, erection of houses for public worship and instruction, and the well being of said church.

"SEC. 3. *And be it further ordained*, That, as said church holds the constitutional and original right, in common with all civil and religious communities, 'to worship God according to the dictates of conscience,' to reverence communion agreeably to the principles of truth, and to solemnize marriage compatible with the revelations of Jesus Christ for the security and full enjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all, it is also declared that such church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass and establish rules, regulations, ordinances, laws, customs and criterions for the good order, safety, government, conveniences, comfort and control of said church and for the punishment or forgiveness of all offences relative to fellowship according to church covenants; that the pursuit of bliss and the enjoyment of life in every capacity of public association, domestic happiness, temporal expansion, or spiritual increase upon the earth may not legally be questioned: *Provided*, *however*, That each and every act or practice so established or adopted for law or custom shall relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithings, marriages, fellowship or the religious duties of man to his Maker, inasmuch as the doctrines, principles, practices or performances support virtue and increase morality, and are not inconsistent with or repugnant to the Constitution of the United States or of this State and are founded in the revelations of the Lord." Comp. Laws of Utah, 1876, p. 232.

Congress had passed an organic act for establishing a government in the Territory of Utah on the 9th of September, 1850 (9 Stat. 453); but the territorial government was not organized until after the passage of the church charter as above stated. After its organization the territorial legislature, on two different occasions, passed confirmatory acts which had the effect of validating said charter. One was a

joint resolution, passed October 4, 1851, declaring "That the laws heretofore passed by the provisional government of the State of Deseret, and which do not conflict with the organic act of said Territory, be, and the same are hereby declared to be, legal and in full force and virtue, and shall so remain until suspended by the action of the legislative assembly of the Territory of Utah." The other was an act approved January 19, 1855, entitled "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution," which reënacted the said charter.

On the 1st of July, 1862, the following act of Congress was approved, to wit:

"An act to punish and prevent the Practice of Polygamy in the Territories of the United States, and other Places, and disapproving and annulling Certain Acts of the Legislative Assembly of the Territory of Utah.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless*, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

"SEC. 2. *And be it further enacted*, That the following ordi-

nance of the provisional government of the State of Deseret, so called, namely, 'An ordinance incorporating the Church of Jesus Christ of Latter-Day Saints,' passed February eight, in the year eighteen hundred and fifty-one, and adopted, reënacted and made valid by the governor and legislative assembly of the Territory of Utah by an act passed January nineteen, in the year eighteen hundred and fifty-five, entitled 'An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution,' and all other acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy be, and the same hereby are, disapproved and annulled: *Provided*, That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations or other contrivances.

"SEC. 3. *And be it further enacted*, That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States: *Provided*, That existing vested rights in real estate shall not be impaired by the provisions of this section." 12 Stat. 501.

Another act, known as the Edmunds act, was approved March 22, 1882, entitled "An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy and for other purposes." 22 Stat. 30, c. 47. This act contained stringent provisions against the crime of polygamy, and has frequently come under the consideration of this court, and need not be recited in detail.

On the 19th of February, 1887, another act of Congress was passed, and became a law by not being returned by the President, 24 Stat. 635, c. 397, which made additional provisions as to the prosecution of polygamy, and in the 13th, 17th, and 26th sections, enacted as follows:

"SEC. 13. That it shall be the duty of the Attorney General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the act of Congress approved the first day of July, eighteen hundred and sixty-two, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah, or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States'; and all such property so forfeited and escheated to the United States shall be disposed of by the Secretary of the Interior, and the proceeds thereof applied to the use and benefit of the common schools in the Territory in which such property may be: *Provided*, That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground, shall be forfeited."

"SEC. 17. That the acts of the legislative assembly of the Territory of Utah incorporating, continuing or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called general assembly of the State of Deseret incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved. That it shall be the duty of the Attorney General of the United States to cause such proceedings to be taken in the Supreme Court of the Territory of Utah as shall be proper to execute the foregoing provisions of this section and to wind up the affairs of said corporation conformably to law; and in such proceedings the court shall have power, and it shall be

its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this act and in section twenty-six of this act, to the respective trustees mentioned in section twenty-six of this act; and for the purposes of this section said court shall have all the powers of a court of equity."

"SEC. 26. That all religious societies, sects and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a Territory, only on the nomination of the authorities of such society, sect or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect or congregation." 24 Stat. 637, 638 and 641.

In pursuance of the 13th section above recited, proceedings were instituted by information on behalf of the United States in the Third District Court of the Territory of Utah, for the purpose of having declared forfeited and escheated to the government the real estate of the corporation called the Church of Jesus Christ of Latter-Day Saints, except a certain block in Salt Lake City used exclusively for public worship.

On the 30th of September, 1887, the bill in the present case was filed in the Supreme Court of the Territory, under the 17th section of the act for the appointment of a receiver to collect the debts due to said corporation and the rents, issues and profits of its real estate, and to take possession of and manage the same for the time being; and for a decree of dissolution and annulment of the charter of said corporation, and other incidental relief. The bill is in the name of the United States, and was brought by direction of the Attorney General, against "the late corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints," and John Taylor, "late trustee in trust," and eleven other persons late assistant trustees of said corporation.

Statement of the Case.

The bill sets forth the act of incorporation of the said church, and its confirmation by the territorial legislature, as before expressed, and then states, further, that John Taylor (since deceased) on and prior to the 19th of February, 1887, was trustee in trust, and the other individual defendants were the assistant trustees of the corporation;

That the corporation acquired and held large amounts of real and personal property in the Territory of Utah after the 1st of July, 1862, — the value of the real estate being about $2,000,000, and the value of the personal property about $1,000,000 as held and owned on the 19th of February, 1887, and which the defendants still claim to hold in violation of the laws of the United States;

That the corporation was a corporation for religious or charitable purposes;

That by the third section of the act of July 1st, 1862, 12 Stat. 501, c. 126, § 3, reënacted as section 1890 of the Revised Statutes of the United States, any corporation for religious or charitable purposes was forbidden to acquire or hold real estate in any territory, during the existence of the territorial government, of greater value than $50,000; and that more than this value of the property of the said corporation has been acquired since July 1st, 1862, which is not held or occupied as a building or ground appurtenant thereto for the purpose of the worship of God, or a parsonage connected therewith, or burial ground;

That, therefore, the real estate referred to, owned by the corporation, is subject to escheat to the United States;

That on the 19th day of February, 1887, (by the said act of that date,) the charter and act of incorporation of the corporation aforesaid was disapproved, repealed and annulled by Congress, and the corporation was dissolved, and all the real estate owned and occupied by it, in excess of $50,000, not held or occupied for the worship of God, etc., was subject to escheat to the United States;

That the said corporation, and the successor of said John Taylor as trustee in trust, (whose name is unknown, and who is asked to be made a party to the bill,) and the other defend-

ants, assistant trustees, wrongfully and in violation of the laws of the United States still claim to hold and exercise the powers which were held and exercised by said corporation, and are unlawfully possessing and using the said real estate, and claim the right to sell, use and dispose of the same;

That since the 19th of February, 1887, there is no person lawfully authorized to take charge of, manage, preserve, or control said property, and the same is subject to irreparable and irremediable loss and destruction.

The bill prays that a receiver may be appointed to receive and hold all the property of the corporation; that a decree be made declaring the dissolution and annulment of the charter of the said corporation; that the court appoint a commissioner to select and set apart out of the real estate which was held and occupied by the corporation such real estate as may be lawfully held for religious uses; make necessary orders, and take proceedings to wind up the affairs of the said corporation; and grant such other and further relief as the nature of the case may require.

On the 7th of November, 1887, the court appointed a receiver, and on the 8th William B. Preston, Robert T. Burton and John R. Winder, claiming to have an interest in a portion of the property, were made parties to the suit. Demurrers to the bill having been overruled, the defendants severally answered.

The corporation of the Church of Jesus Christ of Latter-Day Saints, in its answer, after stating the granting of its charter by an ordinance of the assembly of Deseret, and its confirmation by the legislature of the Territory of Utah, contended that this charter was a contract between the government and the persons accepting the grant, and those becoming corporators; and that the corporation had the power to hold real and personal property, without limit as to value and amount, for the purposes of its charter; that it never acquired property in its own name, but under the powers granted by the ordinance it did acquire and hold certain real and personal property, in the name of a trustee, in trust for said corporation; that the act of July 1st, 1862, expressly provided that existing vested

rights in real estate should not be impaired; that the defendant has ever been and still is a corporation or association for religious or charitable purposes; that so much of the act of Congress which took effect March 3, 1887, (referring to the act passed February 19, 1887,) as attempts to dissolve the defendant corporation, or to interfere with or limit its right to hold property, or to escheat the same, or to wind up its affairs, is unconstitutional and void; that the United States has not the power to do this, by reason of said contract; that when the act of March 3, 1887, took effect the said corporation, through its trustees, held and owned only three parcels of real estate, namely: 1st, all of block 87, in plat "A," Salt Lake City survey; 2d, part of block 88, plat "A," of said survey, containing $2\frac{157}{160}$ acres; 3d, part of lot 6, in block 75, plat "A," of same survey; that the defendant corporation had acquired the first two of these lots before July 1, 1862; that the first piece, namely, all of block 87, in plat "A," was, ever since 1850, and still is, used and occupied exclusively for purposes of the worship of God; that the third of said tracts, which is the only tract of land owned by the corporation on the 3d of March, 1887, which had been acquired subsequent to July 1, 1862, was always, and still is, used as a parsonage, necessary for the convenience and use of the corporation; that said corporation had owned other lands, but had sold and disposed of the same prior to March 3, 1887; that after the said act took effect, and in pursuance of section 26 of said act, it applied to the proper probate court for Salt Lake County for the appointment of three trustees to take the title to the three tracts above described; that on May 19, 1887, said court appointed William B. Preston, Robert T. Burton and John R. Winder such trustees; that afterwards said three tracts, except a part of lot 6, in block 75, (the third lot,) were conveyed to said trustees; that the remaining part of said lot 6 is now held by Theodore McKean, in trust for the defendant corporation, having been omitted from the conveyance to the said trustees by mistake; that said corporation does not now hold any real estate whatsoever; and that no successor to said John Taylor has ever been appointed trustee in trust by said corporation.

The answer denies that the charter and act of incorporation of the defendant was annulled by the act of February 19, 1887; and alleges that even if said act is valid and binding, it did not go into effect until March 3, 1887.

The answer further avers that prior to February 28th, 1887, the defendant corporation from time to time acquired and held personal property for charitable and religious purposes, and, on that day, held certain personal property donated to it by the members of the church and friends thereof solely for use and distribution for charitable and religious purposes, such property being always held by its trustee in trust; and that on the 28th of February, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said corporation, as trustee in trust, with its consent and approval, donated, transferred and conveyed the same (after reserving sufficient to pay its then existing indebtedness) to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by them solely to charitable and religious uses and purposes, and delivered the same to them. Wherefore the defendant avers that when the act of March 3d, 1887, went into effect, it did not own or hold any personal property, except mere furniture, fixtures, and implements pertaining to its houses of worship and parsonage.

The defendants Wilford, Woodruff and others, charged as assistant trustees in the bill (except Moses Thatcher), deny that they ever were such assistant trustees, though they admit that they acted as counsellors and advisors of John Taylor, the trustee in trust. Thatcher admits that he was once elected assistant trustee, but alleges that his term of office expired the 9th of October, 1875, and he has never acted since. They all deny that they have ever owned or held any property belonging to the corporation. They all, however, adopt its answer.

Preston, Burton and Winder, who were made defendants after the suit was commenced, admit the conveyance to them of the three tracts described in the answer of the corporation, which they declare that they hold in trust for the Church of

Jesus Christ of Latter-Day Saints. They also adopt the answer of the corporation.

Replications were duly filed.

One Angus M. Cannon intervened as a claimant of certain coal lands supposed to be affected by the proceedings, and was admitted as a defendant, and filed an answer explaining his claim.

Several petitions were filed in the cause, with leave of the court, for the purpose of asking that certain pieces of property therein described might be set apart for the use of the church. They were:

1. A petition by Francis Armstrong, Jesse W. Fox, Jr., and Theodore McKean, who alleged that they held divers pieces of real estate (described in their petition) in trust for the use and benefit of the Church of Jesus Christ of Latter-Day Saints. To this petition the plaintiff filed a general replication.

2. William B. Preston, Robert T. Burton and John R. Winder filed a petition stating that they were duly appointed by the probate court of Salt Lake County trustees to hold title to real estate belonging to the said church, and as such trustees hold the legal title to certain pieces of land described, to wit: 1st, a piece known as the "Guardo house" and lot, held for the use and benefit of the president of the said church as a parsonage, where he has made his home and residence since 1878; 2dly, another piece adjoining the above known as the "Historian's Office" and grounds, the building on which contains the church, library and records, and the legal title to which is in Theodore McKean. The petitioners pray that the said premises be set apart to said church as a parsonage, and that the title be confirmed to the trustees.

To this petition the United States filed an answer, denying that said Preston, Burton and Winder hold the title to said "Guardo house" and land, or that they hold the same in trust for the said Church of Jesus Christ of Latter-Day Saints; that the pretended conveyance under which they claim to hold the same is void and of no effect, for want of power in the grantors; that said property has never been a parsonage; and that the property designated as the historian's office and

grounds has never been part of any parsonage. On the contrary, the plaintiff avers that McKean holds the legal title to said property in trust for the late corporation of the Church of Jesus Christ of Latter-Day Saints as a part of its general property, and that the historian's office and grounds are entirely separate and apart from the Guardo house and lot, and in no manner connected therewith.

The said Preston, Burton and Winder filed another petition, stating their appointment as trustees as aforesaid, and that they, as such, hold another property described in the petition (being a portion of block 88, plat "A," of Salt Lake City survey) for the use and benefit of the said church, which was taken possession of by the agents of said church when Salt Lake City was first laid out in 1848, and ever since had been used and occupied by said church; and that prior to July 1, 1862, valuable buildings and improvements had been built thereon, still owned and possessed by the said church; and they pray that said property be set apart to said church, and the title and possession confirmed to the petitioners as trustees.

The United States filed an answer to this petition denying the truth of the same.

A similar petition was filed by the same parties, Preston, Burton and Winder, claiming to hold the legal title to block 87, plat "A," Salt Lake City survey, known as the "Temple Block" containing three large buildings constructed by said church exclusively for religious purposes, and which had been in its possession since 1848. They pray that this property may be set apart to the church, and the title and possession confirmed to the petitioners as trustees. The plaintiff, by answer, alleges that the conveyance under which the petitioners claim this property is also void for want of power in the grantors to convey.

Another petition was filed by George Romney, Henry Dinwoody, James Watson and John Clark, in behalf of themselves and of other members of the Church of Jesus Christ of Latter-Day Saints, alleging that said members are more than one hundred thousand in number, and so numerous that they cannot, without inconvenience and oppressive delays, be brought before the court; that they all have an interest in

common in the subject of the petition and the questions involved in this suit; that on the 7th of November, 1887, this court made an order appointing Frank H. Dyer receiver of the church aforesaid; that he, as such receiver, has seized, taken possession of, and now holds, subject to the order of the court, the following-described real and personal property, to wit:

1. All of block 87, plat "A," Salt Lake City survey, known as "Temple Block."

2. The east half of lot 6, block 75, plat "A," aforesaid, known as the "Guardo house" and grounds.

3. Part of lot 6, block 75, plat "A," aforesaid, known as the "Historian's office" and grounds.

4. A portion of block 88, plat "A," aforesaid, known as part of the "tithing-office" property.

5. The south half of lots 6 and 7, in block 88, plat "A," aforesaid, known as part of the "tithing-office" property.

6. Various tracts of land, designated, containing a large number of acres, situated in township 1 south, range 1 west, United States survey of Utah, and known as the church farm; excepting, however, a tract sold to the Denver and Rio Grande Western Railway Company by deed dated February 7, 1882.

7. The undivided half of the south half of the southeast quarter, the southeast quarter of the southwest quarter, and lot 4, section 18, and the north half of the northeast quarter of section 19, township 3 north, range 6 east, in Summit County, Utah Territory, known as coal lands.

Also a number of items of personal property, including 800 shares of stock in the Salt Lake Gas Company; 4732 shares in the Deseret Telegraph Company; several promissory notes of different parties and amounts; 30,158 sheep; $237,666.15 of money.

That since said personal property came into possession of the receiver he has collected rents on the real estate, and dividends on the gas stock; and that all the property in the possession of the receiver is of the aggregate value of about $750,000 exclusive of Temple Block.

That all of said property at the time so taken, and long prior thereto, was the property of the Church of Jesus Christ of

Latter-Day Saints, and that the possession of the receiver is wrongful and without authority or right.

That said church is a voluntary religious society, organized in the territory of Utah for religious and charitable purposes.

That said petitioners and others, for whose benefit they file the petition, are members of said church, residing in said Territory; that the church became possessed of all of said property in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its members, to be held, managed and applied to the use and benefit of the church, for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference.

That John Taylor, the late trustee so appointed, died on the 25th day of July, 1887, and no trustee has been appointed since.

That the property in the hands of the trustees is claimed adversely to the church, the petitioners and the members thereof, and wholly without right, by the United States, and is wrongfully withheld by the receiver from the purposes to which it was dedicated and granted; that the petitioners and the members on whose behalf this petition is filed are equitably the owners of said property, and beneficially interested therein, and to prevent a diversion thereof from the religious and charitable purposes of the said church to which they donated and granted said property, the petitioners pray that in case said corporation of the Church of Jesus Christ of Latter-Day Saints should, upon the final hearing, be held and decreed to be dissolved, an order may be made decreeing:

1. That the said property belongs to the individual members of said church, and that they are authorized to appoint a trustee or trustees to hold, manage and apply such property to the purposes for which it was originally given. 2. That said receiver deliver the possession thereof to such trustee or trustees as may be named and appointed at a general conference of the members of the church, in accordance with its rules and customs.

To this petition the United States filed an answer, denying

the claim of the petitioners; admitting the appointment of the receiver, and his taking possession of the property referred to; denying that at the time of such taking it was the property of the said Church of Jesus Christ of Latter-Day Saints, whether the petition is intended to apply to the late corporation or to the voluntary religious sect which has existed under that name since the dissolution of the said corporation. It admits that prior to the said dissolution said property belonged to the corporation of the Church of Jesus Christ of Latter-Day Saints, but alleges that since then it has had no legal owner except the United States; denies that the said Church of Jesus Christ of Latter-Day Saints has been for years past a voluntary religious society or association, but alleges that up to the 19th day of February, 1887, said church existed as a corporation for religious purposes, and since that time, when it became dissolved, there has existed a voluntary and unincorporated religious society or sect, known by the name of the Church of Jesus Christ of Latter-Day Saints. It denies that the corporation to which all of said property belonged acquired the same by voluntary contributions, donations and dedications of the members thereof, and alleges that all of said realty was acquired by purchase, and that said personalty was acquired by said church largely by purchase and other means, as afterwards set out. It denies that the receiver is wrongfully withholding and diverting the property from the purposes to which it was donated, and denies that the petitioners or any other persons are equitably or otherwise the owners of said property or any portion thereof, or beneficially interested therein. The answer then sets forth the incorporation of the Church of Jesus Christ of Latter-Day Saints as a body for religious and charitable purposes, by the act of the Territorial Assembly of Utah in 1855, and avers that it continued to be a corporation up to the 19th of February, 1887; it then sets forth the act of Congress of July 1, 1862, before referred to, and the act of March 3, 1887, disapproving and annulling the act of incorporation aforesaid, and dissolving the said corporation, and alleges that it did become dissolved. It then states the previous proceedings

in the suit, and the appointment of a receiver, and alleges that the United States had filed in the District Court for the Third District of Utah a proceeding in the nature of an information against all the real property set out in the petition, for the purpose of having the same declared forfeited and escheated to the United States, which proceedings are now pending. And the answer alleges that said real property has become forfeited to the United States, as shown in said information. The answer further states that the said corporation was a religious corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said church, and that it never had any other corporate objects, purposes or authority; never had any capital stock or stockholders, nor persons pecuniarily interested in its property, nor any natural persons authorized to take or hold any personal property or estate for said corporation, except such trustees as were provided for by its statute of incorporation, and that the power of appointing such trustees ceased and became extinct at the date of its dissolution; that up to that date said personal property had been used for and devoted exclusively to the promulgation, spread and maintenance of the principles, practices, teachings and tenets of said Church of Jesus Christ of Latter-Day Saints, amongst which the doctrine and practice of polygamy, or plurality of wives, was a fundamental and essential doctrine, tenet and principle of said church, and the same was opposed and contrary to good morals, public policy and the laws of the United States, and that the use made of said personal property was largely for purposes of upholding and maintaining said doctrine and practice of polygamy, and violating the laws of the United States; that since said dissolution there has existed a voluntary and unincorporated sect known as the Church of Jesus Christ of Latter-Day Saints, comprising the great body of individuals named in said intervention, who formerly formed the membership of the said corporation; that the organization and general government of said voluntary religious sect, and its principles, doctrines, teachings and tenets include the practice of polygamy, and have been substantially the same as

those of the said corporation; that the said voluntary religious sect has upheld and maintained the unlawful and immoral practice and doctrine of polygamy as strongly as the said corporation did; and that any uses, purposes or trusts to which said personal property could be devoted in accordance with the original purposes and trusts to which it was dedicated would be opposed to good morals and public policy, and contrary to the laws of the United States. The answer further states that there are no natural persons or corporations entitled to any portion of the personal property thereof, as successors in interest to said corporation; that all definite and legal trusts to which said property was dedicated have totally failed and become extinct; and that by operation of law the said property has become escheated to the United States; that the allegation that said property was acquired by voluntary contributions, donations and dedications of the members of the corporation is not true, but that the late corporation carried on business to a wide extent, and whilst a large amount of personalty in the shape of tithes was paid to the church each year by the members thereof, yet the personalty now in the hands of the said receiver is in no part made up of voluntary contributions or tithes paid in as aforesaid, but is all of it property which was acquired by said corporation in the course of trade, by purchase, and for a valuable consideration; and it held the same in its corporate capacity, absolutely and entirely independent of any individual members of said corporation, and upon the trust and for the uses and purposes set out, which, as has been alleged, were in whole or in part immoral and illegal.

A replication was filed to this answer.

The last-mentioned petition of intervention and the answer thereto are in the nature of an original bill and answer, but serve to present the whole controversy in all its aspects, and for that purpose may properly be retained, as no objection is made thereto.

The cause came on to be heard upon the pleadings, proofs and an agreed statement of the facts. The court made a finding of facts, upon which a final decree was rendered. The facts found are as follows:

"1st. That the Church of Jesus Christ of Latter-Day Saints was, from the 19th day of January, 1855, to the 3d day of March, A.D. 1887, a corporation for religious and charitable purposes, duly organized and existing under and in pursuance of an ordinance enacted by the legislature of the Territory of Utah, and approved by the governor thereof on the said 19th day of January, A.D. 1855, a copy of which ordinance is made a part of the complaint herein.

"2. That on the 19th day of February, A.D. 1887, the Congress of the United States passed an act entitled 'An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March 22d, 1882, which purported to disapprove, repeal and annul the said charter and act of incorporation of the corporation of the Church of Jesus Christ of Latter-Day Saints aforesaid and passed as aforesaid.

"3. That immediately before the passage of said act of Congress of February 19th, 1887, the said John Taylor was, and for a long time prior thereto had been, the qualified and acting trustee in trust of said corporation of the Church of Jesus Christ of Latter-Day Saints; that after the passage of said act of Congress of February 19th, 1887, the said John Taylor claimed to hold and continued to exercise the powers conferred upon said Church of Jesus Christ of Latter-Day Saints by said act of incorporation until his death, which occurred on the 25th day of July, A.D. 1887.

"4. That at the date of the passage of said act of Congress of February 19th, A.D. 1887, and for a long time prior thereto, there were no assistant trustees of said corporation, none having been elected, appointed or qualified since the year 1887; that said Wilford Woodruff, Lorenzo Snow, Erastus Snow, Franklin D. Richards, Brigham Young, Moses Thatcher, Francis M. Lyman, John Henry Smith, George Teasdale, Heber J. Grant and John W. Taylor were, at the commencement of this suit, counsellors and advisers of the said John Taylor, and continued to his death counselling and advising him respecting the management, use and control of the property hereinafter described.

"5. That since the passage of said act of Congress of February 19, 1887, the Church of Jesus Christ of Latter-Day Saints has existed as a voluntary religious sect, of which the said Wilford Woodruff is the acting president, and it has had duly designated and appointed by the Probate Court of Salt Lake County, in said Territory, in pursuance of the act of Congress aforesaid, the following-named trustees, William B. Preston, Robert T. Burton and John R. Winder, to take the title to and hold such real estate as shall be allowed said religious sect by law for the erection and use of houses of worship, parsonages and burial grounds.

"6. That at the time of the passage of said act of Congress of February 19, 1887, there were no outstanding debts of or claims against said corporation, so far as appears to the court from the evidence herein.

"7. That at the time of the passage of the act of Congress of February 19, 1887, the said corporation owned, held, and possessed the following real estate in said Territory, to wit."

The items of real estate were then enumerated, being substantially the same as those specified in the petition of George Romney and others, before referred to, with the addition of the valuation of each item or piece of property; the Temple Block being valued at $500,000; the Guardo house and grounds at $50,000; the Historian's office and grounds at $20,000; the Tithing-office and grounds, one portion at $50,000, and the other at $25,000; the Church farm at $110,000; and the seventh item, known as "coal lands in Summit County," valued at $30,000.

The court further found as follows:

"The legal title to the real estate, first above described, known as the Temple Block, at the time said act of February 19, 1887, went into effect was in John Taylor, as trustee in trust for the said corporation, which said trustee in trust subsequently and on the 30th day of June, 1887, attempted to convey the same to William B. Preston, Robert T. Burton and John R. Winder, as trustees, by a certain instrument in writing in the words and figures following, to wit:

"'This indenture, made on this thirtieth day of June, in the

year of our Lord one thousand eight hundred and eighty-seven, by and between John Taylor, trustee in trust of that certain body of religious worshippers called and known as the Church of Jesus Christ of Latter-Day Saints, party of the first part, and William B. Preston, presiding bishop of said church, and his two counsellors, Robert T. Burton and John R. Winder, parties of the second part.'"

The indenture then recites the appointment of the parties of the second part, by probate court of Salt Lake County, as trustees to hold certain real property of the said church located in Salt Lake City, under and in pursuance of the 26th section of the act of March 3, 1887, and purports on the part of Taylor, the party of the first part, in consideration of one dollar, to convey to the parties of the second part and their successors duly appointed, upon trust, the property referred to, being all of block 87 in plat "A," Salt Lake City survey, for the use, benefit and behoof of that body of religious worshippers known and called the Church of Jesus Christ of Latter-Day Saints, and for such use as said church or its authorities should dictate and appoint, with provision for the devolution of the property in case of failure of the trustees.

The court further found as follows:

"The said Temple Block was taken possession of by the agents of the said Church of Jesus Christ of Latter-Day Saints, then existing as a voluntary unincorporated religious sect, when Salt Lake City was first laid out and surveyed, in 1848, and since said date has been in possession of said church as a voluntary religious sect until it became incorporated as aforesaid, and then as a corporation; that at the time the same was taken possession of as aforesaid it was a part of the public domain and continued to be such until said land was entered by the mayor of said city, along with other lands, on the 21st day of November, 1871, under the town-site act of Congress entitled 'An act for the relief of cities and towns upon the public lands,' approved March 2, 1867; that on the 1st day of June, 1872, the same was conveyed by the mayor of said Salt Lake City to the trustee in trust of said corporation, in whom the title remained until the act of Congress of February 19, 1887, took effect.

"The facts in regard to the possession and acquisition of the balance of said real estate above described are as follows: The second property, above described and known as the Guardo house and grounds, was owned by Brigham Young individually at the time of his death, in 1877, and was thereafter transferred and conveyed by his executors to John Taylor, as trustee in trust for the corporation of the Church of Jesus Christ of Latter-Day Saints, for a valuable consideration, pursuant to the powers in them vested by the will of the said Brigham Young; that subsequently, on the 24th day of April, 1878, the said John Taylor, as trustee in trust, transferred and conveyed the same to Theodore McKean on a secret trust for said corporation, who held the same upon said trust until the 2d day of July, 1887, when he attempted to convey the same to William B. Preston and Robert T. Burton and John R. Winder, trustees, by a certain instrument in writing, of which the following is a copy."

The deed is then set out in the findings, and is altogether similar to that executed by John Taylor to Preston, Burton and Winder, before recited.

The court further found as follows:

"That said Guardo house and grounds were used and occupied by said John Taylor, president of said church, from 1878 up to the time of his death as a residence.

"The third property above described, known as the historian's office and grounds, was taken possession of by Albert T. Rockwood in 1848, and was a part of the public domain, and continued to be such up to the 21st day of November, 1871, when the town site of Salt Lake City was entered as aforesaid; that on the 3d day of October, 1855, the Church of Jesus Christ of Latter-Day Saints, through its trustee in trust, Brigham Young, purchased the said Rockwood's claim to said premises and at its own cost and expense erected thereon the building which has ever since been known as the historian's office and residence; that said building was large enough to accommodate the historian's family and furnish an office for the church historian; that from the year 1848 until the time of his death in 1875, George A. Smith was the historian of

said church and lived in said building with his family and had the custody of the books, papers and records of said church relating to its history or public acts of its officers and members; that the same have always been kept in said building from the time of its construction until the present time, at the cost of said church, and that such office is and has been necessary for the use of said historian in the discharge of his duties; that in 1872 the said George A. Smith obtained the title to said premises from the mayor of Salt Lake City under the town-site act, and that after his death the same was conveyed to his wife and one of his granddaughters, who afterwards transferred and conveyed the same to Theodore McKean for a valuable consideration; that the said Theodore McKean has ever since that date held and now holds the same on a secret trust for the use and benefit of said corporation; that said grounds are immediately west of and adjoining the Guardo-house grounds.

"The fourth property above described, known as part of the tithing office and grounds, was taken possession of by the agents of the Church of Jesus Christ of Latter-Day Saints when Salt Lake City was first laid out and surveyed, in 1848, and ever since that time has been used and occupied by said church as a voluntary sect until it became incorporated as aforesaid, and then as a corporation, receiving and disbursing tithing and voluntary contributions of property, and that prior to July 1, 1862, buildings and other improvements of considerable value had been built thereon by said church; that at the time said property was taken possession of as aforesaid it was a part of the public domain and continued to be such until the 21st day of November, 1871, when said land was entered as aforesaid along with other lands under said town-site act by the mayor of Salt Lake City; that Brigham Young, who was then president and trustee in trust of said corporation, claimed said land under said town-site law and it was conveyed to him by Daniel H. Wells, mayor of Salt Lake City; that in November, 1873, Brigham Young transferred and conveyed said property to George A. Smith, as the trustee in trust of the corporation of the Church of Jesus Christ of Latter-Day Saints, and his successor in office; that on the death of said George A. Smith

the legal title in said premises vested in Brigham Young as such successor, and the executors of said Brigham Young transferred and conveyed said property to John Taylor, as the trustee in trust of said corporation, who, in April, 1878, transferred and conveyed the same to Edward Hunter upon a secret trust for the use and benefit of said corporation; that said Edward Hunter afterwards, to wit, on the 24th day of April, 1878, transferred and conveyed the same to Robert T. Burton on a secret trust for said corporation, and on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to William B. Preston, John R. Winder, and himself, as trustees, by a certain instrument in writing in the words and figures following, to wit."

The deed here copied is similar to the previous deeds before recited.

The court further found as follows:

"The fifth piece of property above described, known as a part of the tithing office and grounds, was possessed, acquired and owned as follows:

"In the year 1848, Newell K. Whitney, then presiding bishop of said Church of Jesus Christ of Latter-Day Saints, took possession of lot five, block eighty-eight, plat 'A,' Salt Lake City survey, and in the same year Horace K. Whitney took possession of lot six, in said block; that some time in the year 1856 the Church of Jesus Christ of Latter-Day Saints, by its agents, took possession of the south half of said lots and placed thereon yards and corrals, and have continued to occupy the same with said yards and corrals down to this period; that in the year 1870 the mayor of Salt Lake City entered the town site of Salt Lake City, in trust for the inhabitants and occupants thereof, under the law of 1867; that the foregoing lots are a portion of said entry.

"The said Church of Jesus Christ of Latter-Day Saints, by its trustee, Brigham Young, filed an application in the proper court for a title to the south half of said lots, and the heirs of Newell K. Whitney also filed an application in the proper court for the south half of lot five, and Horace K. Whitney filed an application in the same court for the south half of lot

six. The court awarded the title to the said premises to Brigham Young, as trustee as aforesaid.

"That afterwards, in the year 1872, Brigham Young, trustee, obtained a deed from the heirs of Newell K. Whitney to said south half of lot five, and in consideration thereof paid them seven thousand dollars, and at the same time the said Brigham Young, trustee, obtained a deed from Horace K. Whitney of lot six, and paid him therefor the sum of two thousand dollars.

"At the time the act of Congress of February 19, 1887, took effect the legal title thereto was held by Robert T. Burton on a secret trust for the use and benefit of said corporation; that on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to Wm. B. Preston, John R. Winder, and himself as trustees, by that certain instrument of writing hereinbefore last set out.

"The remainder of said real estate held, owned and possessed by said corporation as aforesaid was acquired by it after the first day of July, 1862, by purchase, but the legal title thereof was at all times held by persons in trust for said corporation upon secret trusts, and not by the corporation itself.

"That at the time the said act of Congress of February 19, 1887, took effect said corporation owned, held and possessed the following-described personal property, to wit."

The items of personal property are then set out, being the same as in the petition of Romney and others before referred to.

The court further found as follows:

"That the said corporation of the Church of Jesus Christ of Latter-Day Saints was in its nature and by its statute of incorporation a religious and charitable corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said church, and for the purpose of dispensing charity, subject and according to said principles, practices, teachings and tenets, and that from the time of the organization of said corporation up to the time of the passage of said act of February the 19th, 1887, it never had any other corporate objects, purposes and authority; never

had any capital stock or stockholders, nor have there ever been any natural persons who were authorized under its act and charter of incorporation to take or hold any personal property or estate of said corporation, except the trustees provided for by said statute of incorporation.

"That the said personal property hereinbefore set out had been accumulated by said late corporation prior to the passage of said act of February the 19th, 1887, and that such accumulation extended over a period of twenty years or more; that prior to and at the time of the passage of said act the said personal property had been used for and devoted to the promulgation, spread and maintenance of the doctrines, teachings, tenets and practices of the said Church of Jesus Christ of Latter-Day Saints, and the doctrine of polygamy or plurality of wives was one of the said doctrines, teachings, tenets and practices of the said late church corporation, but only a portion of the members of said corporation, not exceeding twenty per cent of the marriageable members, male and female, were engaged in the actual practice of polygamy; that since the passage of the said act of Congress of February 19, 1887, the said voluntary religious sect known as the Church of Jesus Christ of Latter-Day Saints has comprised the great body of individuals who formerly composed the membership of said corporation, and the organization, general government, doctrines and tenets of said voluntary religious sect have been and now are substantially the same as those of the late corporation of the Church of Jesus Christ of Latter-Day Saints.

"That certain of the officers of said religious sect, regularly ordained, and certain public preachers and teachers of said religious sect, who are in good standing, and who are preachers and teachers concerning the doctrines and tenets of said sect, have, since the passage of said act of Congress of February the 19th, 1887, promulgated, taught, spread and upheld the same doctrines, tenets and practices, including the doctrine of polygamy, as were formerly promulgated, taught and upheld by the said late corporation, and the said teachings of the said officers, preachers and teachers have not been repudiated or dissented from by said voluntary religious sect, nor have their

teachings and preachings or their actions created any division or schism in said voluntary religious sect.

"That any dedication or setting aside of any of the personal property hereinbefore set out as having belonged to the late corporation, to the uses and purposes of or in trust for the members of the late corporation of the Church of Jesus Christ of Latter-Day Saints, or any of them, would practically and in effect be a dedication and setting aside of said personal property to the uses and for the purposes of and in trust for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"That at the commencement of this suit all of said personal property was in the possession of the said William B. Preston, who held it in trust and for the benefit of said corporation.

"That all of the above described property, real and personal, is now in the possession of Frank H. Dyer, receiver of this court.

"That of the above-described real estate the following tract, including the buildings thereon, situated in said county of Salt Lake, Territory of Utah, and being all of block eighty-seven (87), in plat 'A,' Salt Lake City survey, at the time of the passage of the act of Congress of February 19, 1887, was used exclusively for the worship of God according to the doctrines and tenets of the Church of Jesus Christ of Latter-Day Saints.

"That several proceedings have been instituted by and with the consent and advice of this court, by information, on behalf of the United States of America, in the Third District Court of said Territory of Utah, for the purpose of having declared and adjudged forfeited and escheated to the government of the United States all of the above-described real estate, excepting the said block eighty-seven of plat 'A,' Salt Lake City survey, last above mentioned, by virtue of the said act of Congress entitled 'An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' which proceedings are now pending in said court and undetermined."

Upon this finding of facts the court adjudged and decreed as follows, to wit:

"That on the 3d day of March, 1887, the corporation of the Church of Jesus Christ of Latter-Day Saints became and the same was dissolved, and that since said date it has had no legal corporate existence.

"2d. It is furthermore adjudged and decreed that the following alleged deeds, hereinbefore set out, were executed without authority, and that no estate in the property set out in said deeds passed by the same or any of them, to wit;

"The deed, dated June 30th, 1887, from John Taylor, trustee in trust, to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Temple Block.' The deed, dated July 2d, 1887, from Theodore McKean and his wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for property known as the 'Guardo house' and grounds. The deed, dated July 2d, 1887, from Robert T. Burton and wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Tithing house' and grounds.

"And it is therefore ordered and decreed that said alleged deeds and each of them be, and the same are hereby, annulled, cancelled and set aside.

"3d. It is further adjudged and decreed that the following-described real estate, to wit, all of block eighty-seven, in plat 'A,' Salt Lake City survey, in the city and county of Salt Lake, Territory of Utah, be, and the same is hereby, set apart to the voluntary religious worshippers and unincorporated sect and body known as the Church of Jesus Christ of Latter-Day Saints, and that the said William B. Preston, Robert T. Burton and John R. Winder, trustees appointed by the Probate Court of Salt Lake County, as hereinbefore set out, do hold, manage and control said property so set aside for the benefit of said voluntary religious worshippers and unincorporated sect and body, and for the erection and use by them of houses of worship, and for their use and convenience in the lawful exercise of worship according to the tenets of said sect and body; and it is ordered that Frank H. Dyer, receiver of this court, heretofore appointed, do surrender and deliver possession and control of all of the property so set aside to the trustees,

William B. Preston, Robert T. Burton and John R. Winder, aforesaid.

"4th. It is furthermore adjudged and decreed that, except as to the Temple block aforesaid, the petitions of William B. Preston, Robert T. Burton and John R. Winder, trustees, filed the 6th day of October, 1888, in this court for the setting aside of certain real estate for the uses and purposes of the religious sect known as the Church of Jesus Christ of Latter-Day Saints be, and the same are hereby, denied; and it is adjudged and decreed that the balance of the real estate over and above said Temple block, which has been hereinbefore found as belonging to said late corporation, has not nor has any of it ever been used as buildings or grounds appurtenant thereunto for the purposes of the worship of God or of parsonages connected therewith, or for burial grounds by the said late corporation of the Church of Jesus Christ of Latter-Day Saints, nor is the said real estate, except as set aside, or any part thereof, necessary for such purposes for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"5th. It is furthermore adjudged and decreed that all of the real estate set out in the findings of fact hereinbefore was the property of and belonged to the late corporation of the Church of Jesus Christ of Latter-Day Saints, and the same was held in trust for said corporation; and, furthermore, that the legal titles of and estates in said real estate and every part and parcel thereof were acquired by said late corporation and its trustees subsequently to July 1, 1862, and that prior to said date neither the said corporation nor its trustees had any legal title or estate in and to said real estate or any part thereof.

"6th. And it is further adjudged and decreed that the petition of intervention by George Romney, Henry Dinwoody, James Watson and John Clark, on behalf of themselves and other members of the late corporation of the Church of Jesus Christ of Latter-Day Saints, filed this day in this court, which said petition alleges the claim on behalf of the petitioners and those for whom it is filed in and to the real and personal property formerly belonging to said late corporation and now

in the hands of the receiver of this court be, and the same is hereby, denied; and it is adjudged and decreed that neither said interveners nor those in whose behalf they filed said petition have any legal claim or title in and to said property or any part thereof.

"7th. And the court does further adjudge and decree that the late corporation of the Church of Jesus Christ of Latter-Day Saints having become by law dissolved as aforesaid, there did not exist at its dissolution and do not now exist any trusts or purposes within the objects and purposes for which said personal property was originally acquired, as hereinbefore set out, whether said acquisition was by purchase or donation, to or for which said personalty or any part thereof could be used or to which it could be dedicated, that were and are not in whole or in part opposed to public policy, good morals and contrary to the laws of the United States; and, furthermore, that there do not exist any natural persons or any body, association or corporation who are legally entitled to any portion of said personalty as successors in interest to said Church of Jesus Christ of Latter-Day Saints, nor have there been nor are there now any trusts of a definite and legal character upon which this court, sitting as a court of chancery, can administer the personal property hereinbefore set out; and it is furthermore adjudged that all and entire the personal property set out in this decree as having belonged to said late corporation of the Church of Jesus Christ of Latter-Day Saints has by reason of the dissolution of said corporation as aforesaid, on account of the failure or illegality of the trusts to which it was dedicated at its acquisition and for which it had been used by said late corporation and by operation of law, become escheated to and the property of the United States of America, subject to the costs and expenses of this proceeding and of the receivership by this court instituted and ordered.

"8th. It is furthermore ordered and adjudged that there is not now and has not been since the 3d day of March, 1887, any person legally authorized to take charge of, manage, preserve and control the personal and real property hereinbefore set out, except the receiver heretofore appointed by this court;

and it is therefore ordered that the receivership hereinbefore established by this court is continued in full force and effect, and that the said receiver shall continue to exercise all and entire the powers and authority conferred upon him by the decree appointing him; and it is further ordered that he do continue in his possession and keeping all of the property, real and personal, hereinbefore set out, except such realty as has been set apart by the provision of this decree for the benefit of the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints, and that he do safely keep, manage and control the same in accordance with the provisions of the order of this court appointing him receiver, pending the determination of the proceeding upon information hereinbefore referred to and until the further order of this court; and final action upon and determination concerning the accounts, proceedings and transactions of said receiver and all matters connected with or incidental thereto are ordered to be reserved for the future consideration and decision of this court."

From this decree the defendants appealed, and the interveners, Romney and others, also took a separate appeal, and the case is now here for adjudication.

Mr. James O. Broadhead (with whom was *Mr. Franklin S. Richards* on the brief) for appellants.

It is settled law that the people of the United States represented by Congress, may do for the Territories what the people of each State may do for their State. But the same authority has established the doctrine that the personal and civil rights of the inhabitants of the Territories are secured to them by the same principles of constitutional liberty which restrain all the agencies of government, state and national, and that therefore the Congress of the United States has no right to impair the safeguards which protect the civil rights of every citizen, whether in a State or a Territory, and which are secured to him by the express provisions of the Constitution of the United States, or by the principles of government which underlie our whole political system. And it is equally well established by

the decisions of this court that Congress can pass no law impairing the obligation of contracts, or legislating back to the government property that has been given away by acts of Congress, or divesting title of property from one citizen and giving it to another, because such acts are repugnant to the spirit of our institutions.

In the exercise of its unquestioned power the territorial legislature of Utah, in 1851, by joint resolution, approved the charter of this corporation, which had been previously granted by the so-called State of Deseret, and on the 19th day of January, 1855, it confirmed and reënacted the same. The franchises granted to this corporation were that it should be a corporation with perpetual succession, and with power to acquire and hold real and personal estate for the religious and charitable purposes set forth in the charter. No authority was given to the church by this charter, nor is it claimed in its organization that any authority exists, to set at defiance the laws of the land, nor is it claimed, as has been asserted by the Supreme Court of Utah in the opinion delivered by that court in this case, that the organization claims to be directed and led by inspiration that is above all human wisdom and subject to a power above all municipal governments. The court claims this assertion of fact as belonging to history, whereas the very contrary doctrine is asserted in what are called the "revelations" of this church, to be found on page 219 of their book of Doctrine and Covenants. The one distinguishing feature of this corporation is, that, being a corporation founded for religious and charitable purposes it was not founded for the profit of the corporators, but for the administration of charitable trusts. It is with regard to a corporation of this character that we maintain that:

I. Congress having, by the organic act of September 9, 1850, given full power and authority to the Territory of Utah over all rightful subjects of legislation, including the power and authority to create private corporations, and no right to repeal, alter or amend the powers and franchises vested in the church corporation having been reserved in the act of incorporation, or in any other act or law of the territorial legisla-

ture of Utah, or in the organic act itself, the creation of this corporation was a contract which could not be altered or repealed by any subsequent act of the territorial legislature or of the Congress of the United States.

While we admit that the Congress of the United States has supreme legislative authority over the Territories, we maintain that it has not the power to undo what it authorized to be done. We say that while the granting of a corporate franchise is an act of legislation — a law, because it is an act of the law-making power, the only representative of the State in this respect — it is something more than a law in the general sense of that word. A law in its general sense is a rule of action, and applies to every citizen in the community. An act of incorporation, or any other contract made by the authorities representing the State, applies to one individual, or to a limited number of individuals; and while it is a law, as applied to them, it is at the same time a contract made with them, which, if executed, may not be impaired by any subsequent act of legislation. If there is a provision in the charter that it may be repealed by the power granting it — that the artificial person created by the act may be destroyed — then this power of repeal becomes a part of the contract, or if by a general law relating to the subject of corporations it is declared substantially that their charters may be amended, and that the State reserves the right to alter or repeal them, then this reservation becomes a part of the contract. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 637, 645, 682, 700.

The reservation contained in the organic act of the Territory of the right to disapprove acts passed by the territorial legislature is not a reservation upon all the grants of power contained in that section of the organic act, or rather in that part of the section which gives them the right to legislate upon all rightful subjects of legislation. There is nothing in the organic act, nor in the charter under consideration, nor in any act of Congress, which reserves to Congress or to the territorial legislature the right to alter, amend or repeal a charter of incorporation. Every decision of this court in which the right of a legislature to alter or take away the franchises

of a corporation has been upheld is a case in which there was either a special reservation in the charter, or some provision of a general law on the subject of corporations, reserving to the State the power to alter or repeal the act creating the corporation. *Miller* v. *State*, 15 Wall. 478, 488; *Greenwood* v. *Freight Company*, 105 U. S. 13, 15; *Pennsylvania College Cases*, 13 Wall. 190, 212; *Terrett* v. *Taylor*, 9 Cranch, 43, 53; *Wilkinson* v. *Leland*, 2 Pet. 627, 657; *Osborn* v. *Nicholson*, 13 Wall. 654; *Calder* v. *Bull*, 3 Dall. 386, 388; *Dred Scott* v. *Sandford*, 19 How. 393, 449.

II. The charter of the church corporation received the implied sanction of Congress, and thereafter Congress could not impair the contract nor dissolve the corporation, either by disapproving the act of incorporation, or by repealing the charter.

The law requires that the secretary of the Territory shall transmit to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress, two copies of the laws and journals of each session of the territorial legislature, within thirty days after the end of each session, and one copy to the President of the United States. This court will presume that the officers have performed their duty in this respect. From 1851 to 1887 there were thirty-six regular sessions of Congress. The sixth section of the organic act provides that all laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect. It is true there is no time fixed within which this disapproval may be manifested, but after this long period of time it is certainly fair to presume that such legislation has received the implied sanction of Congress. *Clinton* v. *Englebrecht*, 13 Wall. 434, 446.

But if it should be held that Congress had the power to disapprove the charter of the church and dissolve the corporation, then the property now in possession of the receiver would belong to the members of the corporation, and it should have been set apart, by the court below, for their use and benefit. In the well considered opinion of the Court of Ap-

peals in New York in the case of *People* v. *O'Brien*, 111 N. Y. 2, it is said: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the State; it is enough that it has become private property, and it is thus protected by the law of the land."

To the same effect is the language of this court in *Greenwood* v. *Freight Co.*, *ubi sup.*, where it is said: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." p. 19.

The act of March 3, 1887, was an act of judicial legislation, and for this reason beyond the power of the legislative department of the general government; it is, therefore, unconstitutional. *Hurtado* v. *California*, 110 U. S. 516, 535; *Davis* v. *Gray*, 16 Wall. 203, 223; *Pennsylvania College Cases*, 13 Wall. 190, 212; *Terrett* v. *Taylor*, *ubi sup.*; *Loan Association* v. *Topeka*, 20 Wall. 655, 662.

The act of Congress of March 3, 1887, not only purports to disapprove the territorial act incorporating the church, but it also decrees the dissolution of the corporation and confiscates its property.

What has been said in regard to the power of Congress to annul the charter of incorporation of the Church of Jesus

Christ of Latter-Day Saints applies to the act of July 1, 1862, and of March 3, 1887. In regard to the act of March 3, 1887, it may be further said that it was an act of judicial legislation, even if it were a lawful act, so far as the mere disapproval of the act of incorporation is concerned.

The Congress of the United States is not content with dissolving the corporation and leaving the rights of property belonging to the corporation at the time of its dissolution to be determined by existing laws, but it makes, or undertakes to make, a new law in the nature of a judicial determination to the effect that this property no longer belongs to the corporation, nor to the individual members who composed the corporation, but that it belongs to the United States, and that the court will set apart so much as in its judgment shall be necessary for the convenience and use of the congregation, or the members composing the congregation, and that the balance shall be disposed of conformably to some law not pointed out in the act, but which the Congress of the United States assumes to have an existence, fixing rules for the disposition of such property.

The court, in its final judgment, adjudged the personal property escheated; set aside part of the real estate; and authorized the remainder to be proceeded against by information. It is difficult to understand why the realty was not escheated as well as the personalty. There was as much authority to do the one as the other; and there was no legal authority to do either.

IV. There is no such thing known to the jurisprudence of the United States as escheat. There is no rule of law by which personal property of any kind can escheat to the United States.

Under the laws of the United States, property may become subject to forfeiture under the provisions of various statutes, but no forfeiture can exist except by statutory provision. The doctrine of escheat belongs to the common law which was varied from time to time by acts of Parliament. "Escheats," said Lord Coke, "are of two kinds; First, *propter defectum tenentis;* second, *propter delictum tenentis.*" See Coke Lytt. 13 a, 92 b.

Argument for Appellants.

The doctrine, as applied to real estates in England, is that where a person dies intestate, without leaving any person who, according to the law of inheritance, can claim as heir, the estate in fee will escheat to the lord from whom the fee is held. And, as this doctrine was derived partly from the feudal system, things which do not lie in tenure as a rent charge will not escheat; and at common law an equitable or trust estate would not be forfeited or escheated either for treason or felony, for the simple reason that there is a trustee in possession; and if there be a tenant, no matter whether he holds for himself or in trust for some one else, the reasons which would cause an escheat to the lord would not in that case exist. See *Attorney General* v. *Sands*, Tudor's Leading Cases, 775 and notes, 3d Eng. ed.

If lands be given to a body corporate or politic, as for instance to a dean and chapter, or to a mayor and commonalty and to their successors, upon its dissolution the land will revert to the donor and not to the lord by escheat. Coke Lytt. 13 b.

Equitable estates and estates held in trust are not liable to escheat, because they are not the subject of tenure and because the lord can only claim the escheat on account of the defect of the tenant. *Cox* v. *Parker*, 22 Beavan, 168; *Burgess* v. *Wheate*, 1 Eden, 128, 176; *Taylor* v. *Haygarth*, 14 Sim. 8, 16; *Beale* v. *Symonds*, 16 Beavan, 406.

At common law, the crown, by virtue of its prerogative, is entitled to chattels, real or personal, of an intestate leaving no next of kin. Tudor's Leading Cases, 784 and notes; *but this does not apply to equitable estates or the property of dissolved religious corporations.*

Personal estate was formerly forfeited to the crown upon conviction of treason or felony. *McDowell* v. *Bergen*, 12 Irish Com. Law (N. S.) 391; Hawkins's Pleas of the Crown, book 2, c. 49, sec. 9.

But the harsh rules of the common law in regard to escheats and forfeitures were abolished in cases of treason or felony by Statutes 33 and 34 Vict. c. 23.

In the statutes of most of the States of the Union there

are laws regulating escheat; and in most of those States — all of them indeed except the State of Louisiana — the common law, and the acts of Parliament of a general nature prior to the fourth year of the reign of James I, have been adopted, but the common law has never been adopted by the United States. *Wheaton* v. *Peters*, 8 Pet. 591.

V. The personal property is not subject to escheat to the United States on account of any failure or illegality of the trusts to which it was dedicated at its acquisition and for which it has been used by the corporation.

There is no rule of equity jurisprudence which authorizes a chancellor to declare as forfeited or escheated to the government, property which has been used for an illegal or immoral purpose. Courts of equity will refuse to carry into effect illegal or immoral contracts. Of this there are numerous instances, but we know of no case in which a court of equity, in the absence of any statutory provision on the subject, has been authorized to escheat or forfeit to the government, property which has been illegally acquired, or which is held for illegal or immoral purposes. By the provisions of the statutes of some of the States, courts of equity, at the instance of an escheator, an officer appointed to prosecute on behalf of the Commonwealth in such cases, will entertain jurisdiction of escheats. But even where this is provided by positive law, the doctrine of escheats will be avoided by courts of equity in the interests of justice, by the application of the doctrine of equitable conversion. *Commonwealth* v. *Martin*, 5 Munford, 117.

VI. If both the acts of Congress referred to should be held constitutional and valid, and it should be declared that any real estate belonging to the corporation can be legally forfeited and escheated to the United States by any legal proceedings, then we claim that the following described real estate cannot be held as forfeited and escheated to the United States; (1) all real estate in which the church held vested rights, either legal or equitable, on the 1st day of July, 1862; (2) real estate to the value of fifty thousand dollars at the time of its acquisition acquired after the 1st of July, 1862; (3) all

real estate held or occupied by the corporation at the date of its dissolution, for the purpose of the worship of God, or parsonage connected therewith, or burial ground, and property appurtenant to such real estate as may have buildings erected thereon for any of these purposes.

The property in which the church corporation had vested rights at the time of the passage of the act of July 1, 1862, consisted of the Temple Block, the Historian's Office, the Tithing Office, and the real estate connected with those respective premises. Similar titles have been held valid in *Hussey* v. *Smith*, 99 U. S. 20, 22; *Stringfellow* v. *Cain*, 99 U. S. 610, 616; *Colfield* v. *McClellan*, 16 Wall. 331. See also *Lamb* v. *Davenport*, 18 Wall. 307, 313.

There can be no doubt, from the decisions of this court, that the Church of Jesus Christ of Latter-Day Saints had and held, on the first day of July, 1862, such an equitable interest in the Temple Block, the Tithing Office property, and the Historian's Office and grounds, as constituted a "vested right in real estate," which the act of Congress of that date declared should "not be impaired." The property still belongs to the church, and should have been set apart to it. *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 758; *Harvard College* v. *Boston*, 104 Mass. 470, 488.

VII. Under the averments of the bill and the proofs taken there was no authority to appoint a receiver, because: (1) The bill does not describe any property that the government claims has been escheated, or is subject to escheat or forfeiture; (2) There is no averment or claim that any of the personal property is subject to escheat or forfeiture to the government; (3) There is no averment in the bill, or proof, that any of the property referred to was in danger of being lost or injured, or that it was not safe in the hands of the persons who are alleged to be in the possession of the same — it is only claimed to be illegally in their possession, and that they have no right to hold it.

"The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his

order that while favoring one, injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied." *Fosdick* v. *Schall*, 99 U. S. 235, 253.

Mr. Solicitor General Jenks for the appellees.

Mr. Joseph E. McDonald (with whom was *Mr. John M. Butler* on the brief) for appellants, made the following point, not made by *Mr. Broadhead.*

If said act of Congress of March 3, 1887, is finally held constitutional and valid, the seventeenth section thereof, wherein it is provided and required that "the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by such corporation for places of worship and parsonages connected therewith and burial grounds, and of the description mentioned in the *proviso* to section thirteen of this act, and in section twenty-six of this act, to the respective trustees mentioned in section twenty-six of this act," is a direct legislative declaration and determination by the Congress of the United States that the teachings, doctrines, tenets and practices of the church, sect, association or organization now known as the Church of Jesus Christ of Latter-Day Saints are not opposed to public policy and good morals, and are not contrary to the laws of the United States.

And if said church, sect, association or organization is competent in law to receive and hold by its trustees valuable real estate for its religious and charitable uses and purposes in accordance with the "tenets of said sect and body," it is contrary to law, equity and reason to hold, as is held by the decree appealed from, that all of the personal property and estate belonging to said corporation and dedicated to its religious and charitable uses and purposes is forfeited and escheated to the United States, on the ground that the retention of said personal property by said church, sect, association or organization, now known as the Church of Jesus Christ of Latter-Day Saints, and the appropriation and dedication thereof by

said church to its religious and charitable uses and purposes, would be opposed to public policy, good morals and contrary to law.

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

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sover-

eignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall, in the case of the *American Insurance Company* v. *Canter*, 1 Pet. 511, 542, well said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." And Mr. Justice Nelson delivering the opinion of the court in *Benner* v. *Porter*, 9 How. 235, 242, speaking of the territorial governments established by Congress, says: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the federal and state authorities." Chief Justice Waite, in the case of *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, said: "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy* v. *Ramsey*, 114 U. S. 15, 44, Mr. Justice Matthews said:

"The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein, is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the 6th section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared "that the legislative powers 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. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." 9 Stat. 454.

This brings us directly to the question of the power of Congress to revoke the charter of the Church of Jesus Christ of Latter-Day Saints. That corporation, when the Territory of Utah was organized, was a corporation *de facto*, existing under an ordinance of the so-called State of Deseret, approved Feb-

ruary 8, 1851. This ordinance had no validity except in the voluntary acquiescence of the people of Utah then residing there. Deseret, or Utah, had ceased to belong to the Mexican government by the treaty of Guadalupe Hidalgo, and in 1851 it belonged to the United States, and no government without authority from the United States, express or implied, had any legal right to exist there. The assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the Territory of Utah into a government, and no other government was lawful within the bounds of that Territory. But after the organization of the territorial government of Utah under the act of Congress, the legislative assembly of the Territory passed the following resolution: "*Resolved, by the Legislative Assembly of the Territory of Utah*, That the laws heretofore passed by the provisional government of the State of Deseret, and which do not conflict with the organic act of said Territory, be and the same are hereby declared to be legal and in full force and virtue, and shall so remain until superseded by the action of the legislative assembly of the Territory of Utah." This resolution was approved October 4, 1851. The confirmation was repeated on the 19th of January, 1855, by the act of the legislative assembly entitled, "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution." From the time of these confirmatory acts, therefore, the said corporation had a legal existence under its charter. But it is too plain for argument that this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other act of the territorial legislature, it was subject to this condition. Not only so, but the power of Congress could be exercised in modifying or limiting the powers and privileges granted by such charter; for if it could repeal, it could modify; the greater includes the less. Hence there can be no question that the act of July 1, 1862, already recited, was a valid exercise of congressional power. Whatever may be the effect or true construction of this act, we have no doubt of its validity. As far

as it went it was effective. If it did not absolutely repeal the charter of the corporation, it certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the act of July 1, 1862, had but a partial effect, Congress had still the power to make the abrogation of its charter absolute and complete. This was done by the act of 1887. By the 17th section of that act it is expressly declared that "the acts of the legislative assembly of the Territory of Utah, incorporating, continuing or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called general assembly of the State of Deseret, incorporating the said church, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, so far as it may now have or pretend to have any legal existence, is hereby dissolved." This absolute annulment of the laws which gave the said corporation a legal existence has dissipated all doubt on the subject, and the said corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act. It was not necessary to resort to the condition imposed by the act of 1862, limiting the amount of real estate which any corporation or association for religious or charitable purposes was authorized to acquire or hold; although it is apparent from the findings of the court that this condition was violated by the corporation before the passage of the act of 1887. Congress, for good and sufficient reasons of its own, independent of that limitation, and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which of course depended upon its charter.

The next question is, whether Congress or the court had the power to cause the property of the said corporation to be seized and taken possession of, as was done in this case.

When a business corporation, instituted for the purposes of gain, or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject as we shall hereafter see to the charitable use. To this rule the corporation in question was undoubtedly subject. But the grantor of all, or the principal part, of the real estate of the Church of Jesus Christ of Latter-Day Saints was really the United States, from whom the property was derived by the church, or its trustees, through the operation of the town site act. Besides, as we have seen, the act of 1862 expressly declared that all real estate acquired or held by any of the corporations or associations therein mentioned, (of which the Church of Jesus Christ of Latter-Day Saints was one,) contrary to the provisions of that act, should be forfeited and escheat to the United States, with a saving of existing vested rights. The act prohibited the acquiring or holding of real estate of greater value than $50,000 in a Territory, and no legal title had vested in any of the lands in Salt Lake City at that time, as the town site act was not passed until March 2, 1867. There can be no doubt, therefore, that the real estate of the corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States.

If it be urged that the real estate did not stand in the name of the corporation, but in the name of a trustee or trustees, and therefore was not subject to the rules relating to corporate property, the substance of the difficulty still remains. It cannot be contended that the prohibition of the act of 1862 could have been so easily evaded as by putting the property of the corporation into the hands of trustees. The equitable

or trust estate was vested in the corporation. The trustee held it for no other purpose; and the corporation being dissolved that purpose was at an end. The trust estate devolved to the United States in the same manner as the legal estate would have done had it been in the hands of the corporation. The trustee became trustee for the United States instead of trustee for the corporation. We do not now speak of the religious and charitable uses for which the corporation, through its trustee, held and managed the property. That aspect of the subject is one which places the power of the government and of the court over the property on a distinct ground.

Where a charitable corporation is dissolved, and no private donor, or founder, appears to be entitled to its real estate, (its personal property not being subject to such reclamation,) the government, or sovereign authority, as the chief and common guardian of the State, either through its judicial tribunals or otherwise, necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted, so far as they are lawful and not repugnant to public policy. This is the general principle, which will be more fully discussed further on. In this direction, it will be pertinent, in the meantime, to examine into the character of the corporation of the Church of Jesus Christ of Latter-Day Saints, and the objects which, by its constitution and principles, it promoted and had in view.

It is distinctly stated in the pleadings and findings of fact, that the property of the said corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy — a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress — notwithstanding all the efforts made to suppress

this barbarous practice — the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacri-

fices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised. *Davis* v. *Beason*, 133 U. S. 333. And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the late corporation was endowed for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not, the right, through its courts, and in due course of administration, to cause them to be seized and devoted to objects of undoubted charity and usefulness — such for example as the maintenance of schools — for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings and burying grounds, as provided in the law.

The property in question has been dedicated to public and charitable uses. It matters not whether it is the product of private contributions, made during the course of half a century, or of taxes imposed upon the people, or of gains arising from fortunate operations in business, or appreciation in values; the charitable uses for which it is held are stamped upon it by charter, by ordinance, by regulation and by usage, in such an indelible manner that there can be no mistake as to their character, purpose or object.

The law respecting property held for charitable uses of

course depends upon the legislation and jurisprudence of the country in which the property is situated and the uses are carried out; and when the positive law affords no specific provision for actual cases that arise, the subject must necessarily be governed by those principles of reason and public policy which prevail in all civilized and enlightened communities.

The principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity. They are found imbedded in the civil law of Rome, in the laws of European nations, and especially in the laws of that nation from which our institutions are derived. A leading and prominent principle prevailing in them all is, that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use, it is considered as given to the public, and is, therefore, taken under the guardianship of the laws. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the State, it will be applied to some object of kindred character so as to fulfil in substance, if not in manner and form, the purpose of its consecration.

The manner in which the due administration and application of charitable estates is secured, depends upon the judicial institutions and machinery of the particular government to which they are subject. In England, the court of chancery is the ordinary tribunal to which this class of cases is delegated, and there are comparatively few which it is not competent to administer. Where there is a failure of trustees, it can appoint new ones; and where a modification of uses is necessary in order to avoid a violation of the laws, it has power to make the change. There are some cases, however, which are beyond its jurisdiction; as where, by statute, a gift to certain uses is declared void and the property goes to the king; and in some other cases of failure of the charity. In such cases the king as *parens patriæ*, under his sign manual, disposes of

the fund to such uses, analogous to those intended, as seems to him expedient and wise.

These general principles are laid down in all the principal treatises on the subject, and are the result of numerous cases and authorities. See Duke on Char. Uses, c. 10, §§ 4, 5, 6; Boyle on Char. Bk. 2, c. 3, c. 4; 2 Story's Eq. Jur. §§ 1167 *et seq.*; *Attorney General* v. *Guise*, 2 Vernon, 266; *Moggridge* v. *Thackwell*, 7 Ves. 36, 77; *De Themmines* v. *De Bonneval*, 5 Russ. 289; *Town of Pawlet* v. *Clark*, 9 Cranch, 292, 335, 336; *Beatty* v. *Kurtz*, 2 Pet. 566; *Vidal* v. *Girard's Executors*, 2 How. 127; *Jackson* v. *Phillips*, 14 Allen, 539; *Ould* v. *Washington Hospital*, 95 U. S. 303; *Jones* v. *Habersham*, 107 U. S. 174.

The individual cases cited are but *indicia* of the general principle underlying them. As such they are authoritative, though often in themselves of minor importance. Bearing this in mind, it is interesting to see how far back the principle is recognized. In the Pandects of Justinian we find cases to the same effect as those referred to, antedating the adoption of Christianity as the religion of the Empire. Amongst others, in the Digest, lib. 33, tit. 2, law 16, a case is reported which occurred in the early part of the third century, in which a legacy was left to a city in order that from the yearly revenues games might be celebrated for the purpose of preserving the memory of the deceased. It was not lawful at that time to celebrate these games. The question was, what was to be done with this legacy. Modestinus, a celebrated jurist of authority, replied, "Since the testator wished games to be celebrated which are not permitted, it would be unjust that the amount which he has destined to that end should go back to the heirs. Therefore let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner." Here is the doctrine of charitable uses in a nutshell.

Domat, the French jurist, writing on the civil law, after explaining the nature of pious and charitable uses, and the favor with which they are treated in the law, says, "If a pious

legacy were destined to some use which could not have its effect, as if a testator had left a legacy for building a church for a parish, or an apartment in an hospital, and it happened, either that before his death the said church, or the said apartment had been built out of some other fund, or that it was noways necessary or useful, the legacy would not for all that remain without any use; but it would be laid out on other works of piety for that parish, or for that hospital, according to the directions that should be given in this matter by the persons to whom this function should belong." [1] And for this principle he cites a passage from the Pandects. Domat's Civil Law, book 4, title 2, section 6, par. 6.

By the Spanish law, whatever was given to the service of God, became incapable of private ownership, being held by the clergy as guardians or trustees; and any part not required for their own support, and the repairs, books and furniture of the church, was devoted to works of piety, such as feeding and clothing the poor, supporting orphans, marrying poor virgins, redeeming captives and the like. Partida III. tit. 28, ll. 12–15. When property was given for a particular object, as a church, a hospital, a convent or a community, etc., and the object failed, the property did not revert to the donor, or his heirs, but devolved to the crown, the church or other convent or community, unless the donation contained an express condition in writing to the contrary. Tapia, Febrero Novisimo, lib. 2, tit. 4, cap. 22, §§ 24–26.

A case came before Lord Bacon in 1619, *Bloomfield* v. *Stowe Market*, Duke on Char. Uses, 624, in which lands had been given before the Reformation to be sold, and the proceeds applied, one-half to the making of a highway from the town

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[1] Si un legs pieux était destiné à quelque usage qui ne pût avoir son effet, comme si un testateur avait légué pour faire une église pour une paroisse, ou un bâtiment dans un hôpital, et qu'il arrivât, ou qu'avant sa mort cette église ou ce bâtiment eût été fait de quelque autre fonds, ou qu'il n'y en eût point de nécessité ni d'utilité, le legs ne demeurerait pas pour cela sans aucun usage; mais il serait employé à d'autres œuvres de piété pour cette paroisse ou pour cet hôpital, selon les destinations qu'en feraient les personnes que cette fonction pourrait regarder.

in which the lands were, one-fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others. The Lord Keeper decreed the establishment of the uses for making the highway and repairing the church, and directed the remaining fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town and the poor of the town where the donor inhabited.

In the case of *Baliol College*, which came before the court of chancery from time to time for over a century and a half, the same principle was asserted, of directing a charity fund to a different, though analogous use, where the use originally declared had become contrary to the policy of the law. There, a testator in 1679, when Episcopacy was established by law in Scotland, gave lands in trust to apply the income to the education of Scotchmen at Oxford, with a view to their taking Episcopal orders and settling in Scotland. Presbyterianism being reëstablished in Scotland after the Revolution of 1688, the object of the bequest could not be carried into effect; and the court of chancery, by successive decrees of Lord Somers and Lord Hardwicke, directed the income of the estate to be applied to the education of a certain number of Scotch students at Baliol College, without the condition of taking orders; and, in consideration of this privilege, directed the surplus of the income to be applied to the college library. See the cases of *Attorney General* v. *Guise*, 2 Vernon, 266; *Attorney General* v. *Baliol College*, 9 Mod. 407; *Attorney General* v. *Glasgow College*, 2 Collyer, 665; *S. C.* 1 H. L. Cas. 800. And see abridgment of the above cases in *Jackson* v. *Phillips*, 14 Allen, 581, 582.

Lord Chief Justice Wilmot, in his opinion in *Attorney General* v. *Lady Downing*, 1 Wilmot, 32, looking at the case in the supposition that the trusts of the will (which were for instituting a college) were illegal and void, or of such a nature as not fit to be carried into execution, said: "This court has long made a distinction between superstitious uses and mistaken charitable uses. By mistaken, I mean such

as are repugnant to that sound constitutional policy, which controls the interest, wills and wishes of individuals, when they clash with the interest and safety of the whole community. Property, destined to superstitious uses, is given by law of parliament to the king, to dispose of as he pleases; and it falls properly under the cognizance of a court of revenue. But where property is given to mistaken charitable uses, this court distinguishes between the charity and the use; and seeing the charitable bequest in the intention of the testator, they execute the intention, varying the use, as the king, who is the curator of all charities, and the constitutional trustee for the performance of them, pleases to direct and appoint." "This doctrine is now so fully settled that it cannot be departed from." *Ib.*

In *Moggridge* v. *Thackwell*, 7 Ves. 36, 69, Lord Eldon said: "I have no doubt, that cases much older than I shall cite may be found; all of which appear to prove that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity: but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." In Hill on Trustees, page 450, after citing this observation of Lord Eldon, it is added: "In accordance with these principles, it has frequently been decided that where a testator has sufficiently expressed his intention to dispose of his estate in trust for charitable purposes *generally*, the general purpose will be enforced by the court to the exclusion of any claim of the next of kin to take under a resulting trust; although the *particular* purpose or mode of application is not declared at all by the testator. And the same rule prevails, although the testator refers to some past or intended declaration of the particular charity, which declaration is not made or cannot be discovered; and although the selection of the objects of the charity and the mode of application are left to the discretion of the trustees. And it is immaterial that the trustees refuse the gift, or die, or that their appointment is revoked in the

lifetime of the testator, causing a lapse of the bequest at law. The same construction will also be adopted where a *particular* charitable purpose is declared by the testator which does not exhaust the whole value of the estate; or where the particular trust cannot be carried into effect, either for its uncertainty or its illegality, or for want of proper objects. And in all these cases the general intention of the testator in favor of charity will be effectuated by the court through a *cy-près* application of the fund." The same propositions are laid down by Mr. Justice Story in his Equity Jurisprudence, sections 1167 *et seq.* But it is unnecessary to make further quotations.

These authorities are cited (and many more might be adduced) for the purpose of showing that where property has been devoted to a public or charitable use which cannot be carried out on account of some illegality in, or failure of the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the State, to other charitable objects lawful in their character, but corresponding, as near as may be, to the original intention of the donor.

They also show that the authority thus exercised arises, in part, from the ordinary power of the court of chancery over trusts, and, in part, from the right of the government, or sovereign, as *parens patriæ*, to supervise the acts of public and charitable institutions in the interests of those to be benefited by their establishment; and, if their funds become *bona vacantia*, or left without lawful charge, or appropriated to illegal purposes, to cause them to be applied in such lawful manner as justice and equity may require.

If it should be conceded that a case like the present transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the *parens patriæ* of the State, it may then be contended that, in this country, there is no royal person to act as *parens patriæ*, and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But, here, the legislature is the *parens*

patriæ, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England. Chief Justice Marshall, in the *Dartmouth College Case*, said: "By the revolution, the duties, as well as the powers, of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department." 4 Wheat. 651. And Mr. Justice Baldwin, in *McGill* v. *Brown*, Brightly, 346, 373, a case arising on Sarah Zane's will, referring to this declaration of Chief Justice Marshall, said: "The revolution devolved on the State all the transcendent power of parliament, and the prerogative of the crown, and gave their acts the same force and effect."

Chancellor Kent says: "In this country, the legislature or government of the State, as *parens patriæ*, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is entrusted with it." 4 Kent Com. 508, note.

In *Fontain* v. *Ravenel*, 17 How. 369, 384, Mr. Justice McLean, delivering the opinion of this court in a charity case, said: "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriæ*."

This prerogative of *parens patriæ* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves. Lord Chancellor Somers, in *Cary* v. *Bertie*, 2 Vernon, 333, 342, said: "It is true infants are always favored. In this court there are several things which

belong to the king as *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."

The Supreme Judicial Court of Massachusetts well said, in *Sohier* v. *Mass. Gen. Hospital*, 3 Cush. 483, 497: "It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries and losses, if estates, in which persons are interested, who have not capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could under no circumstances, be sold, and perfect titles effected. But, in such cases, the legislature, as *parens patriæ*, can disentangle and unfetter the estates, by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

These remarks in reference to infants, insane persons and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic; but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

It is true, that in some of the States of the Union in which charities are not favored, gifts to unlawful or impracticable objects, and even gifts affected by merely technical difficulties, are held to be void, and the property is allowed to revert to the donor or his heirs or other representatives. But this is in cases where such heirs or representatives are at hand to claim the property, and are ascertainable. It is difficult to see how this could be done in a case where it would be impossible for any such claim to be made, — as where the property has been the resulting accumulation of ten thousand petty contributions,

extending through a long period of time, as is the case with all ecclesiastical and community funds. In such a case the only course that could be satisfactorily pursued, would be that pointed out by the general law of charities, namely, for the government, or the court of chancery, to assume the control of the fund, and devote it to lawful objects of charity most nearly corresponding to those to which it was originally destined. It could not be returned to the donors, nor distributed among the beneficiaries.

The impracticability of pursuing a different course, however, is not the true ground of this rule of charity law. The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the State. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application, or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the State; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court, the legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect. The State, by its legislature or its judiciary, interposes to preserve them from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed.

The interposition of the legislature in such cases is exemplified by the case of *The Town of Pawlet* v. *Clark*, 9 Cranch, 292, which arose in Vermont. In the town charter, granted

in the name of the king in 1761, one entire share of the town lands was granted "as a glebe for the Church of England as by law established." There was no Episcopal church in the town until 1802. In that year one was organized, and its parson laid claim to the glebe lands, and leased them to Clark and others. Of course, this church had never been connected with the "Church of England as by law established;" and the institution of such a church in 1802 was impossible, and would have been contrary to the public policy of the State. Meantime, in 1794, the legislature had granted the glebe lands to the several towns to be rented by the selectmen for the sole use and support of public worship, without restriction as to sect or denomination. This law was subsequently repealed, and in 1805 the legislature passed another act, granting the glebe lands to the respective towns, to apply the rents to the use of schools therein. This was held to be a valid disposition. Mr. Justice Story, in the course of an elaborate opinion, amongst other things, showed that a mere voluntary society of Episcopalians within a town could no more entitle themselves, on account of their religious tenets, to the glebe than any other society worshipping therein. "The glebe," he said, "remained *hæreditas jacens*, and the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or encumber it, or might erect an Episcopal church therein," etc. p. 335. "By the revolution the State of Vermont succeeded to all the rights of the crown as to the unappropriated as well as the appropriated glebes." p. 335. Again: "Without the authority of the State, however, they [the towns] could not apply the lands to other uses than public worship; and in this respect the statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure."[1] p. 336.

[1] *Note by* Mr. Justice Bradley. The frequency with which this power of the legislature is exerted is shown by a recurrence to the private laws of any of the States. Taking New Jersey for example; the Index of Private Laws, under the head of "Academies" alone, refers to the following acts:

1. By an ancient charter the trustees of the township of Bergen held

Coming to the case before us, we have no doubt that the general law of charities which we have described is applicable

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certain lands for the common benefit of the freeholders, a portion of which was set apart for the free school of the township. An academy being organized and incorporated in the town, its trustees claimed this portion and sold certain parcels of it. The legislature, on the representation of the trustees of the township, confirmed the sales that had been made, but directed that the proceeds, and the land unsold should be vested in the trustees of the township, for the use and benefit of the free school alone. This, of course, the court of chancery could not have done. Laws of 1814, p. 202.

2. By an act of March 2, 1848, it was enacted, that the title of a lot in the village of Hackensack, formerly vested in the trustees of the Washington Academy, should be vested in the Washington Institute of Hackensack, to be held by them for the purposes and trusts, and subject to the conditions, of the articles of their association. Laws of 1848, p. 118. It is probable that the first institution had ceased to exist.

3. A certain school-house and lot in the city of Newark was held by trustees for the benefit of "The Female Union School Society," for the education of indigent female children. Not being longer needed for that purpose, in consequence of the establishment of public free schools in the city, the legislature authorized the trustees, with the assent of the association, to sell the property and pay over the proceeds to a new corporation created for the support and education of destitute orphan children of the city, called The Protestant Foster Home Society. Laws of 1849, p. 143.

4. In 1854 an act was passed, authorizing the trustees of the Camden Academy to convey their property to the Board of Education of the city of Camden. The reason appears from the following recital of the act "Whereas a certain lot of land [describing it] has heretofore been given or bequeathed for the purpose of erecting a school-house thereon; and whereas the building known as the Camden Academy has been erected thereon by voluntary subscription; and whereas the donors of said land and the subscribers to the funds, for the erection of said building, have, with few exceptions, departed this life, and the objects which they had in view have in a great degree been frustrated; and whereas it is considered that the same may be best promoted by securing said lot of land, and the building thereon, for the occupancy of public schools of the city of Camden; *Be it enacted*," etc. Laws of 1854, p. 353.

5. By an act passed in 1871, the trustees of Chatham Academy, in the county of Morris, were authorized to convey any part of the real estate held by them, or to sell the same and pay over the proceeds, to the trustees of Chatham School District No. 1, to be used by them for educational purposes only. Laws of 1871, p. 670. Here was, evidently, another case of an academy having run down, and its operations discontinued.

Instances of this kind of legislation, in which the legislature clearly acts as *parens patriæ*, may be found almost without number.

thereto. It is true, no formal declaration has been made by Congress or the territorial legislature as to what system of laws shall prevail there. But it is apparent from the language of the organic act, which was passed September 9, 1850, (9 Stat. 453,) that it was the intention of Congress that the system of common law and equity which generally prevails in this country should be operative in the Territory of Utah, except as it might be altered by legislation. In the 9th section of the act it is declared that the Supreme and District Courts of the Territory "shall possess *chancery* as well as *common law* jurisdiction," and the whole phraseology of the act implies the same thing. The territorial legislature, in like manner, in the first section of the act regulating procedure, approved December 30, 1852, declared that all the courts of the Territory should have "*law* and *equity* jurisdiction in civil cases." In view of these significant provisions, we infer that the general system of common law and equity, as it prevails in this country, is the basis of the laws of the Territory of Utah. We may, therefore, assume that the doctrine of charities is applicable to the Territory, and that Congress, in the exercise of its plenary legislative power over it, was entitled to carry out that law and put it in force, in its application to the Church of Jesus Christ of Latter-Day Saints.

Indeed, it is impliedly admitted by the corporation itself, in its answer to the bill in this case, that the law of charities exists in Utah, for it expressly says: "That it was, at the time of its creation, ever since has been, and still is, a corporation or association for religious or charitable uses." And again it says:

"That prior to February 28, 1887, it had, as such corporation, as it lawfully might by the powers granted to it by its acts of incorporation, acquired and held from time to time certain personal property, goods and chattels, all of which it had acquired, held and used solely and only for charitable and religious purposes; that on the 28th day of February, A.D. 1887, it still held and owned certain personal property, goods and chattels donated to it by the members of said church and friends thereof solely and only for use and distribution for

charitable and religious purposes;" and "that on February 28, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said defendant corporation as trustee in trust for said defendant, by and with the consent and approval of defendant, donated, transferred and conveyed all of said personal property, moneys, stocks and bonds held by him belonging to said defendant corporation, after setting apart and reserving certain moneys and stocks then held by him, sufficient in amount and necessary for the payment of the then existing indebtedness of said defendant corporation, to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by said ecclesiastical corporations solely and only to charitable and religious uses and purposes."

And the interveners, Romney and others, who claim to represent the hundred thousand and more individuals of the Mormon Church in their petition say:

"That the said Church of Jesus Christ of Latter-Day Saints is and for many years last past has been a voluntary religious society or association, organized and existing in the Territory of Utah for religious and charitable purposes.

"That said petitioners and others, for whose benefit they file this petition, are members of said church, residing in said Territory; that said church became possessed of all the above-described property, in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its said members, to be held, managed and applied to the use and benefit of said church and for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference or meeting of said members."

The foregoing considerations place it beyond doubt that the general law of charities, as understood and administered in our Anglo-American system of laws, was and is applicable to the case now under consideration.

Then looking at the case as the finding of facts presents it, we have before us — Congress had before it — a contumacious

organization, wielding by its resources an immense power in the Territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did.

It is not our province to pass judgment upon the necessity or expediency of the act of February 19, 1887, under which this proceeding was taken. The only question we have to consider in this regard, is as to the constitutional power of Congress to pass it. Nor are we now called upon to declare what disposition ought to be made of the property of the Church of Jesus Christ of Latter-Day Saints. This suit is, in some respects, an ancillary one, instituted for the purpose of taking possession of and holding for final disposition the property of the defunct corporation in the hands of a receiver, and winding up its affairs. To that extent, and to that only, the decree of the Circuit Court has gone. In the proceedings which have been instituted in the District Court of the Territory, it will be determined whether the real estate of the corporation which has been seized (excepting the portions exempted by the act) has, or has not, escheated or become forfeited to the United States. If it should be decided in the affirmative, then, pursuant to the terms of the act, the property so forfeited and escheated will be disposed of by the Secretary of the Interior, and the proceeds applied to the use and benefit of common schools in the Territory.

It is obvious that any property of the corporation which may be adjudged to be forfeited and escheated will be subject to a more absolute control and disposition by the government than that which is not so forfeited. The non-forfeited property will be subject to such disposition only as may be required by the law of charitable uses; whilst the forfeited and escheated property, being subject to a more absolute control of the government, will admit of a greater latitude of discretion in regard to its disposition. As we have seen, however, Congress has signified its will in this regard, having declared that the proceeds shall be applied to the use and benefit of

common schools in the Territory. Whether that will be a proper destination for the non-forfeited property will be a matter for future consideration in view of all the circumstances of the case.

As to the constitutional question, we see nothing in the act which, in our judgment, transcends the power of Congress over the subject. We have already considered the question of its power to repeal the charter of the corporation. It certainly also had power to direct proceedings to be instituted for the forfeiture and escheat of the real estate of the corporation; and, if a judgment should be rendered in favor of the government in these proceedings, the power to dispose of the proceeds of the lands thus forfeited and escheated, for the use and benefit of common schools in the Territory, is beyond dispute. It would probably have power to make such a disposition of the proceeds if the question were merely one of charitable uses, and not of forfeiture. Schools and education were regarded by the Congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality. In the ordinance of 1787, passed for the government of the Territory Northwest of the Ohio, it is declared, Art. 3, "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Mr. Dane, who is reputed to have drafted the said ordinance, speaking of some of the statutory provisions of the English law regarding charities as inapplicable to America, says: "But in construing these laws, rules have been laid down, which are valuable in every State; as that the erection of schools and the relief of the poor are always right, and the law will deny the application of private property only as to uses the nation deems superstitious." 4 Dane's Abridg. 239.

The only remaining constitutional question arises upon that part of the 17th section of the act, under which the present proceedings were instituted. We do not well see how the constitutionality of this provision can be seriously disputed, if it be conceded or established that the corporation ceased to

exist, and that its property thereupon ceased to have a lawful owner, and reverted to the care and protection of the government as *parens patriæ*. This point has already been fully discussed. We have no doubt that the state of things referred to existed, and that the right of the government to take possession of the property followed thereupon.

The application of Romney and others, representing the unincorporated members of the Church of Jesus Christ of Latter-Day Saints, is fully disposed of by the considerations already adduced. The principal question discussed has been, whether the property of the church was in such a condition as to authorize the government and the court to take possession of it and hold it until it shall be seen what final disposition of it should be made; and we think it was in such a condition, and that it is properly held in the custody of the receiver. The rights of the church members will necessarily be taken into consideration in the final disposition of the case. There is no ground for granting their present application. The property is in the custody of the law, awaiting the judgment of the court as to its final disposition in view of the illegal uses to which it is subject in the hands of the Church of Latter-Day Saints, whether incorporated or unincorporated. The conditions for claiming possession of it by the members of the sect or community under the act do not at present exist.

The attempt made, after the passage of the act on February 19, 1887, and whilst it was in the President's hands for his approval or rejection, to transfer the property from the trustee then holding it to other persons, and for the benefit of different associations, was so evidently intended as an evasion of the law, that the court below justly regarded it as void and without force or effect.

We have carefully examined the decree, and do not find anything in it that calls for a reversal. It may perhaps require modification in some matters of detail, and for that purpose only the case is reserved for further consideration.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Lamar, dissenting.

Dissenting Opinion: Fuller, C. J., Field, Lamar, JJ.

I am constrained to dissent from the opinion and judgment just announced. Congress possesses such authority over the Territories as the Constitution expressly or by clear implication delegates. Doubtless territory may be acquired by the direct action of Congress, as in the annexation of Texas; by treaty, as in the case of Louisiana; or, as in the case of California, by conquest and afterwards by treaty; but the power of Congress to legislate over the Territories is granted in so many words by the Constitution. Art. 4, sec. 3, clause 2.

And it is further therein provided that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

In my opinion Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument. And no such power as that involved in the act of Congress under consideration is conferred by the Constitution, nor is any clause pointed out as its legitimate source. I regard it of vital consequence, that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices.

The doctrine of *cy-près* is one of construction, and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it

cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in Congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this act of Congress is in contravention of specific limitations in the Constitution; unauthorized, expressly or by implication, by any of its provisions; and in disregard of the fundamental principle that the legislative power of the United States as exercised by the agents of the people of this republic is delegated and not inherent.

RYAN *v.* UNITED STATES.

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

No. 1307. Submitted April 21, 1890. — Decided May 19, 1890.

The facts stated by the court constituted a valid contract, mutually binding on the parties, for the sale to the United States of a tract of land in Michigan for purposes of fortification and garrison, as specified in the act of July 8, 1886, 24 Stat. 128, c. 747.

In the absence of the Secretary of War the authority with which he was invested by that act could be exercised by the officer who, under the law, became for the time Acting Secretary of War.

Under the Michigan statute of frauds it is not essential that the description in a memorandum for the sale of real estate should have such particulars and tokens of identification as to render a resort to extrinsic evidence needless when the writing comes to be applied to the subject matter; but it must be sufficient to comprehend the property which is the subject of the contract, so that, with the aid of extrinsic evidence, without being contradicted or added to, it can be connected with and applied to the tract intended, to the exclusion of other parcels.

A complete contract, binding under the statute of frauds, may be gathered from letters, writings and telegrams between the parties relating to its subject matter, and so connected with each other that they may fairly be said to constitute one paper relating to the contract.

Statement of the Case.

If an offer is made by an owner of real estate in writing to sell it on specified terms, and the offer is accepted as made, without conditions, without varying its terms, and in a reasonable time, and the acceptance is communicated to the other party in writing within such time, and before the withdrawal of the offer, a contract arises from which neither party can withdraw at pleasure.

When, under a contract to sell real estate, the vendor delivers to the vendee a deed of conveyance for the purpose of examination, its recitals, if the memorandum of sale is not fatally defective under the statute of frauds, are competent for the purpose of showing the precise locality of the parcel referred to in the memorandum.

When one assumes by his deed to convey a title to real estate, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire and assert an adverse title, and turn his grantee over to a suit upon the covenant for redress.

In an action of ejectment, involving merely the legal title, the plaintiff is entitled to recover upon showing a good title as between him and the defendant.

EJECTMENT. The case, as stated by the court, was as follows:

This action of ejectment was brought to recover certain lands in the village of Sault Sainte Marie, Chippewa County, Michigan, of which the United States claims to be the owner in fee, and the possession of which is alleged to be wrongfully withheld from the government by the defendant, Thomas Ryan. They are described in a deed from Ryan and wife to the United States, of date December 18, 1886, and recorded in the proper local office on the 25th of May, 1887. At the conclusion of the evidence the jury, under the direction of the court, returned a verdict for the government, and a judgment was entered against the defendant. The present writ of error brings that judgment here for review. The principal question to be determined is whether the title to the premises in dispute ever passed from the defendant to the government. It is claimed that the negotiations in reference to the sale of these premises never resulted in a binding contract between the United States and the defendant; that the deed of December 18, 1886, although signed and acknowledged by the defendant and his wife, was delivered to the officers of the government, pending such negotiations, only for examination,

and was not placed upon record with the assent, express or implied, of the grantors; that the proposal made in Ryan's name for the sale of the property was withdrawn by him before it was accepted, and before the above deed was filed for record; and that, therefore, no title passed to the United States. Each of these propositions is controverted by the government.

The facts upon which these several propositions depend are very numerous, and are to be gathered principally from letters and telegrams between the parties and their agents. They are, substantially, as follows:

By the third section of an act of Congress, approved July 8, 1886, 24 Stat. 128, c. 747, the Secretary of War was authorized to sell the military reservation known as Fort Brady, in the village of Sault Sainte Marie, in the State of Michigan, except certain portions thereof. By the fourth section he was authorized to purchase grounds in or near the same village, suitable and sufficient for fortification and for garrison purposes, and to construct thereon the necessary buildings, with appurtenances, sufficient for a four-company military post, to be known as Fort Brady, in accordance with estimates to be prepared by the War Department; and the sum of one hundred and twenty thousand dollars was appropriated to enable the Secretary to comply with the provisions of the act. That section contained the proviso "that the title to lands authorized to be purchased under the fourth section of this act shall be approved by the Attorney General." It was declared by the sixth section that section three should not take effect until the purchase of the new site provided for in section four should have been effected.

By direction of the Secretary and in execution of the above act, a board of officers of the army was constituted, to meet at Fort Brady, Michigan, on the 7th of September, 1886, or as soon thereafter as was practicable, for the purpose, among others, of selecting for purchase suitable and sufficient grounds as indicated in the fourth section of the above act of Congress. The board was directed to report by telegraph to the Adjutant General with its recommendation for the approval of the Sec-

retary of War, as soon as a new site was selected. Shortly before the day fixed for its convening, Ryan and his attorney, Mr. Cady, met in Detroit, and during their interview in that city some conversation was had between them in relation to the meeting of this board, and the purposes for which it was to be convened. It appears that for a number of years prior to that date this property had been mentioned in military circles and among citizens as a possible site for a fort.

On the 7th of September, 1886, Cady telegraphed from Sault Sainte Marie to Ryan at Detroit, Michigan: "Telegraph price to me of southwest quarter of southwest quarter of section 6 and southeast quarter of southeast quarter of section 1 for Fort Brady. Answer immediately." To this telegram Ryan responded on the same day under his own signature: "Twelve thousand dollars." On the next day Ryan, by Cady, telegraphed to the board convened by the Secretary of War: "I am instructed by Mr. Ryan to offer the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 6 and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 1, (both in towns. 47 N. of ranges 1 E. and W.), containing eighty (80) acres, more or less, if sold together, for the sum of twelve thousand dollars ($12,000). Although not authorized yet, I assume that Mr. Ryan would sell any portion of said lands at a price in ratio to the above (*i.e.*, $150 per acre)." To this telegram was appended a postscript: "P. S. The above offer is subject to the opening of Easterday Avenue along the south line." Under date of September 9, 1886, the president of the board of officers telegraphed to the Adjutant General at Washington: "The board recommends for purchase the two adjoining forty-acre tracts on the hill, half mile due south of west end of canal, divided through the centre of length by meridian of Sault Ste. Marie, aggregating about seventy-five acres; price, twelve thousand dollars." General Drum, Acting Secretary of War, under date of September 11, 1886, made the following endorsement on this telegram: "Under ordinary circumstances action in this case would have been deferred until the return of the Secretary of War or the Lieutenant General. In view, however, of the importance of the selection of this site, and of the fact that inaction here would delay further action by the

board, which is now in Michigan awaiting reply, the recommendation of the board as contained in the within telegram is approved. The board will be advised by telegraph of such approval." On the same day General Kelton, Acting Adjutant General, telegraphed to Lieutenant Colonel Abbot, president of the board: "Despatches nine (9) and eleven (11) instant received. The Secretary of War approves the recommendation of board for purchase of two (2) tracts designated at the price of twelve thousand dollars ($12,000). Acknowledge receipt. No further instructions." This telegram was received; for on the 11th of September, 1886, Lieutenant Colonel Abbot, the president of the board of officers, wrote from Fort Brady to Ryan at Sault Ste. Marie: "You are hereby notified that the Acting Secretary of War has approved the recommendation of the board of officers now in session at this post, that your proposal dated September 8, 1886, be accepted, viz., for the sale of certain tracts of land described in your proposal as follows: 'The S. W. ¼ of the S. W. ¼ of sec. 6 and the S. E. ¼ of the S. E. ¼ of sec. 1, subject to the opening of Easterday Avenue along the south line, for twelve thousand dollars.'" This letter was first delivered to Mr. Cady, and was by him delivered to Ryan within three or four days after it came to his hands. The receipt of it by Ryan is not disputed.

On the 30th of September, 1886, the Acting Secretary of War wrote to Colonel Poe, one of the board: "The recommendation of the board, approved by the department, selects a tract of about 75 acres of land at Sault Ste. Marie, owned by Thomas Ryan, as the new site for Fort Brady, at the proposed price of $12,000. Papers on file show Mr. Ryan's address to be Michigan Exchange Hotel, Detroit. Please take the proper steps without delay to collect and forward to this department the necessary deeds and other title papers for the conveyance of this land to the United States for examination by the Attorney General, as required by law. General Orders 47, H'dq'rs of Army, A. G. O., of 1881, publishes regulations of the Department of Justice concerning such title papers, a copy of which will be forwarded to you by mail." Under

date of October 4, 1886, Mr. Cady wrote to the Adjutant General of the Army at Washington: "On the 11th ulto. Mr. Thomas Ryan, of Sault Ste. Marie, Mich., was notified by Henry L. Abbot, Lieutenant Colonel of Engineers, president of board, that his offer of certain lands as a site for Fort Brady had been accepted. I have the honor of acting for Mr. Ryan in preparing his title for the Attorney General. Will you please furnish me with a copy of the printed directions for preparing abstracts for the use of the government? Any communication relative to the matter should be addressed to W. B. Cady, Sault Ste. Marie, Mich." Two days thereafter, October 6, 1886, Colonel Poe wrote to Ryan: "I have received from the War Department the following letter of instructions, viz.: [Letter above of September 30, 1886]. I have, therefore, to request that you will proceed as rapidly as possible with the preparation of the requisite papers, and to aid you in this I enclose herewith a copy of General Orders No. 47, Headquarters of the Army, Adjutant General's Office, May 13, 1881, above referred to. Please acknowledge receipt of this communication and inform me as to how soon you can begin the preparation of the papers in question." The general order referred to in this letter was one issued from the Headquarters of the Army, by direction of the Secretary of War, and embodying certain regulations established by the Department of Justice for the guidance of those drawing conveyances, making abstracts, or collecting evidences of title to land in cases in which it is the duty of the Attorney General to pass upon the validity of such title. Among other requirements was one to the effect that a deed to the United States should be acknowledged according to the laws of the State where the land lies, and one (XX) directing that before any papers relating to title were sent to the Department of Justice for examination they should be submitted to the proper District Attorney of the United States.

Under date of October 13, 1886, Mr. Cady thus acknowledged the receipt of Colonel Poe's letter of the 6th inst. to Thomas Ryan, saying: "I am acting for Mr. Ryan in preparing his title for the inspection of the Attorney General. I expect to

be able to send on the necessary papers in from six to eight weeks." Some time having passed without anything being heard either from Mr. Ryan or from his attorney, Cady, Colonel Poe, under date of December 10, 1886, wrote to the latter urging him to forward "the title papers to the Ryan property purchased by the United States for a new site for Fort Brady." To this letter Mr. Cady replied, under date of December 11, 1886, stating that he had met with unexpected delay in obtaining certain papers, and saying: "If I understand directions, I am to first send papers to G. Chase Godwin, U. S. District Attorney for this district. Do you wish them first sent to you? Also, should the deed from Ryan to the government be recorded before forwarding? Will you honor me by answering the above questions at once? I expect to start for Detroit on the 20th inst., and if you wish to see the papers I will bring them down for your examination and send to Mr. Godwin from Detroit."

The next letter, in the order of their dates, which appeared in evidence, was one under date of December 22, 1886, from Colonel Poe to Mr. Godwin, United States District Attorney at Grand Rapids. In that letter the writer said: "In accordance with paragraph XX of the circular of the Attorney General of the United States, dated October 27, 1875, W. B. Cady, Esq., attorney for Mr. Thomas Ryan, of Sault Ste. Marie, Michigan, visits you for the purpose of submitting the title papers to a tract of land which the government desires to purchase for a new site for Fort Brady. The War Department is anxious to complete the transaction as soon as possible, and your early action would greatly facilitate matters." This letter was delivered to Mr. Godwin by Mr. Cady, the latter having with him abstracts, certified copy of deeds, maps, etc., relating to the title to the property. On the same day as the letter last referred to, Cady & Cady wrote to the Adjutant General, at Washington, enclosing the papers, "relating to Thomas Ryan's sale to the government," including a "deed of Thomas Ryan *et ux.* to U. S. to carry out above sale," and "authority of Thomas Ryan and E. K. Roberts, cashier, relating to your draft, etc." Under date of January 3, 1887,

Mr. Cady addressed a letter to the District Attorney, in which he said: "I enclose deed, etc., in the Ryan sale. This makes papers complete. I would respectfully call your attention to the following: 1st. I enclose two deeds of lands in question, one in exact conformity to Mr. Ryan's bid, the other reserving a strip of land 33 feet wide off east side for street purposes; 2d. That the dower right, if any, of Mrs. Warner is cut off by the state tax deeds held by Mr. Ryan. Most respectfully asking you to consider the paper at as early a date as possible and to communicate to me the results, I submit the papers to your inspection. In conversation with General Poe to-day he seemed quite certain that the papers would be sent to him after your examination of them, and that he should send them to the War Department, you sending your report to the Attorney General. Would you kindly inform me what course you have decided to follow in the matter?"

Among the papers enclosed with this letter was a deed, duly executed and acknowledged, by Ryan and wife, for the premises in dispute. It contained a covenant that the grantors were seized of the premises in fee simple, and would warrant and defend the same against all lawful claims whatsoever. That deed excepted a strip off the south side of the southeast quarter of the southeast quarter of section one in township 47 N., thirty-three feet in width, reserved for Easterday Avenue, and, also, a strip off the south side of the southwest quarter of the southwest quarter of section six in same township, of like width, reserved for the same avenue, and a strip of like width, off the east side of the latter forty acres, for street purposes. During the latter part of January or first of February, Cady received a letter from the District Attorney asking for further information in regard to what was called the Warner dower, and in respect to a mortgage held by the Citizens' Bank of Detroit.

Under date of March 18, 1887, all the papers were forwarded by the District Attorney to the Attorney General. In that letter the former expressed the opinion that the title to the lands was sufficient. On the next day, March 19, 1887, the District Attorney wrote to Cady: "Yours of the 16th inst.

received. The abstract and accompanying papers in the matter of the title to the Fort Brady reservation proposed site have been forwarded to General Poe, together with my opinion regarding the same. I have recommended and advised that the title is good and complete." The papers referred to in this letter were immediately forwarded by General Poe to the Secretary of War. The latter, under date of March 28, 1887, referred them, together with the deed of conveyance by Ryan and wife to the United States, to the Attorney General, with the request that the War Department be advised as to the validity of the title to the lands in question, and whether the above deed was sufficient to vest the title in the United States.

While these papers were in the hands of the Attorney General, Brennan & Donnelly, attorneys for Ryan, wrote to the Secretary of War: "Mr. Thomas Ryan of Sault Ste. Marie, in this State, with whom your department had some negotiations some months ago for the purchase of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 6, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 1, in said town., as a site for Fort Brady, has instructed us to say that he has arranged for a different disposition of the property, and further negotiations are unnecessary. Will you please return to him all papers submitted to the government concerning said property?" This document was referred by the Secretary to the Lieutenant General of the army, who was informed that the title papers had been forwarded to the Attorney General, and that a copy of the document had been sent to the latter. Under date of April 9, 1887, the Attorney General returned the papers to the Secretary of War. They were sent again to the Attorney General on the 16th of April, 1887, the latter being advised by the Secretary of War that their return was not desired, and that the opinion of the Attorney General was desired as to the validity of the title to these lands, as to the sufficiency of the deed to vest the title in the United States, and as to whether there was a sufficient agreement in writing to bind Ryan notwithstanding his attempted withdrawal from the agreement. On the 18th of May, 1887, the Attorney General

returned the papers to the Secretary of War, with a written opinion to the effect that the deed was sufficient to pass title to the United States provided nothing had transpired since its execution to affect the title. He advised the Secretary of War that information on that point should be obtained before completing the purchase price, by having search made for liens, incumbrances, etc., down to that date. The Attorney General, on the next day, transmitted the deed of Ryan and wife to the District Attorney, instructing him to continue the search for liens, incumbrances, etc., subsequent to the date of the deed, and saying: "Should the title be found to be unaffected thereby and to remain unchanged, you are instructed to have the deed recorded, after which payment of the purchase money will be made in the usual way through the War Department. Please attend to this promptly and report your doings under these instructions as early as practicable."

On the 28th of May, 1887, the District Attorney wrote to the Attorney General, acknowledging the receipt of the latter's letter of the 19th, and saying: "I found upon investigation that he had got a deed from one Anne E. Warner, who made claim of dower, but which claim had no force, I thought, but I found that on the 4th of April Thomas Ryan and wife deeded to the village of Sault Ste. Marie a strip of land 40 feet wide off the east side of the southwest quarter of the southwest quarter of section 6, and 40 feet off the west side of the southeast quarter of the southeast quarter of section one, making together a strip 80 feet wide, for street purposes. I hereto attach a slip, with the land marked out, showing you what has been done to affect the title to the land. Notwithstanding all this, I recorded the deed running to the United States. Perhaps I should explain further. Since this land was contracted to the government a very remarkable business boom has struck Sault Ste. Marie, and Mr. Ryan claims that the land deeded to the government is worth fifty or sixty thousand dollars. He has made a claim that the government was dealing with the expectation of purchasing it, and assuming that it had not been accepted as yet, but was under

consideration by the government, while I supposed you had accepted his offer to sell the land for $12,000. This being the situation, I took the responsibility of recording the deed, notwithstanding that eighty feet had been deeded away, thinking that it would be the safest way to secure the government, as the property is unquestionably worth more than $12,000, although the conveyance of the street should be valid. There is no doubt that the village officers knew of such contract when made, and no doubt exists in my mind but the village officers prefer that the government should own this property. The facts seem to be that Thomas Ryan had other lands adjoining this, or in the vicinity, which he had sold for fabulous prices, and he has no doubt promised to other parties the opening of this street, and in pursuance of this fact has made this deed. As this now stands the title of the land is in the government, except only that Ryan has conveyed away this 80-foot strip. I shall be pleased to take any steps that may be directed in this matter." Under date of June 9, 1887, the Attorney General transmitted to the Secretary of War the letter of the District Attorney, in which he said: "It appears that since the date of that deed, and before the same was recorded, namely, on the 4th of April, 1887, the said Ryan and wife deeded a small part of the premises to the village of Sault Ste. Marie for the purpose of a street. Notwithstanding this, the United States attorney thought it advisable to put the deed to the United States on record. By the law of Michigan an unrecorded deed is 'void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded.' If the conveyance to the village has been first duly recorded, and is otherwise within the provision of law just adverted to, its title to so much of the premises as is granted thereby would doubtless be superior to a title derived under the deed to the United States. However, should the use of that part of the premises for the purpose of a street be unobjectionable, the failure to derive the title thereto under such deed may be unimportant."

Statement of the Case.

The Lieutenant General of the Army recommended that the ground be not purchased unless the 80-foot right of way referred to be given up by the village. This recommendation was approved and the papers were referred to the Chief of Engineers, Colonel Poe, to ascertain whether the village would relinquish the strip 80 feet wide. The Secretary and the Lieutenant General decided "to await further action of the village council of Sault Ste. Marie, that the rights of the United States should be maintained, and that payment must be withheld until the roadway is relinquished to the government, thus making the title of the United States good to the whole tract conveyed by the deed of Thomas Ryan to the United States." The result desired in this particular was attained; for by deed of May 22, 1888, the village, which had then become a city, relinquished to the United States all the rights that it had obtained from Ryan and wife under their deed to it of April 4, 1887.

It was admitted at the trial that previous to the action of the village council authorizing said deed, namely, May 22, 1888, Major Adams, on behalf of the United States, made a tender to Ryan of the sum of twelve thousand dollars. Before this tender, Adams had an understanding with the local authorities that the village would make the relinquishment, which they shortly thereafter did.

It appeared in evidence that Ryan was not the holder of the legal title at the beginning of the negotiations between him and the government. On the 6th of June, 1883, he and his wife conveyed to James R. Ryan by deed, which was recorded, without any reservation therein for streets. By deed of June 16, 1883, recorded June 19, 1883, James R. Ryan and wife, for the consideration of one dollar "and other considerations," conveyed by quit-claim deed ten acres of these lands to Remegius Chartier, S. J., and his successors and assigns, "to be forever the property of the Fathers of the Society of Jesus for the purpose of education and other works, in accordance with their constitution, with the power to sell and dispose of the same to accomplish the same ends in case circumstances should require it; together with all and singular

the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said parcel of land hereinbefore described to the said party of the second part, and to his successors, heirs and assigns to the sole and only proper use, benefit and behoof of the said party of the second part, [his] successors, heirs and assigns forever." Chartier, for the consideration of one dollar, by deed of November 26, 1886, recorded November 29, 1886, reconveyed said parcel to James R. Ryan. The latter, by deed of December 6, 1886, recorded December 13, 1886, conveyed to Thomas Ryan the same premises which the latter and wife had conveyed by their deed of June 6, 1883.

Other facts are set out in the bill of exceptions, but the above are all that are necessary to be stated.

Mr. Michael Brennan, *Mr. John C. Donnelly* and *Mr. Isaac Marston* for plaintiff in error.

I. There was no contract between the parties valid under the statute of frauds of Michigan. *Gault* v. *Stormount*, 51 Michigan, 636, and cases cited.

II. There was no mutuality in the alleged contract, which was essential to its validity. *Wilkinson* v. *Heavenrich*, 58 Michigan, 574; *Richardson* v. *Hardwick*, 106 U. S. 252.

III. An acceptance by the Secretary of War was necessary before the proposal could become a binding contract. *Gilbert & Secor* v. *United States*, 8 Wall. 358; *Parish* v. *United States*, 8 Wall. 489; *Filor* v. *United States*, 9 Wall. 45; *United States* v. *Burns*, 12 Wall. 246.

IV. Until delivery and acceptance of the deed, either party could terminate the negotiations, and Ryan did, actually, terminate them.

V. The papers were submitted to the United States only for inspection. This was not a delivery, transferring title. *Wadsworth* v. *Warren*, 12 Wall. 307; *Graves* v. *Dudley*, 20 N. Y. 76; *Parker* v. *Parker*, 1 Gray, 409; *Murdoch* v. *Gilchrist*, 52 N. Y. 242; *Eggleston* v. *Wagner*, 46 Michigan, 610; *Taft* v. *Taft*, 59 Michigan, 185; *Pennington* v. *Pennington*,

75 Michigan, 600; *McCullough* v. *Day*, 45 Michigan, 554; *Martz* v. *Eggemann*, 44 Michigan, 430; *Patrick* v. *Howard*, 47 Michigan, 40; *Hyne* v. *Osborn*, 62 Michigan, 235; *Hendricks* v. *Rasson*, 53 Michigan, 575; *Stevens* v. *Castel*, 63 Michigan, 111.

VI. Chartier, the trustee in the deed from Ryan, had no power to reconvey the tract to him, and consequently nothing passed by his deed. 2 Howell's Stats. § 5565, § 5573, subd. 5; § 5583; *Methodist Church* v. *Clark*, 41 Michigan, 730, 739; *Pierce* v. *Grimley*, 43 N. W. Rep. 932. And this may be taken advantage of in ejectment. *Doolan* v. *Carr*, 125 U. S. 618; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, 698.

Mr. Solicitor General for defendants in error.

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

No question is made in this case, as in view of the decisions of this court and the statutes of Michigan there could not properly be, in respect to the right of the United States, by purchase, to acquire the premises in dispute for the purposes of fortification and garrison expressed in the act of July 8, 1886. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Jones*, 109 U. S. 513; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 154; 2 Howell's Anno. Stats. Mich. §§ 5202, 5203. Nor can it be doubted that what was done by the Secretary of War and by other officers of the government acting under his direction was within the limits of the authority conferred by that act. It is equally clear that in the absence of the Secretary the authority with which he was invested could be exercised by the officer who, under the law, became for the time Acting Secretary of War. Rev. Stat. § 179.

But the defendant insists that the alleged contract between him and the government was not valid or binding under the statute of frauds of Michigan, which provides that "every contract for the leasing for a longer period than one year, or for the sale of any lands, or interest in lands, shall be void,

unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made, or by some person by him lawfully authorized by writing." Howell's Stat. § 6181. His contention is, that the writings, including telegrams, which are relied upon to establish a valid, binding contract, do not, in themselves, show that the lands therein referred to are the lands in question, and, therefore, no written memorandum, such as the statute requires was executed. In support of this view we are referred to *Gault* v. *Stormount*, 51 Mich. 636, 638. In that case, the memorandum was only a receipt, given at Wyandotte, Michigan, by the party selling, showing that he had received from the party proposing to buy "the sum of $75 as part of the principal of $1050 on sale of my house and two lots on corner of Superior and Second streets in this city." This receipt was held to be insufficient to answer the requirements of the statute, for the reason that "though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined;" the court adding that "a memorandum, to be sufficient under the statute, must be complete in itself, and leave nothing to rest in parol." It will be observed that the memorandum in that case was not rejected as insufficient because of any want of fulness in the description of the premises, nor is there any intimation that such description, (if the case had turned upon that point,) might not have been aided by extrinsic parol evidence, identifying the premises intended to be sold. That case did not in any degree modify the decision in *Eggleston* v. *Wagner*, 46 Mich. 610, 618, where the court said: "A further objection is that the proposal did not sufficiently describe the real estate to satisfy the statute of frauds. The general principle is not questioned. The degree of certainty with which the premises must be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are all harmonious. But they agree in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the

writing comes to be applied to the subject matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property. The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the statute."

Did the papers which passed between the parties, constituting the memorandum of the transaction, contain such a description of the lands in dispute as was sufficient, in connection with extrinsic evidence not contradictory of nor adding to the written description, to meet the requirements of the Michigan statute of frauds? We say "the papers," because the principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract. *Beckwith* v. *Talbot*, 95 U. S. 289, 292; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Coles* v. *Trecothick*, 9 Ves. 234, 250; *Cave* v. *Hastings*, 7 Q. B. D. 125, 128; *Long* v. *Millar*, 4 C. P. D. 450, 456.

Turning now to the evidence in the case there would seem to be no ground for doubt as to the sufficiency of the description of the lands. Cady's telegram of September 7, 1886; Ryan's response thereto on the same day; his written proposal through Cady to the board of army officers on the 8th; and the formal written notification to Ryan on the 11th of September, by the president of the board, of the acceptance by the Acting Secretary of War of his proposal of the 8th, show that the lands which the defendant proposed to sell to the United States, and which the government agreed to buy, for the sum of $12,000, was the "S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 6, and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 1, subject to the opening of Easterday Avenue along the south line." And this

description of the premises must be taken in connection with the act of Congress, showing that the authority given to the Secretary of War was to purchase grounds "in or near the village of Sault Ste. Marie." It is said that neither the telegram of Cady to Ryan nor the latter's response thereto identified the lands by naming any township or range. But Ryan's written proposal through Cady to sell did give the township and range, and the government's written acceptance of the 11th of September referred to that proposal by its date of September 8, 1886. It is well said by the Solicitor General that, in the absence of any evidence to show it, or to raise doubt upon the subject, the presumption is not to be indulged that Ryan owned, in or near the village of Sault Ste. Marie, two tracts of land in different townships and ranges which would answer the description of "southwest quarter of southwest quarter of section 6, and southeast quarter of southeast quarter of section 1." The only fact which gives even plausibility to the contention we are considering is the absence from the written proposal of Ryan, as well as from the written acceptance of the government, of any express statement as to the particular village in which the lands were situated. But this defect, if it be one, is supplied by the communication of Colonel Poe, of October 6, 1886, in which he transmits to Ryan the letter of instructions from the War Department of September 30, 1886, in which the lands that the board recommended to be bought — the recommendation alluded to in the government's letter of acceptance of September 11, 1886, addressed to Ryan — are referred to as containing "about 75 acres of land at Sault Ste. Marie." Besides the deed executed by Ryan and wife, and delivered by them to the United States, describes the lands as being "in the village of Sault Ste. Marie." Whatever may be said as to the effect of this deed in passing title, if it was delivered only for purposes of examination, or if the previous memorandum of sale had been for any reason fatally defective under the statute of frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing the precise locality of the property which the memorandum of sale was intended to embrace.

Jenkins v. *Harrison*, 66 Alabama, 345, 355, and authorities there cited.

For these reasons we are of opinion that the written proposal of the defendant to sell the premises in dispute at the price of twelve thousand dollars, and the written acceptance of that proposal by the government, through its authorized officers, constituted a valid contract, mutually binding upon the parties under the Michigan statute of frauds. In this view, the notification given by the defendant on the 1st of April, 1887, to the Secretary of War, that he had arranged for a different disposition of the property, and that further negotiations were unnecessary, did not affect the rights of the government. A mere offer to sell real estate, upon specified terms, may undoubtedly be withdrawn at any time before its acceptance. Such is the general rule. But if the offer be accepted without conditions, and without varying its terms, and the acceptance be communicated to the other party without unreasonable delay, a contract arises, from which neither party can withdraw at pleasure. Was there an unreasonable delay upon the part of the government in accepting the defendant's offer? Clearly not. The acceptance was within a few days after the offer. Nor, after the acceptance, was there any such delay by the government as entitled the defendant to abandon the contract, or to treat it as rescinded. He was informed by the act of Congress, of which he was bound to take notice, that the approval of the title by the Attorney General was a condition precedent to the payment by the Secretary of War of the price for the lands. He recognized the right of the government to have the title examined. He was furnished with a copy of the regulations prescribed by the Department of Justice for the examination of the titles to property where such titles were to be passed upon by the Attorney General. The defendant himself was dilatory in furnishing the necessary abstracts and papers relating to the title. And while the Attorney General was engaged in the examination of the title, he assumed to withdraw from the contract, and to convey a part of the premises to the village of Sault Sainte Marie. The delay which occurred after that

conveyance came to the knowledge of the government was necessary in order that it might, before paying for the lands, secure a reconveyance of such part thereof as had been conveyed by Ryan to the village. That result being obtained, the government made the tender of the full amount it agreed to pay.

It is said, however, that the deed was delivered to the officers of the government only for the purpose of an examination of the title, and that they had no right to put it on record. This view has been pressed upon the theory that there was no valid contract upon the part of Ryan for the sale of the land, and that he had the right to withdraw his proposal to sell at the time he assumed to do so. If he had not been bound by contract to sell the lands, at the time he withdrew his offer, the placing of the deed upon record would have been unauthorized, and might not have passed the title as between the defendant and the United States. In the case supposed the government, upon being notified of the withdrawal of the offer to sell, would have been under a duty to return the deed. But we have seen that long before such attempted withdrawal there was a valid contract that bound the parties, the one to sell and the other to buy the lands at an agreed price. The attempt to withdraw the offer did not, therefore, impair the rights of the government. The deed was delivered in execution of that contract, with the intention that it should become presently operative when the Attorney General approved the title, and the government had the right to put it on record when the title was approved by that officer. The title was approved by him, and thereupon the government became bound to pay the price it agreed to pay for the lands. The delay in making the tender was due to Ryan's efforts to evade or defeat his contract.

There are one or two other matters that require to be examined. It is said that the defendant was not the owner of these lands at the time when, according to the views already expressed, there arose a binding contract between him and the United States. But the title was in him prior to 1883, and was again in him on the 6th of December, 1886, as well

as on and after December 18, 1886, when he and his wife executed and acknowledged the deed of the United States. If he chose to bind himself by contract to sell land that he did not at the time own, but the title to which he subsequently acquired and conveyed by general warranty, he will not, in an action of ejectment based upon the title so conveyed, be heard to say that he had no title at the time he agreed to sell.

It is, also, said that the deed from Remegius Chartier, S. J., to James R. Ryan, for ten acres of these lands, and the deed from James R. Ryan and wife to Thomas Ryan were void, as to that ten acres, because the previous deed of James R. Ryan and wife to Chartier showed, upon its face, that said ten acres were the property of "The Fathers of the Society of Jesus for the purposes of education and other works in accordance with their constitution." In the view we take of this question it is unnecessary to determine the precise nature of the interest, if any, acquired by that society in the ten acres conveyed to Chartier, nor to determine whether the court below correctly interpreted the words "absolutely void" in section 5583 of the Statutes of Michigan, which declares that "when the trust shall be expressed in the instrument creating the estate, any sale, conveyance or other acts of the trustees, in contravention of the trust, shall be absolutely void." The legal title was in Chartier, his successors and assigns, in trust for the purposes of education and other works in accordance with the constitution of his society, "with power to sell and dispose of the same to accomplish the same ends in case circumstances should require it." He thus had the power, under some circumstances, to sell and convey. He did sell and convey by a deed which did not disclose upon its face a violation of the trust, and his grantee, holding then the legal title to the entire premises in dispute, conveyed to the defendant, who with his wife covenanted in their deed to the United States that they were seized of the premises in fee simple, free from all incumbrances whatever, and that they, and their heirs, executors and administrators, would warrant and defend the title against all lawful claims whatsoever. The title acquired

by him, after he contracted to sell to the United States, enured to the benefit of his grantee. He is estopped to dispute his grantee's right of possession, or to dispute, as between him and his grantee, the title he assumed to convey with general warranty. In *Van Rensselaer* v. *Kearney*, 11 How. 297, 325, it was said that the principle deducible from the authorities was "that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies." See, also, *Bush* v. *Cooper*, 18 How. 82, 85; *Crews* v. *Burcham*, 1 Black, 352, 357; *Moore* v. *Crawford*, 130 U. S. 122, 130; *Jackson ex dem. Danforth* v. *Murray*, 12 Johns. 201. And such is the established doctrine of the Supreme Court of Michigan, which said, in *Smith* v. *Williams*, 44 Michigan, 240, 242 — an action of ejectment — "that when one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenant for redress." See also *Case* v. *Green*, 53 Michigan, 615, 620.

The United States has established a good title and right as against the defendant, and that is sufficient to entitle it to judgment in this action of ejectment.

These considerations require an affirmance of the judgment below and it is so ordered.

Syllabus.

KNEELAND v. AMERICAN LOAN AND TRUST COMPANY.

KNEELAND v. BALLOU.

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

Nos. 252, 1537. Argued April 3, 7, 1890. — Decided May 19, 1890.

A party bidding at a foreclosure sale of a railroad makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.

Where not concluded by the terms of a decree of foreclosure of a railroad, any subsequent rulings which determine in what securities, of diverse value, the purchaser's bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court.

The appointment of a receiver of a railroad vests in the court no absolute control of the property, and no general authority to displace vested contract liens, and when a court makes such an appointment it has no right to make the receivership conditional on the payment of any unsecured claims except the few which by the rulings of this court have been declared to have an equitable priority; it being the exception and not the rule that the contract priority of liens can be displaced.

A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are necessarily burdens on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership.

When a court appoints a receiver of railroad property it may, in the administration, contract debts necessary for operating the road, or for labor, supplies or rentals, and make them a prior lien on the property.

When, at the instance of a general creditor, a receiver of a railroad and its rolling stock is appointed, and among the latter there is rolling stock leased to the company with a right of purchase, and, there being a deficit in the running of the road by the receiver, the rental is not paid, and the lessor takes possession of his rolling stock, his claim for rent is not entitled to priority over mortgage creditors on the foreclosure and sale of the road under the mortgage.

When the holder of a first lien upon the realty alone of a railroad company

asks a court of chancery to take possession not only of the realty but also of personal property used for the benefit of the realty, that personalty thus taken possession of and operated for the benefit of the realty should be first paid in preference to the claim secured by the realty.

Where, on the application of the trustee of a railroad mortgage, a receiver is appointed and takes possession of the road and of its rolling stock, and among the latter is rolling stock which the company was operating under lease, and the receiver continues to operate it, its rental at the contract price, (and not according to its actual use,) if not paid from earnings will be a charge upon the proceeds of the sale under the foreclosure of the mortgage prior to the mortgage debt.

In equity. The case is stated in the opinion.

Mr. John M. Butler for appellant.

Mr. James L. High, for Paul, trustee, and the United States Rolling Stock Company, appellees.

Mr. Bluford Wilson for R. S. Grant, The American Loan and Trust Company, and the Grant Locomotive Works, appellees.

Mr. Henry D. Hyde (with whom was *Mr. Samuel Williston* on the brief) for the American Loan and Trust Company and E. B. Phillips, trustee, appellees.

Mr. Robert G. Ingersoll (with whom was *Mr. Clarence Brown* on the brief) for appellant.

Mr. Justice Brewer delivered the opinion of the court.

These cases were argued and are considered together, the questions involved being similar, and growing out of the same foreclosure suits. In a general way it may be stated that they arise between a purchaser at foreclosure sales of certain railroad property and intervening creditors. The initial question is as to the right of appellant, the purchaser, to his appeal. It is urged that a purchaser at a sale under a decree has no right to appeal from its terms. He takes under it. His purchase is a voluntary act, and, coming in voluntarily to take under a decree, he may not challenge that under which he takes. The contention of appellant is that his attitude is not thus limited; that his appeal is not from the decree of sale

under which he purchased, but from orders made thereafter respecting his bid, the modes of payment thereof, and the debts to which it should be applied, matters in which he was interested, and in respect to which, by the terms of the decree of sale, he was given a right of appeal; and that such right springs not alone from the grant of the right of appeal, but also from his relations to the matters determined and adjudged in these subsequent proceedings, and by the final decree. For a correct solution of this question a statement more in detail of the facts is essential.

Decrees of foreclosure, for there were separate divisions, the Toledo and the Saint Louis divisions, separate suits and several mortgages, were entered on the 12th day of November, 1885. It is sufficient, however, to notice the proceedings in one, for there was no substantial difference between the cases. It contained these provisions: "The complainants herein and the purchaser or purchasers at the foreclosure sale under this decree reserve the right to appeal from any orders and final decrees made by the court, directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein and hereby foreclosed, if they shall be so advised." "In making payment of any surplus of said purchase-money left, after full payment of the court and receiver's indebtedness, the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinabove provided, each such coupon and bond being received by the master for such sum as the holder thereof is entitled to receive under the distribution herein provided and according to the priorities herein adjudged." So that by the decree the bidders at the sale were notified in advance of their right to be heard, both in the trial and appellate courts, upon the question of what amounts should be paid to intervening creditors and what in the bonds secured by the mortgages. Common experience is that intervening claims have to be paid in cash, while the mortgage bonds of a defaulting and insolvent

corporation are generally purchasable much below par. In this case the enormous disproportion between the amount of outstanding bonds and the value of the property suggests that those bonds must have been purchasable at a very low price; and, therefore, that the question of the amount of intervening claims finally to be charged upon the property was a matter affecting materially the interests of the purchaser, and the right to be heard upon it, one which would largely determine the amount of his bid.

Further, on February 23, 1886, when the master had reported upon the intervening claims, the appellant, among others, filed exceptions to that report, in the following words: "Come now James M. Quigley, Charles T. Harbeck, John McNab, Halsey J. Boardman and Warren D. Hobb, complainants in said causes, and committees representing bondholders holding bonds secured by mortgages on said railroad and property in said causes involved, and the Central Trust Company, trustee in the mortgages in said causes foreclosed, and Sylvester H. Kneeland, purchaser of said railroad and property sold at foreclosure sale under decrees rendered and entered in said above-entitled causes, and owner of and trustee for a vast majority of said mortgage bonds, and now except to each and every of the master's findings and report herein; and said complainants, and said purchaser, for their exceptions, assign the following causes." And in the final decree thereon the exception and allowance of appeal are stated as follows: "To this decree the said Sylvester H. Kneeland, as purchaser and trustee representing the first mortgage bondholders on said entire line of railroad, concerning both divisions from Toledo, Ohio, to East Saint Louis, Illinois, now excepts and prays an appeal to the Supreme Court of the United States, which is granted to operate as a supersedeas, on giving bond in the sum of two hundred thousand dollars, which is now filed with the American Surety Company of New York as surety, and the same is approved by the court, the court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed."

Opinion of the Court.

It appears also that in the early part of these foreclosure proceedings a committee consisting of James M. Quigley and others, was appointed to represent the bondholders, with authority to employ agents, etc. This committee, by leave of the court, was made co-complainant. It is stated by counsel (though that fact does not appear in the record) that a contract between this committee and Mr. Kneeland, with reference to a purchase in the interest and for the benefit of the bondholders, was presented to the court at the time of signing the decree of sale; and that it was upon that that the provision reserving an appeal to the purchaser was inserted. While no such agreement is found in the record, and therefore cannot be a subject of consideration, yet obviously the language in the decree of foreclosure, as well as that of confirmation, suggests that something of the kind must have been presented to the attention of the court. Upon these facts can the appellant's right to an appeal be sustained?

It was adjudged in *Blossom* v. *Milwaukee &c. Railroad Co.*, 1 Wall. 655, that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings that for some purposes he has a right of appeal. It was said by Mr. Justice Miller, in the opinion of the court, that "it is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect." "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to." It

follows from this decision that his right of appeal must extend to all matters adjudicated after his bid, which affect the terms of that bid, or the burdens which he assumes thereby, and which are not withdrawn from his challenge by the terms of the decree under which he purchases. If by the decree the sale is to be made subject to certain conditions, the purchaser acquires no right to be heard as to those conditions, either in the trial or appellate courts. Such was the ruling in *Swann* v. *Wright's Executor*, 110 U. S. 590, in which it was adjudged that, where a decree directed that a sale should be made subject to liens established or to be established, on references previously had or then pending before a master, a purchaser at such sale would not be heard either in the trial or appellate court to dispute the validity of the liens thus established. This ruling was placed distinctly on the ground that by the very terms of the decree the purchaser was to take the chances of the allowance of all the claims then pending, and, therefore, their validity and extent was a matter simply between the claimants and the parties to the mortgage; but the contingency now presented was foreshadowed in the opinion, for it says: "If the court had, in the decree of sale, reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and, therefore, not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first mortgage bondholders."

The right of purchasers at a foreclosure sale to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, was affirmed in *Williams* v. *Morgan*, 111 U. S. 684, when, as in that case, by the terms of the decree, the amount of such compensation placed an additional burden upon the purchasers. The case of *Swann* v. *Wright's Executor*, *supra*, was referred to in the opinion, and

distinguished on the ground of the express provisions in the decree as to the terms of sale. See also *Stuart* v. *Gay*, 127 U. S. 518; *Central Trust Co.* v. *Grant Locomotive Works*, 134 U. S. 207. Deducible from these authorities, as applicable to the facts in this case, and supported by sound reasons, are the following propositions: First. A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. Secondly. Where not concluded by the terms of the decree, any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court. In the case at bar, it is obvious that the amount of intervening claims to be subsequently allowed was a matter affecting the interests of the purchaser, and in terms reserved to him by the decree of sale. Supplementing and strengthening this right, reserved and substantial, is the recital in the allowance of the appeal that the party purchasing is himself a bondholder, and trustee and representative of the other bondholders; which, if not conclusive as to the extent of interest in the litigation, is not to be ignored as wholly a matter of surplusage, but ought to be assumed as correct; and which is not to be disregarded simply because the evidences of that fact are not preserved in the record.

These conclusions compel an inquiry as to the validity of the adjudications in respect to the intervening claims. They were for the rental of rolling stock, and our examination must, therefore, proceed to the facts upon which the adjudications were made: This rolling stock was obtained by the railroad company, a consolidated corporation, from certain manufacturers, the appellees herein, on contracts of purchase. These in form were leases, but, in substance, and properly so adjudged, were contracts of purchase, reserving title in the

vendors until after the payment of certain annual sums, called rents, and with the right to retake possession on default in payment. Full payment of the purchase price was never made.

The first bills under which the receiver was appointed were filed August 1, 1883, by a judgment creditor. The trustees in the several mortgages were made parties to these bills. They entered their appearance, and, neither objecting nor consenting, the receiver was appointed. Such receivership was continued four months and until December 1, 1883, at which time bills were filed by the trustees for the foreclosure of their mortgages and a receiver was appointed thereunder. The first inquiry presented is whether rentals for such period were properly given priority over the mortgage debts. That question must be answered in the negative. It is important to note these facts: First. This case is not embarrassed by any matter of surplus earnings, for it appears beyond any possibility of doubt, that from the time of the purchase of this rolling stock to the time of the final disposition of these cases the receipts did not equal the operating expenses. There was no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In fact, but little interest was ever paid on the bonds. *Railroad Co.* v. *Railway Co.*, 125 U. S. 658, 673. Second. The receivership was at the instance of a judgment creditor, and was with a view of reaching the surplus earnings for the satisfaction of his debt. It was not at the instance of mortgagees, nor were they seeking foreclosure of their mortgages. They were asking nothing at the hands of the court. They were not asking it to take charge of the property, or thus impliedly consenting to its management of the property for their benefit. Third. This rolling stock was not included in the sale, but was returned to the interveners upon orders entered prior to the decree of sale. So that only that property was sold which was covered by mortgages executed prior to any contract with the interveners with respect to rolling stock, and it is the proceeds of this sale which the interveners are seeking to appropriate. They cannot say that their property was sold, or that by such fact they have an interest in the proceeds of sale. Fourth.

The sale realized only a small proportion of the mortgage debts. There was no surplus above the mortgages for distribution to the interveners or among general creditors. In fact, only a small fraction of the mortgage debt was realized. Fifth. During these four months no demand for possession or rental was made of the receiver by any of the interveners, or any one for them, with the single exception of what may be known as the "Grant" claims, and in respect to them the demand for possession was met by refusal on the part of the receiver and a proposition for purchase at the unpaid portion of the purchase price, which proposition was accepted by such interveners, but never finally carried into effect.

Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its per

sonal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *Railroad Co.* v. *Railway Co.*, 125 U. S. 658, 673. So that these interveners acquired no right of priority by virtue of their antecedent contracts of sale.

But it is urged, and with force, that the court did not allow contract price, but only rental, and the question is asked, may a court, through its receiver, take possession of property and pay no rental for it? If it may legitimately compel the operation of the railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries, we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself; and it is in reliance on this general proposition that the interveners insist on an affirmance of the decree.

Opinion of the Court.

But as against this we are confronted with these facts: The court never made any order for the rental of this rolling stock, and the situation of all the parties during this four months receivership was this: The railroad company, with its franchises for building and operating a railroad, was in equity, whatever may have been the location of the legal title, the owner of realty, subject to certain fixed mortgage indebtedness, and of personalty, the rolling stock in question, subject to certain fixed liens. The creation, in the first instance, of those liens gave to neither lien-holder, as against the other, priority in payment otherwise than in respect to the property specially charged with those liens. The holder of the lien on the real estate could not insist that both the real estate and the personalty should be subjected to the payment of his debt, before payment to the holder of the lien on the personalty of his claim, out of the proceeds of its sale. Neither, on the other hand, could the holder of the lien on the personalty insist that his lien should be first paid out of any proceeds of the realty. Each was limited to his priority of right on the property on which his lien rested. Under those circumstances, neither the holder of the lien on the real or the personal property moving in the premises, a general creditor of the common debtor invoked for the payment of his debt the intervention of a court of equity and the possession of all the property charged with these two liens, and its operation with a view to the collection of his unsecured claim. The operation of the road during that receivership did not pay the operating expenses. May the holder of a lien on the real estate insist that the deficiency be charged to the holder of the lien on the personalty, or that the latter shall become liable to the former for the rental of its property? Unquestionably not. Neither lien-holder asking the aid of the court, no obligation was assumed by either in respect to the management of the property as against the other. If the operation of the property seized by the receiver did not result in the payment of the operating expenses, and the common debtor was unable to pay, the burden of the deficiency is as properly cast upon the holder of a lien upon the personalty as upon the holder of a lien upon the

realty; and when the court, in the administration of the receivership thereafter returns the personalty to the holder of the liens upon it, such lien-holder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lien-holder thereon, both the entire burden of the deficiency and compensation to him for the use of his property. Hence it follows that neither by reason of a contract of purchase of the rolling stock, nor by its use for four months at the instance of a general creditor, was any burden cast upon the holder of a lien upon the real estate for the non-payment of such contract price or the rental value. The court therefore erred in charging rental value of the rolling stock during those four months as a prior lien upon the realty.

On the 1st of December, 1883, however, the situation was changed. At that time the mortgagees upon the realty commenced suits to foreclose their mortgages, and at their instance, a receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings; and in that respect the attitude is this: The railroad company owned real and personal property, each subject to a separate lien. The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession, through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court, responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession, not only of the real but also of personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien;

but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the personalty was necessary for the operation of the railroad, and the security of his claim; or else because, by virtue of his secondary right, he expected to pay for the personalty and retain both the personalty and the realty, he has had the court take possession of both by its receiver, and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rental pending the receiver's possession. The conclusion is irresistible, that under the circumstances reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness. Indeed, we do not understand that counsel for appellant seriously contest this proposition. Their contention substantially is, that the basis of such rental value was wrong; that the rental should only be on the basis of actual use — the "mileage system," as it is known in railroad parlance; that, in fact, the railroad company had acquired too much rolling stock, and so, averaging it, the mileage was quite small; whereas the master, as approved by the court, fixed the rental not at actual mileage, but at a reasonable value irrespective of the actual use. We think that the decision of the court was right. The initiative in the matter was taken by the trustees. They asked, by their bill, that the court take possession of all the personalty. If more was taken possession of than was needed, it was their mistake. The court is not to be assumed to be an experienced railroad manager, knowing exactly the amount of rolling stock needed for the operation of the road. It may justly assume that what had been contracted for was necessary, and if the trustees ask that all may be taken possession of, it may act upon that as a declaration that all is necessary, and that rental value is to be paid for all. Theirs is the inquiry, and not the

court's. It is a mistake to suppose that their duties in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest; and it is a part of their duty to make examination and become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information their application should be based. It is true the court is not concluded by their representations; but its information is in the first instance derived therefrom, and it may and does generally act upon them; and its action, based on them, must be held to be conclusive so far as concerns the interest they represent, in respect to all liabilities and obligations flowing from the possession of a receiver. Whatever action the court may take thereafter, on information furnished by its receiver, or by them, or otherwise, in respect to the property not primarily chargeable with their lien, its first action is the recognition of the validity of their application; and the taking possession of all the property they name is in reliance upon their representation that all is needed for the operation of the railroad, and that they consent either to the payment of the unpaid purchase price of any property thus taken possession of, or a reasonable rental for the use of the same. Consider for a moment the ordinary experience of railroad building, as developed in the story of this case. The franchise is acquired; the corporation organized; and a first mortgage placed upon the property, with the usual "after acquired property" clause in it. The construction of the railroad proceeds; it is finished; rolling stock is necessary; and the corporation acquires it under conditional contracts of purchase. The enterprise is a failure; the mortgage interest is unpaid; the trustee, discharging its duty, is bound to know that the rolling stock is held subject to the liens attending its purchase. It asks the court to take possession not alone of the realty but also of the rolling stock thus acquired and held. The application is not resisted. The

court is ignorant of the history of the enterprise; it sustains the application and appoints a receiver, and the rolling stock is taken possession of by that receiver. Can it be held that such possession, taken at the instance of the trustee, casts no burden on the road, either for purchase price or rental prior to the claim of the original mortgage? Can the trustee, forcibly, through the power of a court, compel an appropriation of this rolling stock for the benefit of the property subject to its lien without compensation? Does not its application for possession carry with it an assent that rental for such rolling stock shall be first paid, as one of the expenses of the receivership which it has invoked? But one answer can be made to this inquiry, and that is that its application is a consent to the payment of reasonable rental during the possession of the receiver — a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. So, although it may be true, as claimed by counsel, that more was taken possession of than was needed, and that there was only a limited use of each car and engine, yet the case is to be taken as though all were needed and full use made of all; and that sum which would be reasonable rental value for such use should be paid. Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value. Upon such basis no complaint can be made of the amount fixed by the court, reducing as it did the amount reported by the master.

These are the only matters which, by the exceptions filed to the master's report respecting rentals, were reserved for our consideration. Our conclusion, therefore, in the two cases is, that the decrees must be

Reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto.

Counsel for the Grant claims expressly stated, in open court, in his argument, that in case certain appeals from the

Statement of the Case.

Sixth Circuit were affirmed there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases.

Mr. Justice Bradley dissented.

McCALL *v.* CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

No. 1190. Submitted October 28, 1889. — Decided May 19, 1890.

An agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license-tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional.

Order No. 1589 of the board of supervisors of the city and county of San Francisco, "imposing municipal licenses" provided among other things, as follows:

"Sec. 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not more than one thousand dollars or by imprisonment no more than six months or by both."

"Sec. 10. The rates of license shall be according to the following schedule:

"Subdivision XXXIII.

"First. For every railroad agency, twenty-five dollars per quarter."

Argument for Defendant in Error.

The plaintiff in error, J. G. McCall, was an agent in the city and county of San Francisco, California, for the New York, Lake Erie and Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and which operated a continuous line of road between Chicago and New York. He had not taken out a license for the quarter ending March 31, 1888, as required by the provisions of the aforesaid order. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets to such passengers over that road or any other, but took them to the Central Pacific Railroad Company, where the tickets were sold to them. The only duty he was required to perform for such company was to induce people contemplating taking a trip East to be booked over the line he represented. He neither received nor paid out any money or other valuable consideration on account thereof.

On the 3d of June, 1888, the plaintiff in error was convicted of misdemeanor in the police judge's court of the city and county of San Francisco for violation of the provisions of the aforesaid order, and on the 16th of November of that year, after a motion for a new trial and a motion in arrest of judgment had both been denied, the court sentenced him to pay a fine of twenty dollars, and in default of the payment thereof to imprisonment in the county jail of the city and county until the same should be paid, for a period not exceeding twenty days. Upon appeal to the Superior Court of the city and county of San Francisco that court affirmed the judgment below, and this writ of error was then sued out.

Mr. Joseph P. Kelly for plaintiff in error.

Mr. James D. Page for defendant in error.

The solicitation of business under the circumstances cannot be interstate commerce, as it relates to something wholly outside of the State in which solicitation is made, and has not for an end the introduction of anything into the State. In that

respect this case differs from *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

The municipal license tax sought to be recovered by this action is not a tax upon the business of the railroad represented, but a license tax for the privilege of maintaining an agency in the city of San Francisco. There is an essential difference between this case and that of *Leloup* v. *Port of Mobile*, 127 U. S. 640. It comes directly within the principles decided by the Supreme Court of Pennsylvania in *Norfolk & Western Railroad* v. *Pennsylvania*, 114 Penn. St. 256. See also *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Paul* v. *Virginia*, 8 Wall. 168; and *Smith* v. *Alabama*, 124 U. S. 465.

In the drummers' cases the connection of the avocation with interstate commerce is immediate. Goods are to be sent to the State where the drummer is working from another State. He secures orders for them to be sent, *i.e.*, arranges the contract for sending them. The sending is commerce, — interstate commerce, — and the contract to send is immediately connected with this commerce and essential to its existence; for one of the two States to prevent the contract would be to prevent the commerce.

But the railroad here in question is operated wholly between two States distant from California. The commerce which it does is exclusively between those distant States — namely, transporting persons and goods between them.

A man in California soliciting business for such a road is at best very remotely connected with interstate commerce, and to hinder his work cannot directly hinder the interstate commerce of the road. That commerce is elsewhere, and his business is not essential to its existence, but only very remotely, if at all accessory to its prosperity. The constitutional provision was intended to remedy an unfortunate condition of things, in which States to or through which commerce passed or would pass subjected that commerce to burdens and hindrances. The sweeping away of these burdens and hindrances was the object to be effected, and the Constitution should not be construed to restrict the rights of the States further than is necessary to get rid of substantial hindrances to commerce.

Matters which, in a very remote degree, and in a State in which the commerce itself does not go, affect not the freedom of the commerce but its volume, should be regarded as still within the control of each State. California can levy no prohibitive tax in this case, for the commerce is wholly without California and beyond her reach. Neither can she "regulate" it, for the same reason. Neither can she interfere with any of the usual means and instruments of carrying on such a commerce as a railroad carries on, still for the same reason. A person distant from the road, soliciting others to travel over it when they get to it, is not one of the usual — certainly not one of the necessary — instruments of a railroad company's commerce. The essential commerce is the carrying; whereas this defendant does none of the carrying nor even of the contracting to carry — he is a mere advertisement.

It is not claimed that the ordinance providing for a license from railway agencies conflicts with the laws of the State of California, nor that it is an unwarrantable exercise of police power on the part of the board of supervisors, except in so far as it is claimed that it conflicts with the Constitution of the United States and the laws of Congress.

I respectfully submit that the right sought to be enforced is a proper one, and that under the cases cited there is no interference with commerce nor interstate commerce in so doing.

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

There are three assignments of error which are reducible to the single proposition that the order under which the plaintiff in error was convicted is repugnant to clause 3 of section 8, article 1, of the Constitution of the United States, commonly known as the "commerce clause" of the Constitution, in that it imposes a tax upon interstate commerce, and that therefore the court below erred in not so deciding and in rendering judgment against the plaintiff in error.

This proposition presents the only question in the case, and if it appears from this record that the business in which the

plaintiff in error was engaged was interstate commerce, it must follow that the license tax exacted of him as a condition precedent to his carrying on that business was a tax upon interstate commerce, and therefore violative of the commercial clause of the Constitution.

In the recent case of *Lyng* v. *State of Michigan*, decided April 28, 135 U. S. 161, 166, this court said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, this court defined interstate commerce in the following language: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities."

Pomeroy in his work on "Constitutional Law," section 378, referring to the signification of the word "commerce," says: "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means*, *instruments*, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may, therefore, be regulated."

Tested by these principles and definitions, what was the business or occupation carried on by the plaintiff in error on which the tax in question was imposed? It is agreed by both parties that his business was that of soliciting passengers to travel over the railroad which he represents as an agent. It is admitted that the travel which it was his business to solicit is

not from one place to another within the State of California. His business, therefore, as a railroad agent had no connection, direct or indirect, with any domestic commerce between two or more places within the State. His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States to the city of New York. To what, then, does his agency relate except to interstate transportation of persons? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie and Western Railroad Company in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce, as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the "*means*" by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple.

In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, the taxing district of Shelby County, Tennessee, which included the city of Memphis, acting under the authority of a statute of that State, attempted to impose a license tax upon a "drummer" for soliciting, within that district, the sale of goods for a firm in Cincinnati which he represented; but this court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the Constitution of the United States, and was therefore void.

A like decision was rendered in *Leloup* v. *Port of Mobile*, 127 U. S. 640; and in *Asher* v. *Texas*, 128 U. S. 129, both of these decisions were carefully considered and the principle was affirmed. In *Stoutenburgh* v. *Hennick*, 129 U. S. 141, the same question came before the court and the principle governing the cases to which we have referred was again carefully considered and affirmed. See also *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Fargo* v. *Michigan*, 121 U. S. 230; and the recent cases of *Leisy* v. *Hardin*, 135 U. S. 100, and *Lyng* v. *Michigan*, 135 U. S. 161, decided April 28th, 1890.

We might conclude our observations on the case with the above remarks, but we deem it proper to notice some of the points raised by the defendant in error and which were relied upon by the court below to control its decision sustaining the validity of the aforesaid order.

It is argued that the New York, Lake Erie and Western Railroad Company is a foreign corporation operating between Chicago and New York City, wholly outside of and distinct from California; and it is very earnestly contended that the business of soliciting passengers in California for such a road cannot be interstate commerce, as it has not for its end the introduction of anything into the State. We do not think that fact, even as stated, is material in this case. The argument is based upon the assumption that the provision in the Constitution of the United States relating to commerce among the States applies as a limitation of power only to those States through which such commerce would pass, and that any other State can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a State from taxing interstate commerce as it passes through its own territory, *a fortiori*, the prohibition will extend to such commerce when it does not pass through its territory. The argument entirely overlooks the fact that in this case the object was to send passenger traffic out of California into and through the other States traversed by the road for which the plaintiff in error was soliciting patronage.

It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is, that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is — Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent.

The court below relied mainly upon *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 114 Penn. St. 256; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, and *Smith* v. *Alabama*, 124 U. S. 465, to support its judgment. But we are of opinion that neither of the cases of this court sustains that position. The other case we dispose of in a separate opinion, reversing the judgment in the court below, *post*, 114.

Pembina Mining Co. v. *Pennsylvania* manifestly is not an authority in favor of the position of the court below, but rather the reverse. In that case a company incorporated under the laws of Colorado for the purpose of doing a general mining and milling business in that State had an office in Philadelphia "for the use of its officers, stockholders, agents, and employés." The State of Pennsylvania, through her proper officers, assessed a tax against the corporation for "office license," which the company resisted on the ground that the act under which the assessment was levied was in conflict with the "commerce clause" of the Constitution of

the United States, in that it was an attempt to tax interstate commerce, as such. The Pennsylvania courts affirmed the validity of the assessment and, a writ of error having been sued out, the case was brought here for review. This court held that the state legislation in question did not infringe upon the commercial clause of the Constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth; and went on to say: "The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied," p. 184; quoting at some length from *Paul* v. *Virginia*, 8 Wall. 168, to sustain the conclusion there reached. But the court further remarked that "a qualification of this doctrine was expressed in *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress," p. 185; and in conclusion said: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority," p. 190. The reference to *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* clearly indicates that the court did not intend to lay down any rule recognizing the power of a State to interfere in any manner with interstate commerce. The latter case was one in which the legislature of Florida had granted to the Pensacola company the

exclusive right of establishing and maintaining telegraph lines in two counties in that State, and this court held that such legislation was in conflict with the act of Congress of July 24, 1866, granting to any telegraph company the right "to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States," etc. This court held such state legislation unconstitutional, as interfering with interstate commerce, and in its opinion announced no doctrine not in harmony with the principles of the later decisions to which we have referred.

Smith v. *Alabama* was a case in which an act of the state legislature imposing a license upon any locomotive engineer operating or running any engine or train of cars on any railroad in that State was resisted by an engineer of the Mobile and Ohio Railroad Company, who ran an engine drawing passenger coaches on that road from Mobile in that State to Corinth in Mississippi, on the ground that the statute of the State was an attempt to regulate interstate commerce, and was, therefore, repugnant to the commercial clause of the Constitution of the United States. We held, however, that the statute in question was not in its nature a regulation of commerce; that so far as it affected commercial transactions among the States, its effect was so indirect, incidental and remote as not to burden or impede such commerce, and that it was not, therefore, in conflict with the Constitution of the United States or any law of Congress. It having been thus ascertained that the legislation of the State of Alabama did not impose any burden or tax upon interstate commerce, there is nothing to be found in the opinion in that case that is not in harmony with the doctrines we have asserted in this case. That opinion quoted at length from *Sherlock* v. *Alling*, 93 U. S. 99, 102, where it was expressly held that "the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that

extent and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some *instrument* or subject of commerce, or *exacted a license fee from parties engaged in commercial pursuits*, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on."

It results from what we have said that the judgment of the court below should be, and it hereby is, reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice Fuller, Mr. Justice Gray and Mr. Justice Brewer dissented.

NORFOLK AND WESTERN RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 294. Argued April 24, 25, 1890. — Decided May 19, 1890.

A railroad which is a link in a through line of road by which passengers and freight are carried into a State from other States and from that State to other States, is engaged in the business of interstate commerce; and a tax imposed by such State upon the corporation owning such road for the privilege of keeping an office in the State, for the use of its officers, stockholders, agents and employés (it being a corporation created by another State) is a tax upon commerce among the States, and as such is repugnant to the Constitution of the United States.

The case is stated in the opinion.

Mr. M. E. Olmstead for plaintiff in error.

Mr. John F. Sanderson, (with whom was *Mr. William S. Kirkpatrick* on the brief,) for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

The 16th section of an act of the legislature of the Commonwealth of Pennsylvania, approved June 7, 1879, provides as follows:

"That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth for the use of its officers, stockholders, agents or employés, unless it shall have first obtained from the auditor general an annual license so to do, and for said license every such corporation shall pay into the state treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor general shall not issue a license to any corporation until said license fee shall have been paid. The auditor general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license fee shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this act." Laws of Penn., Sess. 1879, 120, No. 122, § 16.

Under the authority vested in him by that statute the auditor general of the State assessed a license tax against the Norfolk and Western Railroad Company, a corporation existing under the laws of Virginia and West Virginia, for each of the two years ending July 1, 1885, on its capital stock of $25,000,000, at the rate prescribed in the act, amounting to

$6250 a year, on account of its having an office for the use of its officers, stockholders, agents and employés, in the city of Philadelphia. The case now before this court involves the claim of the State for the year ending July 1, 1884, only. As permitted by the laws of Pennsylvania, the company appealed from the auditor general's settlement to the Court of Common Pleas of Dauphin County, in that State. The case was tried in that court without the intervention of a jury, under an act of the state legislature approved April, 22, 1874, and the court made the following findings of fact:

"1. The defendant is a railroad corporation existing under the laws of the States of Virginia and West Virginia, and its main line and branches lie wholly within these States.

"2. Its line of railroad connects at several points with the railroads of other corporations, and, by virtue of these connections, and certain traffic contracts and agreements, it has become a link in a through line of road, over which, as a part of the business thereof, freight and passengers are carried into and out of this Commonwealth.

"3. Its authorized capital stock is twenty-five millions of dollars.

"4. From July 1, 1883, to July 1, 1885, it had an office in this Commonwealth for the use of its officers, stockholders, agents and employés. Its main office is at Roanoke, Virginia.

"5. During this period it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road; but, with trifling exceptions, it owns no property and has no capital invested for corporate purposes within this Commonwealth.

"6. It has paid no office license fee for the years named, as required by section sixteen of the act of 1879 (P. L. 120). Upon this section these settlements are based."

Judgment was rendered against the company on that finding, sustaining the settlement made by the auditor general of the State, for the sum of $7503.12. That judgment having been affirmed by the Supreme Court of the State, this writ of error was sued out. The assignment of errors is to the effect that the court below erred in refusing to sustain the following

points, urged by the company, both in the trial court and in the Supreme Court of the State, viz.:

"(1) Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents and employés of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section two of article IV of the Constitution of the United States, which provides that 'the citizens of each State shall be entitled to all privileges . . . of citizens in the several States.'

"(2) The sixteenth section of the act of June 7, 1879, is an abridgment of the privileges and immunities of the citizens of the United States; it discriminates between corporations of the State of Pennsylvania and corporations of other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents and employés, who were in the State maintaining an office and doing business at and before the passage of the said act, the equal protection of the laws, and is for these reasons void, because in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress — Revised Statutes, section 1977.

"(3) Inasmuch as the Norfolk and Western Railroad Company engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania, or from other States to other States, passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania; therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do, and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with

clause three of section eight of article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

The first two points are disposed of adversely to the company by the decision of this court in *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181. In that case we held, following *Paul* v. *Virginia*, 8 Wall. 168, that corporations are not citizens within the meaning of clause 1, sec. 2, of art. IV of the Constitution of the United States declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And we also held that section 1 of the Fourteenth Amendment to the Constitution declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws" does not prohibit a State from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits. See, also, *Philadelphia Fire Association* v. *New York*, 119 U. S. 110.

The only question for consideration, therefore, arises under the third assignment of error, above set forth. It is well settled by numerous decisions of this court, that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits. Some of the cases sustaining this proposition are collected in *McCall* v. *California*, just decided, *ante*, 104, and need not be repeated here.

The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employés, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meagre on this question — much more so, indeed, than the undisputed evidence in the case warranted — enough is stated in the second paragraph of the

aforesaid finding to show that the company is engaged in interstate commerce in the State. It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads the Norfolk and Western Railroad Company "has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth." That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business — that is, the business of this through line of railroad — is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line.

On this point *The Daniel Ball*, 10 Wall. 557, 565, is an authority. In that case the steamer Daniel Ball was engaged in transporting goods on Grand River, wholly within the State of Michigan, destined for other States, and goods brought from other States destined for places in the State of Michigan, but did not run in connection with, or in continuation of, any line of vessels or railway leading to other States; and the contention was, that she was not engaged in interstate commerce. But this court held otherwise and said: "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed

in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress." See, also, *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, and cases cited.

We pass to the second inquiry above stated, viz.: Was the tax assessed against the company for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employés, a tax upon the business of the company? In other words, was such tax a tax upon any of the *means* or *instruments* by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. One of the terms of the contract by which the plaintiff in error became a link in the through line of road referred to in the findings of fact, provided that "it shall be the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Despatch (the name of said through line) at its own proper cost and expense." Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the Commonwealth the certificate required by the act of the state legislature of 1874 enabling it to maintain an office in the State. That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and cases cited; *McCall* v. *California*, just decided *ante*, 104.

For the foregoing reasons the judgment of the court below is reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE GRAY and MR. JUSTICE BREWER dissented.

HOT SPRINGS RAILROAD COMPANY *v.* WILLIAMSON.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 93. Submitted November 11, 1889. — Decided May 19, 1890.

The refusal of the court below to grant the defendant's request to charge upon a question in relation to which the plaintiff had introduced no evidence, and which was, therefore, an abstract question, not before the court, was not error.

When a state constitution provides that "private property shall not be taken, appropriated or damaged for public use without just compensation" a railroad company constructing its road in a public street, under a sufficient grant from the legislature or municipality, is nevertheless liable to abutting owners of land for consequential injuries to their property resulting from such construction.

THE case is stated in the opinion.

Mr. John M. Moore for plaintiff in error.

Mr. A. H. Garland for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an action at law brought in the Circuit Court of Garland County, Arkansas, at its February term, 1883, by Curnel S. Williamson and Fannie G. Williamson, his wife, against the Hot Springs Railroad Company, a corporation organized under the laws of that State, to recover damages

for alleged injuries done to certain described real estate belonging to Mrs. Williamson, in the city of Hot Springs, by the defendant company.

The declaration alleged that the plaintiff, Fannie G. Williamson, was the owner in fee of lots 1 and 2 in block No. 78 and lot 9 in block No. 69 in that city; that lots 1 and 2 are separated from lot 9 by Benton Street, which is one hundred and forty feet wide, and was laid out by the general government and dedicated to the city, with the other streets in the city, before the damages for which suit was brought were committed; that lot 9 lies south of Benton Street, lot 1 directly across the street on the north, and lot 2 lies immediately north of lot 1; that the defendant, a railroad company, organized as aforesaid, with its termini at Hot Springs and at Malvern, in Hot Springs County, in that State, by and through its agents and employés, on and prior to the 10th of December, 1881, constructed, threw up and completed in and along the centre of Benton Street, between lots 1 and 9, and running the full length of those lots, a permanent embankment of earth and stone, fifty feet wide and of great height, to serve as a road-bed for its railroad track, under a fraudulent and unauthorized contract secretly and clandestinely entered into between it and the city, for the purpose of defrauding and injuring plaintiffs; that the defendant also constructed a turning table at the southeast corner of that embankment and the northeast corner of lot 9, and immediately thereafter proceeded to lay and fix its railroad track permanently on the embankment, which thereby became and thereafter was a part or extension of its railroad; that by the embankment, extension and turning table plaintiffs and others were cut off from and deprived of the use of that street in connection with said lots, and their egress and ingress therefrom and therein impaired and destroyed; that said lots, which, by reason of their lateral frontage upon Benton Street, were of great value, were thereby greatly damaged and decreased in value to the extent of five thousand dollars; and that since the dedication of Benton Street to the city, the defendant had wrongfully appropriated almost the whole of it for its road-bed and other

purposes, thereby wantonly injuring plaintiffs and all other owners of land adjoining that street. The prayer of the petition was for a judgment against the defendant for $5000, and for other relief.

The defendant answered, pleading ignorance as to whether the plaintiff, Fannie G. Williamson, was the owner of the lots described in the petition, and averring that those lots were located upon Malvern Avenue, one of the original streets of the city of Hot Springs, which was laid off by the city and opened and continuously used thereafter as a street, and was never vacated by the city. Further answering, it alleged that its railroad was constructed in and upon its right of way granted it by Congress under the act of March 3, 1877, entitled "An act in relation to the Hot Springs Reservation, in the State of Arkansas," 19 Stat. 380, c. 108, § 17; and under the alleged ordinance of the city, which, it denied, had been passed clandestinely or through any fraud on its part; and also alleged that the turn-table complained of was constructed on its right of way, and upon lots 10 and 11, in block 69, in the city, which were defendant's own property. As a further answer, the defendant alleged that Curnel S. Williamson was improperly joined as a plaintiff in the action.

At the trial of the case before the court and a jury, the following agreed statement of facts, together with a map also agreed upon as correct, was filed:

"1st. The accompanying map shows the location of Malvern Avenue, Benton Street, the plaintiff's lots, and the right of way granted by Congress to the defendant under the act referred to in defendant's answer, and approved by the Hot Springs Commission and the Secretary of the Interior.

"2d. The extension claimed by the defendant under the ordinance of the city of Hot Springs consists of a strip fifty feet wide, the centre thereof on a direct line with the centre of the right of way granted by Congress and extending westward to Malvern Avenue, a distance of 130 feet.

"3. The turn-table is fifty feet in diameter; it is located as marked on the map. Lots 10 and 11, in block 69, upon which a part of the turn-table is located, belong to the defendant.

"4th. Gaines Avenue was located as a street of said city of Hot Springs and opened and accepted by the city in 1876, October or September; it was 80 feet wide and the northern boundary thereof was about coterminous with the northern boundary of defendant's right of way. The right of way is 100 feet wide, subject to explanation."

The map referred to shows that Benton Street and the right of way run almost east and west, the right of way extending south to the south line of Benton Street. Immediately east of lot 9, and also adjacent to the right of way, is lot 10, and immediately beyond that is lot 11. The turn-table is located partly on the right of way and in part on the company's lots 10 and 11; and appears to be about 40 feet east of the east line of lot 9, and nearly the same distance east of the western extremity of the right of way granted by Congress. Malvern Avenue runs nearly from the southeast to the northwest, and is 130 feet west of the western terminus of the right of way.

Considerable testimony was introduced on both sides, on the question of damages as presented by the pleadings, and upon that question alone the evidence was conflicting. Evidence was also introduced on the part of the defendant to show that the alleged obstructions erected by it were such as are generally used at terminal stations, and were necessary for the operations of the road. One of its witnesses testified that "without the turn-table the train could not be run on the right of way within the city of Hot Springs without great danger to life and property, for without (it) the engines could not be turned and would have to be run in back motion either in departing from the depot or coming to it. This would be specially dangerous at night, as the head-light could not be seen while the engine was in back motion."

The embankment was described by the witnesses as being fifty feet wide and several feet higher than the grade of the street, and is enclosed by a granite wall. It is 25 feet from lot 9 on the south, and 65 feet from lot 1 on the north.

The ordinance of the city council granting a right of way fifty feet wide from the western terminus of the congressional right of way to Malvern Avenue (130 feet) was also introduced,

and it was admitted that the company had filed its written acceptance of the same within ten days from its passage, as required by section 4 thereof. It also appeared in evidence that the city had, by an ordinance approved February 26, 1883, "authorized and empowered" the defendant "to erect all necessary and suitable depot buildings and other structures incident to the operation of its road within the limits of its 'right of way,' granted it by Congress, . . . and to maintain and continue the same, or any depot buildings or other erections or improvements heretofore constructed or made by it." That ordinance further provided that that part of Benton Street, for two squares east of Malvern Avenue, "within the limits of the 'right of way' granted by Congress, . . . and the extension thereto heretofore granted by the city of Hot Springs, except so much thereof as shall be required to leave open the crossing of Cottage Street, [first street east of Malvern Avenue,] is hereby vacated and closed, and the extensive [exclusive] use and control thereof is granted to the Hot Springs Railroad Company for railroad and depot purposes."

After the testimony in the case had been closed, upon request of the plaintiff, the name of C. S. Williamson was dropped from the complaint, and his evidence was also excluded from the jury.

At the request of the plaintiff the court charged the jury as follows:

"I. The court instructed the jury that the right to use streets in a city by the adjoining lot owners is property and a right of way belonging to the owner of said lots, and that no such right can be taken or injured or appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money or secured to him by a deposit of money, which compensation is irrespective of any benefit from any improvement made by said corporation.

"II. The city of Hot Springs had no right to pass an ordinance granting the defendant a right of way along Benton Street, and defendant could acquire no right to build any permanent structure or lay its track thereon by virtue of such ordinance,

"III. The court instructs the jury that the measure of damages to adjacent property caused by the use of a street, as a site for a railroad, is the diminution of the value of the property, and the recovery may include prospective as well as past damages when the obstructions to the use of the street are of a permanent nature."

The court, upon its own motion, instructed the jury: "That if they believe from the evidence that the defendant, by its agents or employés, constructed in Benton Street, between lot 9, in block 69, and lots 1 and 2, in block 78, in the city of Hot Springs, a permanent embankment, as a road-bed on which to lay and extend its railroad track, and then, or before the commencement of this suit, placed and fixed its track permanently upon said embankment, as charged in the complaint; that said lots, or any of them, were or are permanently injured or damaged thereby, and that said lots were then and still are the property of the plaintiff, Fannie G. Williamson, they must find in her favor, and, in such case, the difference between the present value of the lot or lots so damaged with the embankment, and the said track thereon existing, and what such value would be if the embankment and said track were removed or had never existed, is the measure of damages." To all of which instructions the defendant at the time excepted.

The defendant requested the court to give several instructions to the jury, which the court declined to do, except in one instance, in a modified form, to which refusals the defendant at the time excepted; but as none of them are relied upon in the argument in this court except the second one, it is only necessary to set that one out in full. It is as follows:

"The right of way was granted by Congress to the defendant from a point on the eastern boundary of the Hot Springs reservation to the old Malvern stage road within said reservation. The grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station-house and such tracks and other improvements of that nature as are necessary to the proper and convenient dispatch of its business; and if you find that the turn-table and other improve-

ments complained of, or any part of them, are within the right of way granted by Congress to the defendant as aforesaid, and are necessary to the operation of its road, and such as are usual at terminal stations, you cannot find for the plaintiffs by reason of any damage caused to their lots by such improvements."

The jury returned a verdict in favor of the plaintiff for the sum of $2275, upon which judgment was rendered; and after a motion for a new trial and also a motion in arrest of judgment had both been overruled, an appeal was taken to the Supreme Court of the State, which affirmed the judgment of the trial court. 45 Arkansas, 429. This writ of error was then sued out.

The following is the only assignment of error:

"The court erred in ruling that the plaintiff in error did not have the lawful right to construct its works, including the turn-table, on the right-of-way granted it by the act of Congress of March 3, 1877, and in holding that it was liable to the defendant in error by reason of the alleged obstruction caused by said works."

From the foregoing statement it is observed that the claim for damages in the trial court was based upon two propositions: First, that the plaintiff's property was injured by reason of the embankment in Benton Street alongside it, west of the terminus of the congressional right of way; and, second, that it was also injured by reason of the construction and existence of the turn-table partly upon the congressional right of way — no claim for damages ever having been made by reason of the construction of a road-bed and track upon the congressional grant.

It is also observed that, while the defendant saved exceptions to the various rulings of the court, on the question of damages arising from the construction of the embankment on that part of Benton Street separating the plaintiff's lots, and also as to the rule for the computation of such damages, none of those exceptions are embodied in the assignment of error, nor is any point made in relation to them in the brief of counsel for the company. In his own language, "The only

question before this court is that which arises under the act of Congress, . . . and relates alone to the turn-table and works constructed on that part of the right-of-way embraced in the grant by Congress. This excludes from consideration the embankment built upon the western extension of the track, under the city ordinance, and involves the proper construction of the act of Congress."

The question before us is, therefore, narrowed down to the ruling of the trial court upon the only issue which the assignment of error presents. Upon an examination of the record it will be found that no evidence was introduced by the plaintiff as to whether the turn-table and other works constructed on the right of way injured and damaged her property at all; and the only evidence on that subject was introduced by the defendant, which evidence tended to show that, by the erection of a depot and other works on the right of way, property in that vicinity had not only not been depreciated, but had, in reality, risen in value.

It is further observed that in its charge to the jury the court made no reference whatever to the question of damages arising out of the construction and operation of the turn-table and other works on the congressional right of way, except that it refused to charge that the defendant had the right to construct and maintain whatever structures thereon it might deem essential to its business, as above set forth in detail; or that, having that right, it was not liable to the owners of abutting real estate for damages caused by the exercise of that right in a proper and skilful manner. Inasmuch, therefore, as the plaintiff introduced no evidence to sustain that branch of her claim for damages, the court was constrained to conclude that it was eliminated from the case. She certainly could not obtain a verdict for any damages arising out of that branch of the claim without introducing any evidence to support it. The evidence which the defendant introduced bearing on that question, if taken into consideration by the jury at all, could not have had any but a favorable effect as to the defendant; but, as already remarked, it was rendered unnecessary by the plaintiff's virtual abandonment of that part

of her claim for damages. There is nothing in the record to show that that evidence was considered by the jury in arriving at their verdict, because no charge relative thereto was given by the court, or could legally have been given by it on that question. The refusal of the court to charge upon an abstract question in relation to which the plaintiff had introduced no evidence, and which was not, therefore, before it, was not error.

Whilst we hold this view upon the sole question involved in the assignment of error, it is proper to add that we concur in the view taken of this case by the Supreme Court of Arkansas. That court held that the act of Congress granting the right of way to the defendant company over the strip of land upon which its road was to be operated, (which in this case was along the line of Benton Street, an original street in the town of Hot Springs, and used as such at the time of the passage of the act,) carried with it the right to construct, maintain and operate its line of railroad therein, and to appropriate such right as a location for its turn-table and depots and for any other purpose necessary to the operation of its road; but that it was equally clear, under the provisions of the present constitution of the State of Arkansas, that if in the exercise of that right the property of an adjoining owner was damaged in the use and enjoyment of the street upon which the road was located, such owner would be entitled to recover such damages from the company. It further held that the contention of the plaintiff in error that the act of Congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability for consequential damages resulting to an abutting owner from the laying of its track in a proper and skilful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question what is a *taking*, within the meaning of such provision; that the constitution of that State of 1878, which provides that "private property shall not be taken, appropriated or damaged for public use without just compensation," has changed that rule;

that all the decisions rendered under similar constitutional provisions concur in holding that the use of a street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining lot owners to the use of the street, as a means of ingress and egress, subjects the railroad company to an action for damages, on account of the diminution of the value of the property caused by such use; and lastly, that even conceding the authority of the town of Hot Springs to pass the ordinance authorizing the company to construct and maintain the railroad embankment, track and turn-table complained of, it cannot impair the constitutional right of the defendant in error to compensation.

We think those views are sound and in accordance with the decisions of this court in *Pennsylvania Railroad Company* v. *Miller*, 132 U. S. 75, and *New York Elevated Railroad* v. *Fifth Nat. Bank*, decided May 5, 1890, 135 U. S. 432.

The judgment of the court below is

Affirmed.

LOVELL *v.* CRAGIN.

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

No. 212. Argued March 12, 13, 1890.—Decided May 19, 1890.

When the matter set up in a cross-bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross-bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill.

In Louisiana the holder of one or more of a series of notes, secured by a concurrent mortgage of real estate, is entitled to a *pro rata* share in the net proceeds, arising from a sale of the mortgaged property, at the suit of a holder of any of the other notes, and an hypothecary action lies to enforce such claim, based upon the obligation which the law casts upon the purchaser to pay the *pro rata* share of the debt represented by the notes that were not the subject of the foreclosure suit.

Such obligation, cast by law upon the purchaser, partakes of the nature of a judicial mortgage, and, in order to be effective as to third persons, (*i.e.* persons who are not parties to the act or the judgment on which the mortgage is founded,) it must be inscribed with the recorder of mortgages, and no lien arises until it is so registered.

Under the laws of Louisiana a claim for damages arising from alleged wrongful acts of a party with respect to removing personal property from a plantation while he had possession of it, and for waste committed by him about the same time, are quasi-offences, and are prescribed in one year.

It appearing that the subject of the controversy in this case is identical with that which was before the court in an action at law at October term, 1883, in *Cragin* v. *Lovell*, 109 U. S. 194, and that the parties are the same, and that the court then held that "the petition shows no privity between the plaintiff and Cragin," and "alleges no promise or contract by Cragin to or with the plaintiff:" *Held*, that while the plea of *res judicata* is not strictly applicable, the court should make the same disposition of the controversy which was made then.

In equity. The case is stated in the opinion.

Mr. W. Hallett Phillips (with whom were *Mr. Charles A. Conrad* and *Mr. Joseph P. Hornor* on the brief) for appellant.

Mr. J. D. Rouse (with whom was *Mr. William Grant* on the brief) for appellees.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity, in the nature of an hypothecary action, under the Civil Code of Louisiana, brought in the court below by George D. Cragin, a citizen of New York, against William S. Lovell, a citizen of Mississippi, and Orlando P. Fisk, a citizen of Michigan. Its object was to have a lien declared in favor of the complainant, upon certain real property belonging to the defendant Lovell, and, in default of the payment thereof by Lovell, to have the property sold to satisfy it.

The bill was filed on the 18th of January, 1883, and its material allegations were substantially as follows: On the 31st of January, 1870, Louisa S. Quitman and Eliza A. Quitman

sold to Orlando P. Fisk a sugar plantation known as the Live Oak plantation, and certain other particularly described real estate, all situated in the parish of Terrebonne, Louisiana, and received in part payment therefor nine promissory notes made by Fisk, payable to his own order and endorsed in blank by him, of $2000 each, due in one, two, three, four, five, six, seven, eight and nine years, respectively, from that date, all of which bore interest at seven per cent until maturity, and eight per cent thereafter until paid, and were secured by a mortgage on the said plantation "in favor of said vendors, their heirs and assigns, and all future holder or holders of said promissory notes or any of them." Fisk paid the first of those notes when it came due, but did not pay any of the others. The second one not having been paid at maturity, the Misses Quitman, on the 14th of February, 1872, brought suit on it against Fisk in the Circuit Court of the United States for the District of Louisiana, to foreclose the mortgage. Afterwards the Quitmans, in consideration of $2386, the amount of that note, including accrued interest, attorneys' fees and costs, paid to them by complainant, sold and transferred to him all their right, title and interest in the note and in that suit, and subrogated him to all their rights in the premises against Fisk, and under the mortgage. Fisk having also failed to pay the third note, the Quitmans brought suit thereon against him on the 21st of May, 1873, in one of the state courts; and a few months afterwards, in consideration of $2608.65, the amount of the note, including accrued interest, attorneys' fees and costs, paid to them by complainant, sold and transferred to him all their right, title and interest in the note and in that suit, with a like subrogation as in the preceding case. The fourth note not having been paid at maturity, the Quitmans brought suit on it against Fisk on the 26th of February, 1874, in one of the state courts of Louisiana, and foreclosed the mortgage; and, under executory process issued by that court, the mortgaged property was seized by the sheriff of the parish, and regularly sold by him on the 2d of May, 1884, to the Misses Quitman for $10,900, which sum, after paying costs and expenses, was reduced to $10,447.05, the whole of which

portion of the price of said property was retained by the said Louisa S. and Eliza A. Quitman.

The bill further alleged, that by the sale to the complainant of the two before-mentioned notes, with subrogation as aforesaid, he acquired a right of priority of payment out of the proceeds of the sale of the property mortgaged to secure the same; that by such sale and transfer to him they made the remaining notes held by them subordinate in rank to those so sold to him; that at the time of the sale the Quitmans were the holders and owners of all of the other notes; and that they, having retained the proceeds of the sale of the property, became and were liable to him for the full amount due upon his two notes, including interest, costs and attorneys' fees, which amount was unpaid and remained secured by lien upon the property.

It was then averred, that Louisa S. Quitman afterwards died, leaving her sister, Eliza A. Quitman, as sole heir and legatee, who entered into the property and took possession of it; that Eliza A. Quitman died soon afterwards, having appointed the defendant Lovell sole executor of her estate, which was still in the course of administration; and that, before the filing of the bill, complainant notified Lovell, as executor, that he was the holder and owner of the two notes purchased by him, and demanded payment of the amount due thereon, including interest and costs, which was refused.

It was then averred that the defendant Lovell is in possession of the property, under a claim of ownership by title derived from the Quitmans, or the last survivor of them, which claim is subject to the demand of complainant; and that, after the aforesaid demand and refusal of payment of his two notes, complainant demanded payment thereof from Lovell, as possessor of the mortgaged property, at least ten days before the filing of the bill, which was also refused, and the defendant Lovell still refused payment of the notes, and also refused to surrender the lands or to permit them to be sold to satisfy complainant's demand.

By reason of the aforesaid premises, complainant averred that he had a first lien and privilege on the mortgaged prop-

erty in the possession of Lovell, for the amount due on his notes, and had the right to have it seized and sold to pay the same.

The bill prayed that an account be taken of the amount due complainant on his notes; that he be decreed to have a first lien and privilege upon the mortgaged property for the amount found due him, which the defendants should be decreed to pay, together with costs, attorneys' fees, etc.; that in default thereof the property be seized and sold to pay his demand; that, if the amount realized from such sale be insufficient to pay his demand, he might have execution for the deficiency against the estate of Eliza A. Quitman; and for other and further relief.

April 2, 1883, the defendant Lovell filed a general demurrer, which was overruled December 10, 1883, reinstated December 14, 1883, and withdrawn January 9, 1884, with leave to file his plea, which he did on the same day. This plea set up (1) that the notes sued on by the complainant having been executed by Fisk, January 31, 1870, and made payable in two and three years from date, respectively, were barred by prescription of five years. (2) That the act of mortgage by which payment of those notes was secured, having been executed January 21, 1870, and recorded February 12, 1870, lapsed and expired and became extinguished January 21, 1880, it having never been reinscribed. (3) That the foreclosure of the mortgage by the Quitmans on one of the notes secured concurrently with those of the complainant, and the sale of the mortgaged property, had the effect to extinguish the mortgage. (4) That the defendant was not in any manner interested in the notes sued on or in any of the others of the series, nor in the mortgage by which they were secured, but acquired the property by purchase, for a valuable consideration, long after the seizure and sale of it to satisfy the mortgage, and therefore subsequently to the extinction of the mortgage.

This plea was overruled June 9, 1884, and March 6, 1885, the complainant amended his bill. In this amendment complainant alleged that, in a suit brought by him in the court below against Fisk, a decree was entered on the 6th of June,

1873, that he recover from Fisk the sum of $96,526.71, and that, as Fisk had used $4918 of complainant's money in examining titles, paying taxes and purchase money of the property in dispute, the latter sum was decreed to be an equitable lien upon the plantation, to take effect from February 13, 1872, the date when the bill in that suit was filed, until discharged by the payment of the whole debt of Fisk, as established by the decree. By reason of that lien, complainant alleged that he had an interest in paying the amount due upon his two notes, and that, by the payment of the amount due upon them to the Quitmans, he was subrogated of right, by operation of law, to all the rights of the Quitmans to those two notes and the mortgage securing them, as well as by the express subrogation alleged in the original bill.

March 7, 1885, Lovell answered, averring as follows: When Fisk purchased the plantation, as aforesaid, he was not acting for himself, but for complainant, who was the real purchaser and furnished the funds to make the cash payment at that time; that shortly after that purchase complainant called upon the attorneys for the Quitmans several times, and acknowledged and claimed that he was the real purchaser of the plantation, and, as such, promised and bound himself to take up and pay the notes given in part payment therefor, and did pay at maturity the first of those notes with his own funds. About the time of the maturity of the second note, the complainant instituted a suit against Fisk on the equity side of the court below, in which he claimed to be the real owner of the plantation, and to have been the purchaser of it, instead of Fisk, who illegally took the title in his own name, and was all the time acting as complainant's agent, having paid the cash part of the purchase and the first note with complainant's money; and that complainant had promised the Quitmans to pay them the balance and was ready to do so. A final decree was rendered in that suit upon the pleadings and proofs, adjudging complainant to be the real owner of the plantation, and finding the matters and things set forth in his bill in that suit to be correct. Prior to the institution of that suit complainant took possession of the plantation as sole owner thereof, and

pending that suit caused himself to be appointed receiver thereof, and continued in the possession thereof, cultivating the plantation and disposing of the crops raised thereon for his own sole and exclusive benefit, accounting to no one therefor. Fisk abandoned the plantation about that time, has never returned, never contested that suit, and never afterwards set up any claim to the plantation. Fisk, at the time of the purchase of the plantation and up to the date of the acts complained of in that bill, was a man in the full confidence of complainant, entrusted with ample funds and credit, but without means of his own, either at that time or since. Complainant was a *bona fide* owner of the plantation from the date of that sale; and the Quitmans did not sell the two notes to him, as he alleges, but accepted payment thereof from him, as the real obligor thereof. Complainant instigated the suits on the mortgage notes, and then bought them in, and by agreement with the Quitmans was subrogated to all of the Quitman's rights as against Fisk, solely in order to aid him in his suit against Fisk, he having advised the Quitmans that Fisk had been acting only as his agent in the transactions; and such subrogation was taken by complainant to be used only in case he should fail in his equity suit with Fisk. Complainant was, and had been for a long time, in possession of the plantation when it was sold in the foreclosure suit of the Quitmans, and, having full knowledge of all those proceedings, consented thereto, and in fact requested the institution of the proceedings, and was present at the sale, stating that he was desirous of having some third person purchase the plantation, as he was unwilling to own it longer.

The answer further denied that complainant bought the two notes of the Quitmans; averred that he acquired no right to the proceeds of the sale of the mortgaged property, but on the contrary continued to owe the Quitmans, as before, on the remaining notes of the series, the difference between the amount of them and the proceeds of the sale; alleged that those two notes were extinguished by his payment thereof, so far as the Quitmans and the plantation were concerned, and that the mortgage, as to them, was also extinguished by those proceed-

ings; and further set up that the Quitmans never became liable to complainant in any manner for any amount, by reason of those proceedings, nor did he thereby acquire any lien or privilege upon the plantation. It was then alleged that, on the 17th of February, 1876, the defendant purchased the plantation from its then owner, Eliza A. Quitman, free and unencumbered with any demand or claim of the complainant or of any one else; that at that time there was no inscription of any mortgage or privilege against the property in the name of any one, and none could exist against the defendant, because he was a third person, within the meaning of art. 176 of the constitution of the State; that the notes which the complainant seeks to collect, having been dated January 31, 1870, and made payable in one and two years from date, respectively, were barred by prescription of five years; that the mortgage securing those notes having been executed January 21, 1870, lapsed and expired and became prescribed under the laws of the State January 21, 1880, and was therefore extinguished and of no effect, as it had never been reinscribed; and that by virtue of the foreclosure proceedings instituted by the Quitmans, upon one of the notes, the mortgage became extinguished.

The defendant Lovell, by way of cross-bill, then set up (1) That by reason of the facts set forth in the foregoing answer, and of the promises made by the complainant to the Quitmans, as therein set forth, complainant became liable for the payment of the whole of the purchase price of the plantation represented by the notes given by Fisk; that complainant, while in possession of the plantation as owner of it, committed great waste thereon, by destroying and injuring the fences, buildings, out-buildings, fixtures and improvements thereof, and removed therefrom all the movable property which was there when the sale was made by the Quitmans to Fisk, for the benefit of an adjoining plantation owned by him, and greatly depreciated the value of the plantation by reason of improper cultivation and business methods, so that it did not sell for a sufficient sum to pay the mortgage under which the foreclosure was made, as it otherwise would have done. Wherefore complainant is liable to and justly owes the defendant Lovell,

as executor of Eliza A. Quitman, the difference between the amount of the unpaid notes, with interest up to the date of the sheriff's sale, to wit, May 1, 1874, and the sum of $10,447.05, the net proceeds of that sale, with interest at eight per cent thereafter until paid.

(2) That Eliza A. Quitman instituted a suit at common law in the court below against the complainant on March 3, 1880, to recover the amount of that difference, and obtained a judgment against him for that amount, which on the 12th of November, 1883, upon appeal, was reversed and ordered to be arrested by this court; and that prescription was thus interrupted, and did not run against this claim urged by the defendant during the pendency of those proceedings. The record in that suit was then referred to, and was made a part of the answer and cross-bill, and the amount for which that suit was brought was claimed as due defendant by complainant.

The prayer of the cross-bill was for an account, a judgment according to the allegations therein contained, and for other and further relief.

On the 4th of April, 1885, the complainant filed a demurrer, plea and answer to the cross-bill, specifically denying all the material allegations of it and pleading the prescription of one, five and ten years. He pleaded the decision of this court in the suit brought by Eliza A. Quitman against him as an estoppel against her and all those claiming under her in this proceeding, and averred that, having a lien upon the plantation, he had an interest to pay the notes of Fisk if he chose, though he was not at any time personally liable to the Quitmans, and, having paid the two notes set forth in his bill, he was entitled to them, as owner, and was subrogated to the mortgage securing them. He further denied that he took the subrogation made by the Quitmans under an agreement or understanding that it should take effect only against Fisk, and not against the Quitmans and the plantation, but averred that he took it without any restrictions or limitations, for all it was worth under the law. He averred further that the complainant in the cross-bill had been sued individually, as third possessor of the premises in dispute, and not as executor of the Quitmans or of

either of them, and that he owned the property personally, and not as executor, and therefore could not maintain his cross-bill, in his capacity as executor.

Fisk was never found and never appeared. On the 28th of May, 1886, upon motion of the attorneys for complainant, suggesting that he had for a valuable consideration transferred to George D. Cragin, Jr., all his interest in this suit, and to the subject matter thereof, with full subrogation to his rights in the premises, it was ordered that the latter be subrogated as complainant, with authority to prosecute and carry on the suit in his own name. A great deal of testimony was adduced on both sides, and on the 12th of June, 1886, the following decree was entered:

"This cause came on to be further heard at this term upon the complainant's bill and the cross-bill of W. S. Lovell, executor of the last will and testament of Eliza A. Quitman, deceased, and the evidence adduced by the parties, and was argued by counsel; whereupon, and in consideration thereof, it was ordered, adjudged and decreed as follows:

"1st. That the complainant purchased the two notes sued upon, and was subrogated expressly as to one, and by operation of law as to the other, to all the rights of action thereon, including the mortgage executed by Orlando P. Fisk to secure the same, as alleged in the complainant's bill, and is entitled to the relief prayed.

"2d. That this cause be referred to J. W. Gurley, master, to take an account of the amount due the complainant on said notes and mortgage, and report the same to this court as soon as practicable.

"3d. It is further ordered and decreed that said cross-bill be dismissed. And further proceedings are suspended until the coming in of the master's report."

On the 14th of June, 1886, the master filed his report, in which he found that, as the sum realized by the Quitmans from the mortgage sale was retained by them, and as they were the holders of six of the unpaid notes and complainant of two, therefore complainant was entitled to one-fourth of the net proceeds of the sale, with interest to June 10, 1886, at

seven per cent, and also one-fourth of the attorneys' fees, in all, $4830.64.

June 15, 1889, a final decree was rendered in accordance with the report of the master; and it was further decreed that, in case the amount thus found due should not be paid within sixty days, the property should be sold to pay that sum; and a personal judgment was also entered against Lovell for any amount left over, in case the property should not sell for the amount found due and the costs.

An application for a rehearing having been denied, Lovell brought this appeal.

The assignments of error are that the court erred: (1) In refusing to maintain the defendant's plea of prescription of five years to the notes sued on. (2) In refusing to maintain his plea of prescription of ten years to the mortgage sued on. (3) In refusing to maintain his plea that the mortgage was extinguished by the sale of the plantation under the foreclosure proceedings taken by the Quitmans. (4) In refusing to maintain his plea on the ground that he was a third person purchasing without notice. (5) In decreeing that the complainant purchased the two notes sued upon, and was subrogated expressly as to one, and by operation of law as to the other, to all the rights of action thereof, including the mortgage executed by Fisk to secure them, as alleged in his bill, and is entitled to the relief prayed. (6) In dismissing the defendant's cross-bill.

A motion to dismiss the appeal has been filed, and associated with it is a motion to affirm. The first of these motions is based upon the ground that the amount in dispute, as determined by the judgment rendered, is but $4830.64, which is less than the amount required to give us jurisdiction. It is then argued that the amount claimed in the cross-bill cannot be added to this amount so as to give jurisdiction, nor can that amount be considered by itself for that purpose, 1st, because the cross-bill asserts no claim on the part of Lovell in his own behalf, but only as executor of Eliza A. Quitman, deceased, while the original bill was brought against him personally, as third possessor of the property; and, 2d, because the subject

matter of the cross-bill, to wit, the equitable claims of the Quitman estate, of which Lovell was executor, against the complainant, are distinct and separate from the subject matters in the original bill. These two grounds upon which the motion rests are negatived by the express averments of the bill itself, which are that the Misses Quitman, "having retained the price of said sale under said foreclosure, became and were liable to your orator for the full amount then due upon the notes held by him, and all interest, costs and attorneys' fees accrued thereon, which amount remained secured by lien and privilege upon all said property, and still so remains, the same still remaining wholly unpaid. . . . And your orator avers that . . . more than thirty days before filing this bill, he notified the said Lovell, executor as aforesaid, that he was the holder and owner of said notes purchased by him as aforesaid, and demanded payment of the amount due thereon," etc. And the prayer of the bill was "that an account may be taken under the direction of this honorable court, before one of the masters thereof, or otherwise, as the court may direct, of the amount due your orator, in principal, interest and costs, upon the two notes hereinbefore described, and acquired by him by purchase as aforesaid; that he be decreed to have a first lien and privilege upon the lands and premises herein described, for the amount so found to be due, to date from said 2d day of May, 1874; that said defendants be decreed to pay the same, together with all your orator's costs and charges in this behalf sustained, (including attorneys' fees at 2 per cent upon the sum due him,) within some short day to be fixed by the court, and, in default thereof, that said mortgaged property be seized and sold under the order and decree of this honorable court, and that your orator be paid out of the proceeds of such sale, and that, if the same be insufficient to pay him, he have execution for the balance, and that his right to recover any deficiency from the estate of said Eliza A. Quitman be reserved to him," etc.

To these averments the cross-bill was directly responsive, and the matter therein set up as equitable claims of the

Quitmans against Cragin were directly connected with the transaction which he alleges, in large part, as the gravamen of his complaint. It is true that the bill also presents a claim against Lovell as the possessor of the property to which the complainant alleged he had a lien, but that only shows the alternative nature of the relief sought. The original bill was an hypothecary action, which, by article 61 of the Louisiana Code of Practice, is thus defined: "An hypothecary action is a *real* action which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt." In the original bill, complainant prayed that the mortgaged property be sold to pay his demand, and if the proceeds of that sale be insufficient for that purpose that he then "have execution for the balance, and that his right to recover any deficiency from the estate of Eliza A. Quitman be reserved to him."

It is thus observed that the action was against the property itself, very much of the same nature as a suit *in rem* at common law; and it was necessarily brought against Lovell because, by coincidence, he had possession of it. The judgment against him, while in one aspect of it a personal judgment, was also a judgment against the property; and it would seem that the claim in the cross-bill, which is one growing out of, or appurtenant to, the property, was really incident to the suit, as it was a part of the original transaction of the sale and mortgage of the Live Oak plantation, out of which the claim in the original bill is derived. The duty of Lovell, as executor of the estate of Miss Quitman, to protect the property, required him to set up the defence in the cross-bill, as a set-off against the claim and the prayer of the complainant's original bill. We think, therefore, the amount claimed by the cross-bill can properly be taken into consideration in determining the jurisdiction of this court; and, as that amount is more than the jurisdictional amount, the motion to dismiss is denied.

For reasons that will be made manifest as we proceed in our discussion of the case upon its merits, the motion to affirm is also denied.

Opinion of the Court.

Assuming for present purposes, that the facts relative to the purchase by complainant of the two notes which form the basis of his claim, and also to the subrogation, are as found by the court below, we pass to the assignment of errors. It is clear that if this were an original suit directly on the notes, to foreclose the mortgage, it could not be maintained, because, under the provisions of the Louisiana law the notes would be prescribed, and the mortgage would be perempted. These notes were both dated January 31, 1870, and matured February 3, 1872, and February 3, 1873, respectively. They were, therefore, prescribed February 3, 1877, and February 3, 1878, respectively, by virtue of art. 3540 of the Civil Code, which is as follows: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by endorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable." The mortgage given to secure these notes was recorded February 12, 1870, and, never having been reinscribed, became perempted in ten years from that date, by virtue of art. 3369 of the Civil Code, which is as follows: "The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

It is also true that a mortgage, under the law of Louisiana, is indivisible, (art. 3282, Civil Code;) and that the foreclosure of it has the effect to extinguish it, even if all the parties to the mortgage have not been made parties to the foreclosure proceedings. *Parkins* v. *Campbell*, 5 Martin, La. (N. S.) 149; *Pepper* v. *Dunlap*, 16 La. 163.

It is insisted, however, by the complainant that this action is brought not on the aforesaid notes and mortgage directly, but to enforce an obligation growing out of the foreclosure and sale of the mortgaged property — an obligation on the part of the purchaser at that sale to pay to the complainant,

out of the net proceeds of the sale, his *pro rata* share thereof. In other words, the contention is, that the net proceeds of the sale should have been divided ratably among the holders of all the unpaid notes secured by the mortgage; and that, as that was not done by the Quitmans, who purchased the property, an obligation arose on their part to pay the different instalments of the debt, which obligation followed the land, and was not prescribable until at least ten years from the date of the sale. Certain provisions of the Civil Code and the Code of Practice, as well as a number of decisions of the Supreme Court of the State, are relied upon to support this view, all which we shall now consider.

The following articles of the Code of Practice relate to the general question involved:

"ART. 679. When there exists a mortgage or privilege on the property put up for sale, the sheriff shall give notice, before he commences the crying, that the property is sold subject to all privilege and hypothecations, of whatsoever kind they may be, with which the same is burthened, and with the condition that the purchaser shall pay in his hands whatever portion of the price for which the property shall be adjudicated may exceed the amount of the privileges and special mortgages to which such property is subject."

"ART. 686. When a seizing creditor has a privilege or a special mortgage on the property seized, for a debt of which all the instalments are not yet due, he may demand that the property be sold for the whole of the debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such instalments as are not due."

"ART. 706. But when the property sold is subject to privileges or special mortgages in favor of other persons besides the suing creditor, the sheriff shall require from the purchaser, and he shall be compelled to deliver to the creditor, whether the sale be made for ready money or on credit, only the surplus of price beyond the amount of the privileges or special mortgages, if there be any surplus."

"ART. 709. The hypothecary action lies against the pur-

chaser of a property seized, which is subject to privileges or mortgages in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rule and restrictions as are applicable to a third possessor of a mortgaged property."

One of the leading cases relied on is *Pepper* v. *Dunlap*, 16 La. 163, 169, 170, 171. In that case the holders of the second and third notes of a series of seven, (the first having been paid at maturity,) concurrently secured by a mortgage on certain real and personal property, obtained an order of seizure and sale, on their mortgage against the mortgaged property, praying in their petition that it be sold to satisfy all the notes, but on a credit to meet those not due. The order was issued by the lower court, and the defendant appealed directly to the Supreme Court. After discussing some incidental questions, the court said: "The mortgage is in its nature indivisible, and prevails over each and every portion of all the immovables subjected to it. Louisiana Code, art. 3249 (now 3282). If so, how can property subject to a special mortgage be sold to satisfy a part of the debt, the whole of which the mortgage secures; would the purchaser acquire such title as he is legally entitled to, and would he not, on the contrary, have to run the danger of being disturbed for the payment of the balance of the debt, although the price of his purchase would be the full value of the property? Such proceedings would, in our opinion, be met with such difficulties and inconveniences that an injury must necessarily result to either of the parties, and we cannot sanction the doctrine that the creditor of part of a debt secured by a special mortgage, for which notes have been given, may be allowed or must be restrained to seeking and obtaining the satisfaction of his claim out of the sale of the property mortgaged for the whole, without any regard to the right of those who may be the holders of the other notes, and with an entire disregard of the consequences as to the purchaser of the property. Our laws being silent on this subject, we must reason by analogy." And after discussing the various articles of the Code of Practice relating to this subject, the court went on to say: "It is

clear, then, from these articles, that the purchaser of the property is *personally* bound for the surplus of the adjudication, still secured by special mortgage on the property sold, and that he holds said surplus in his hands, subject to the claim or call of the creditors who had the inferior mortgages, and who had nothing to do with the sale from which said surplus proceeded, and that when it is demanded of him, if he does not pay it, he is subject to being proceeded against in the same manner as if he were a third possessor. This, it seems to us, would be a safe and proper rule to adopt in a case like the present, where the different instalments are secured by the same mortgage, and where the rights of the creditors are of equal dignity, and we cannot see any good reason why, in the absence of any law, it should not be adopted. . . . We think, therefore, that we may safely establish, as a rule of practice, that when a seizing creditor only sues for such instalments of a debt secured by privilege or special mortgage as are due, the property so mortgaged is to be sold for the whole of the debt, on such terms of credit as are granted by the original contract, although such creditor does not show that the subsequent instalments belong to him, or that he is the holder of all the notes mentioned in the contract of mortgage, and that it suffices that the several instalments, as are not due, be mentioned in the petition."

Johnson v. *Duncan*, 24 La. Ann. 381, resembles the case at bar in some respects. In that case the plaintiff was the owner and holder of one of a concurrent series of notes secured by mortgage on a plantation. The holder of the other notes of the series foreclosed the mortgage, and the property was sold to the defendant for an amount not quite sufficient to satisfy the whole indebtedness. The court said: "The defendant was bound to retain in his hands for the benefit of the plaintiff's note the *pro rata* of the price coming thereto by law, and to pay the same with interest when demanded. We do not think he was bound for any more than this, but judgment to this extent may be properly given under the pleadings and evidence; and this view renders it unnecessary to pass upon many technical points presented in the argument. The

principal defence urged is that of peremption. The defendant contends that the mortgage was first recorded in 1859, and was not reinscribed, and that the plaintiff, whose suit was not instituted till 1871, lost his rights against defendant by peremption. This, we think, an error. The obligation of defendant springs from his purchase, and the duty of retaining in his hands the proportion of price coming to a concurrent mortgage note not embraced in the judgment under which the sale was made, and to deliver such proportion to the holder of such note. An hypothecary action is provided against him. As to him, the mortgage of the concurrent creditor requires no reinscription, for he has assumed the debt to the extent of its proportion of the purchase money, which he must retain."

In *Soniat* v. *Miles*, 32 La. Ann. 164, 166, the court, quoting from the syllabus in *Parkins* v. *Campbell*, 5 Martin, N. S. 149, said: "When a debt, secured by mortgage, is due in several instalments, and the assignee of the second causes the property to be seized and sold, the sale gives a complete title to the purchaser, and the creditor of the first instalment cannot seize the property in his hands, unless *he alleges and proves* that the sale is an absolute nullity, or unless he proceeds against that purchaser, by the hypothecary action, for any proportion of the price to which he may be entitled, under a prior or concurrent mortgage."

These authorities establish the principle that the holder of one or more of a series of notes secured by a concurrent mortgage is entitled to a *pro rata* share in the net proceeds arising from the sale of the mortgaged property at the suit of a holder of any of the other notes, and that an hypothecary action lies to enforce such claim. And one of them, *Johnson* v. *Duncan*, lays down the principle that, as regards the purchaser at the foreclosure sale, no reinscription of the mortgage is necessary, because he has assumed, by his purchase, the payment of the proportionate share of the debt. And the reasoning of the court in that case inevitably leads to the conclusion, that the basis of the hypothecary action provided by the Code in such cases is the obligation which the law casts upon the pur-

chaser to pay the *pro rata* share of the debt represented by the notes that were not the subject of the foreclosure suit.

But the other proposition advanced by the complainant, that the right of action is not prescribable until at least ten years from the date of sale, is not supported by any of these authorities, or by any that have been brought to our attention, or that we have been able to find.

In *Smith* v. *Johnson*, 35 La. Ann. 943, the court held, as stated in the syllabus of the case, that "the hypothecary action against the third possessor is not barred by the prescription of ten years, when the principal obligation has been kept alive, and the mortgage securing it has been properly inscribed and reinscribed."

In *Gentes* v. *Blasco*, 20 La. Ann. 403, 405, the court said: "We consider the hypothecary action as accorded and defined by arts. 61, 62 and 63 of the Code of Practice, to be an original action. It is declared to be a real action, and that it follows the property in whatever hand it may be found. What is said in *Kemp* v. *The Heirs of Cornelius*, 14 La. Ann. 301, in regard to the ten years' prescription being applicable, whenever it becomes necessary to institute a separate and distinct action from the one in which the judgment was rendered, seems not to apply to the hypothecary action. In that case we have already seen the action was personal. We do not find in our Code any period expressly fixed for the prescription of the hypothecary action. And the reason seems to be that its duration is contingent upon the existence of the right from which it springs."

Applying this principle to the case at bar, it is to be observed that the right from which the hypothecary action springs was the right of the complainant to his *pro rata* share of the net proceeds of the sale of the mortgaged property; or, in other words, the hypothecary action is based upon the obligation on the part of the purchasers to pay to him that amount — an obligation which, as before stated, follows the land into the hands of third persons. We have also seen that, according to the rule announced in *Johnson* v. *Duncan*, as to the purchaser at the sale, no inscription of the obligation was neces-

sary. But as to third persons, such is not the case. Upon this point the Louisiana constitution of 1868 and the constitution of 1879 are positive and peremptory. Article 123 of the constitution of 1868 is as follows: "The general assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, eighteen hundred and seventy, unless duly recorded. The general assembly shall provide by law for the registration of all mortgages and privileges."

Article 176 of the constitution of 1879 provides: "No mortgage or privilege on immovable property shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, except privileges for expenses of last illness, privileges for taxes, State, parish, or municipal; *Provided*, Such privilege shall lapse in three years."

The obligation in such case partakes of the nature of a judicial mortgage; and to be effective as to third persons it was necessary that it be inscribed with the recorder of mortgages. The judgment of the court from which the aforesaid obligation arose did not give a lien until so registered. *Hanna* v. *Creditors*, 12 Martin, 32; *Adle* v. *Anty*, 5 La. Ann. 631; *Ford* v. *Tilden*, 7 La. Ann. 533; Arts. 3322 and 3342, Civil Code; Art. 123, Constitution of 1868; Art. 176, Constitution of 1879.

Third persons are understood to be "all persons who are not parties to the act or the judgment on which the mortgage is founded." Art. 3343, Civil Code. And in that class must be placed the defendant Lovell, considered in his individual capacity, as possessor of the property; for his character as executor and his obligation as such did not exist until after he became such purchaser. As to him, the obligation aforesaid was of no effect without being registered, as required by the laws of Louisiana; and no action would lie to enforce it.

This principle was applied by the Supreme Court of Louisiana in *Delony* v. *George*, 20 La. Ann. 216. That case is well stated in the syllabus, as follows: "A having sold a tract of land to B, retained a mortgage thereon for the unpaid portion of the price, with the *pact de non alienando* in the act of sale. B subsequently sold the same tract of land to C, without an assumption in the act of sale of the existing mortgage. A lost his mortgage by allowing ten years to elapse without re-inscription: *Held*, that C, the third purchaser, held the property free from the mortgage of A, after the lapse of ten years from its inscription, notwithstanding the *pact de non alienando* contained in the act of sale from A to B, and that the third purchaser could successfully enjoin the order of seizure and sale taken out by A."

It is to be observed that our discussion of the case hitherto has been upon the theory that the court below was correct in finding that the complainant purchased the two notes in suit and was subrogated to all the rights in and to them enjoyed by the Quitmans. Indeed, the argument of both parties is largely based upon that theory, and the contrary view is presented only incidentally in connection with the issue raised by the cross-bill. In fact, however, it makes no substantial difference in our conclusion on the issues presented by the original bill whether that theory, or, more properly speaking, that finding of fact, be correct or not, as that is the most favorable view of the matter to the complainant that can be taken; and, in any view of the case, his bill cannot be sustained. The decree of the court below in that respect is erroneous and should be reversed.

With respect to the cross-bill, we are of the opinion the decree below was correct, although the grounds upon which the court based its decree are not stated. One of the causes of action alleged in the cross-bill is for damages arising from the alleged wrongful acts of the complainant with respect to removing personal property from the plantation while he had possession of it, and for waste committed by him about the same time. Under the law of Louisiana such acts on the part of the complainant would be considered quasi-offences, and

would, therefore, be prescribed by one year. Art. 3536, Civil Code.

But, furthermore, as stated by the attorney for appellant, the cross-bill "is for the same cause of action" as was originally brought in *Cragin* v. *Lovell*, in which judgment was rendered against Cragin in the court below, but on appeal to this court was reversed and ordered to be arrested because the petition set up no cause of action against Cragin, the complainant herein. 109 U. S. 194. The cause of action in that case was the same as in this, and the parties are the same; and while the plea of *res adjudicata* may not be strictly applicable, because the judgment in that cause was simply arrested and did not, therefore, adjudicate upon the merits of the case, yet a comparison of the cross-bill here and the petition in that case discloses that they are almost, if not entirely, identical, so far as the substance of both is concerned. And, as we held there that "the petition shows no privity between the plaintiff and Cragin," and "alleges no promise or contract by Cragin to or with the plaintiff," it would seem that the same rule should be applied with reference to this cross-bill, even though it is ostensibly an equity proceeding. *Ballance* v. *Forsyth*, 24 How. 183; *Life Insurance Co.* v. *Bangs*, 103 U. S. 780; *Gould* v. *Evansville & Crawfordsville Railroad*, 91 U. S. 526, 534; *Alley* v. *Nott*, 111 U. S. 472, and cases cited.

The decree of the court below sustaining the complainant's bill was erroneous, and to that extent is reversed; and with respect to its dismissal of the cross-bill it was correct, and to that extent is affirmed; and the case is remanded to that court with a direction to dismiss the bill with costs.

CORNELL UNIVERSITY *v.* FISKE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 1224. Argued April 8, 9, 1890. — Decided May 19, 1890.

Under the will of a testatrix who resided in New York, Cornell University, a corporation of that State, was made her residuary legatee. It was provided in its charter that it might hold real and personal property to an amount not exceeding $3,000,000 in the aggregate. The Court of Appeals of New York having held that it had no power to take or hold any more real and personal property than $3,000,000 in the aggregate, at the time of the death of the testatrix, and that, under the jurisprudence of New York, her heirs at law and next of kin had a right to avail themselves of that fact, if it existed, in the controversy about the disposition of the residuary estate, this court held that such decision of the Court of Appeals did not involve any federal question and was binding upon this court.

This court concurred with the Court of Appeals, 111 N. Y. 66, in holding that, at the time of the death of the testatrix, the property held by Cornell University exceeded $3,000,000, and, therefore, it could not take her legacy.

A federal question was involved in this case, arising under the act of Congress of July 2, 1862, 12 Stat. 503, c. 130, granting lands to the State of New York to provide a college for the benefit of agriculture and the mechanic arts.

The legislation of New York on the subject, in its acts of May 5, 1863, May 14, 1863, April 27, 1865, April 10, 1866, May 4, 1868, and May 18, 1880, and the contract of the State with Ezra Cornell, of August 4, 1866, selling to him the land scrip received by the State from the United States under the act of Congress, did not violate that act.

Mr. Justice Blatchford stated the case as follows:

This is a proceeding which originated in the surrogate's court of the county of Tompkins, in the State of New York. John McGraw, a resident of Ithaca, in that county, died May 4, 1877, leaving as his only child and heir Jennie McGraw, who, on the 14th of July, 1880, at Berlin, Germany, intermarried with Willard Fiske, and died September 30, 1881, at Ithaca, her place of residence, after reaching the age of 41, without issue, leaving her husband surviving her. John

Statement of the Case.

McGraw left a last will and testament, which was duly admitted to probate by the surrogate of Tompkins County, and of which his daughter, Jennie McGraw, and Douglass Boardman, and the survivor of them were made sole executors. His daughter, Jennie McGraw Fiske, also left a last will and testament, by which she made Douglass Boardman her sole executor, and which was duly proved and admitted to probate by the surrogate. Excepting about from $130,000 to $150,000 in value, which came to her by devise and bequest from her grandfather, John Southworth, the title to the estate and property which formed the subject of disposition by her will came through the will of her father, John McGraw.

On the 8th of January, 1883, after due citation of all parties interested, there was a judicial settlement of the accounts of Douglass Boardman, as executor of Mrs. Fiske's estate, and a decree entered by the surrogate confirming all payments theretofore made by the executor, and directing the balance of said estate to be paid to Cornell University, as her residuary legatee, and also a decree settling the accounts of said Boardman as surviving executor of John McGraw, and transferring the balance of his estate to the estate of Mrs. Fiske.

On the 6th of September, 1883, on the petition of Willard Fiske, as her surviving husband, the decree settling her estate was opened by the surrogate, and he was permitted to be heard with like effect as if he had appeared on the 8th of January, 1883, such opening being without prejudice to payments made or acts done by the executor in pursuance of her will and of said decree, but leaving the validity and effect of those acts and the rights of the respective parties therein for future adjudication; and on the 24th of October, 1883, a similar order was made opening the said decree of settlement in both estates, on the application of certain persons as the heirs and next of kin to Mrs. Fiske, and also on the application of certain legatees and devisees under John McGraw's will. Proofs were taken, the case was heard by the surrogate in November, 1885, and on the 25th of May, 1886, he made and filed his findings and entered his decision and decree, affirm-

ing in all things his original decrees as to the two estates. On the 23d of June, 1886, the several contestants made and served their exceptions to his findings, and duly appealed to the Supreme Court from his decision and decree. They also requested him to make certain findings upon questions of fact, and rulings upon questions of law, some of which requests he granted and some of which he refused, and exceptions were taken to his refusals.

The controversy in the case, so far as it presents itself for our consideration, is between Cornell University on the one side and the husband, heirs at law and next of kin of Mrs. Fiske on the other side. It was provided by section 5 of the charter of Cornell University that it might "hold real and personal property to an amount not exceeding three millions of dollars in the aggregate;" and the material question in dispute is as to whether, at the time of the death of Mrs. Fiske, on the 30th of September, 1881, the university held real and personal property to the amount of three millions of dollars in the aggregate.

Of the findings of fact made by the surrogate the following are the only ones which seem material to the case as it is before us:

"62. The Cornell University has had at all times since its incorporation, and now has legal and corporate capacity to take by gift, grant or devise real property in the States of Michigan, Wisconsin, Iowa, Minnesota, Ohio, Indiana, Kansas and New Jersey, and such is the law in those States respectively concerning foreign corporations like the university.

"63. The Cornell University has legal capacity to take, and did take by devise, all the real property the title to which was in Jennie McGraw Fiske at the time of her death, under her last will and testament, situate in the States of Michigan, Wisconsin, Iowa, Ohio, Indiana and New Jersey."

"66. The absolute title to the whole of the land situated in New Jersey passed under the will of Mrs. Fiske to Cornell University."

"75. At the date of Mrs. Fiske's death, September 30, 1881, Cornell University had, held and owned real and personal

property which it derived from the founder and other friends of the university, or which was purchased with funds furnished by them or with the income of such funds, and which property, September 30, 1881, was of the value of five hundred and ninety-eight thousand five hundred and eighty-eight and $\frac{65}{100}$ dollars ($598,588.65) in the aggregate." Then follows a description, by items, of the property thus held and owned by the university, with the separate value of each item, as of September 30, 1881. The last item is as follows: "The farm and grounds on which the university buildings are located, consisting of about 260 acres, including the buildings and reservoir, $69,683.33."

"93. The following is a recapitulation of the findings of fact relating to the property of Cornell University, viz.:

"September 30, 1881, Cornell University had, held and owned the property derived from individuals and described in the foregoing 75th finding of fact, to the amount and value of not exceeding $598,588.65 in the aggregate. At the same time Cornell University had, held and owned the property derived from the nation and State, and described in the foregoing findings, to the amount and value of not exceeding $2,088,012.78 in the aggregate, as follows: Western land contracts, $439,834.22; Western lands, $1,648,178.56; total, $2,088,012.78.

"But under and in pursuance of the Cornell contract of August 4, 1866, the whole net proceeds of the avails of said last-mentioned property, being the proceeds of the sale of said college land scrip or lands located therewith, was at that time due or payable by Cornell University to the State of New York, and the total amount and value of the property had, held and owned by Cornell University, September 30, 1881, over and above its obligations to the State of New York, as defined by said contract, was $598,588.65.

"At that time Cornell University had, held and owned the right to 'the income, revenue and avails which should be received from the investment of the proceeds of the sale of the lands or the scrip therefor, or any part thereof, granted to the State of New York by the act of Congress entitled "An act

donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862,' which right to said 'income, revenue and avails' was granted, and for a valuable consideration, paid by Ezra Cornell, was contracted, to Cornell University by section 6 of its charter. The right to the income, etc., of the proceeds of said sales, September 30, 1881, extended to the College Land Scrip Fund and Cornell Endowment Fund, as they then existed, and to all the proceeds of said sales which would or might come to said funds by virtue of the sale to Ezra Cornell of said college land scrip under his contract of August 4, 1866.

"At that time also Cornell University had possession of the Cornell Endowment Fund, and the State of New York had possession of the College Land Scrip Fund.

"Tabular Statement.

"Funds derived from individuals, described in 75th finding of fact	$598,588 65
"Funds derived from nation and State:	
"Western Lands	1,648,178 56
"Western land contracts	439,834 22
"Cornell Endowment Fund	128,596 61
"College Land Scrip Fund	473,402 87
	$3,288,600 91

"Making the total funds which belonged to Cornell University, September 30, 1881, under section 5 of its charter, $598,588.65, and the total funds already realized and to be realized, only the right to the income of which at that date belonged to Cornell University, under section 6, was $2,690,012.26.

"94. I find that the sum of all the property, real and personal, which the said Cornell University had taken before September 30th, 1881, by gift, grant, devise or bequest, did not exceed one million and six hundred thousand dollars.

"95. It has not been proved nor established that the property of the Cornell University, owned and held by it on the

Statement of the Case.

30th day of September, 1881, the date of the death of Jennie McGraw Fiske, together with that devised and bequeathed by her last will and testament to said university, exceeded the sum of three millions of dollars."

On his findings of fact the surrogate decided and held as follows, as conclusions of law :

"I decide and hold, as conclusions of law, that Douglass Boardman, as executor of the last will and testament of Jennie McGraw Fiske, deceased, and as sole surviving executor of John McGraw, deceased, and Cornell University, are entitled to a decree directing :

"(*a.*) That the accounts of Douglass Boardman, as executor of Jennie McGraw Fiske, deceased, and as sole surviving executor of John McGraw, deceased, filed in the Tompkins County surrogate's office on the 8th day of January, 1883, be in all respects allowed, and the decrees, including the summary statements therein contained, recorded and entered upon said accounts, be in all respects ratified and affirmed, including all payments heretofore made by said executor to Cornell University.

"(*b.*) That the said executor pay over to Cornell University the sum of one hundred forty-one thousand six hundred and seventy-six and $\frac{72}{100}$ dollars ($141,676.72), being the balance on hand January 1, 1885, and ready for distribution.

"(*c.*) And adjudging that said Cornell University is the owner and entitled to all the rest, residue and remainder of said estate, and directing said executor to pay the same, when sold, to said Cornell University, in money, or in such other form, or at such other time, as may be mutually agreed upon between said Cornell University and said executor."

The decree of the surrogate being in accordance with his findings and conclusions of law, the husband and the heirs at law and next of kin of Mrs. Fiske appealed to the Supreme Court of the State of New York, from the whole of the decree, the appeal being taken both upon facts and upon questions of law. The case was heard by the general term of that court, and is reported in 45 Hun, 354. Judge Hardin, the presiding judge, delivered an opinion, in which Judge Follett concurred;

and Judge Merwin also delivered a concurring opinion. The three judges were unanimous in reversing the decree of the surrogate.

In the judgment entered by the general term of the Supreme Court, on the 14th of December, 1887, the surrogate's finding of fact numbered 62 was modified so as to read as follows: "62. The Cornell University has had at all times since its incorporation, and now has, legal and corporate capacity to take, by gift, grant or devise, real property in the States of Michigan, Wisconsin, Iowa, Minnesota, Ohio, Indiana, Kansas and New Jersey, subject to the limitation in its charter; and such is the law in those States respectively concerning foreign corporations like the university." His finding of fact numbered 63 was reversed and stricken out. His finding, above recited, in No. 66, as to the title to the land situate in New Jersey, was reversed and stricken out. All those parts of his finding numbered 75, which fixed the value of the item mentioned last therein at $69,683.33, and which fixed the total value of the items named in that finding at $598,588.65, and each clause in any of his findings which recapitulated those values respectively at the sums so stated, especially so much of finding numbered 93 as stated that, on the 30th of September, 1881, "Cornell University had, held and owned the property derived from individuals and described in the foregoing 75th finding of fact, to the amount and value of not exceeding $598,588.65 in the aggregate," were reversed and stricken out, but only in so far as the aggregate of $598,588.65 was made up of the last item in the 75th finding, namely, the farm and university buildings located thereon, valued by him at $69,683.33. The following parts of his finding numbered 93 were reversed and stricken out: "But under and in pursuance of the Cornell contract of August 4, 1866, the whole net proceeds of the avails of said last-mentioned property, being the proceeds of the sale of said college land scrip, or lands located therewith, was at that time due or payable by Cornell University to the State of New York, and the total amount and value of the property had, held and owned by Cornell University, Sep-

tember 30, 1881, over and above its obligations to the State of New York, as defined by said contract, was $598,588.65." "Making the total funds which belonged to Cornell University, September 30, 1881, under section 5 of its charter, $598,588.65, and the total funds already realized and to be realized, only the right to the income of which at that date belonged to Cornell University, under section 6, was $2,690,-012.26." His finding numbered 95 was reversed and stricken out.

The judgment of the Supreme Court then went on to provide as follows:

"And it is further found, adjudged and decided by this court, in pursuance of the statute in such case made and provided that at the death of Jennie McGraw Fiske, September 30, 1881, the value of the farm and grounds on which the university buildings are located, consisting of about 260 acres, including the buildings and reservoir, was the sum of $400,-000.00, instead of 69,683.33, as found by the surrogate, and the total value of the items set forth in the finding of the surrogate numbered 75, including this last item, viz., $400,000.00, was $928,905.32.

"And it is further found, decided and adjudged by this court, that the property of the Cornell University which was held and owned by it when Jennie McGraw Fiske died, on the 30th day of September, 1881, amounted in value to the sum of $3,015,414.71, made up as follows:

"Funds derived from individuals, described in the 75th finding of fact, (excluding the last item thereof,) as valued by the surrogate . . .	$528,905 32
"The last item in said finding, viz., farm of about 260 acres and university buildings, as valued by this court	400,000 00
"Property derived from Cornell contracts with the State, as valued by the surrogate in his findings:	
"Western lands	1,648,178 56

"Western land contracts	$439,334 22
"Cornell endowment fund	128,596 61
"Total	$3,145,014 71
"Less amount due to the college Land Scrip Fund, for the last 30 cents an acre on 432,000 acres	129,600 00
"Balance	$3,015,414 71

"Making the total funds which belonged to Cornell University September 30th, 1881, under section five of its charter, $3,015,414.71.

"And it is further found, decided and adjudged that there was at that time due to the College Land Scrip Fund, and to be treated as a part thereof, the sum of $129,600 mentioned above.

"And it is further found, decided and adjudged that the College Land Scrip Fund, consisting of $473,402.87, together with the sum of $129,600, as found above, is not the property of Cornell University, and should not be reckoned or included as a part thereof, or subject to its charter limitation.

"And this court does further find and decide, that, at the date of the death of said Jennie McGraw Fiske, the said Cornell University held and owned real and personal property, of which the yearly income or revenue was more than ($25,000) twenty-five thousand dollars, exclusive of the College Land Scrip Fund then held by the Comptroller of the State of New York for the benefit of said university, and such yearly income and revenue was derived in part from lands and avails of sales of land which came to Cornell University through the Cornell contract of August 4, 1866.

"And it is further found, decided and adjudged by this court, that at the time of the death of Jennie McGraw Fiske the Cornell University had already reached the limit of property prescribed by its charter, as found above, and was not entitled to and could not take or hold any of the property or funds devised or bequeathed to it by her last will and testa-

ment, and never had any right, title or interest in or to the same or any part thereof; and that at her decease, the legal right and title in and to all of the property and funds so devised and bequeathed by her to the Cornell University passed to and vested in the appellants, according to their several rights therein as between themselves, as the same may hereafter appear."

The judgment then went on to reverse the surrogate's decree of May 25, 1886, with costs to be paid by the executor out of the funds of the estate, and to order the proceedings to be remitted to the surrogate, and that he enter a decree in conformity with the judgment of the Supreme Court, and make a distribution to the appellants according to their respective rights, as between themselves, they having already agreed upon such rights, of all the property in the hands of the executor of Mrs. Fiske, after paying debts, expenses and legacies other than those to Cornell University, together with all the property and funds which had come into the possession of the executor, and which he had delivered or paid over to Cornell University; and that the university restore into his hands all money and property received from him, and all dividends, interest and income therefrom, received by the university, less any expenses necessarily incurred in investing and managing the same; and that the surrogate ascertain and fix the amount so received by the university from the executor, with the gains, profits and income thereof, less such expenses, and enforce restitution of the same to the executor, by a decree.

Boardman, as executor of John McGraw and of Mrs. Fiske, and also Cornell University, appealed to the Court of Appeals of the State of New York from the judgment of December 14, 1887. The Court of Appeals affirmed the judgment and a remittitur from that court having been sent to the Supreme Court an order was entered in the latter court on the 12th of December, 1888, making the judgment of the Court of Appeals the judgment of the Supreme Court, and awarding the costs of the Court of Appeals against the executor and the university.

The opinion of the Court of Appeals, delivered by Judge Peckham, is reported in 111 N. Y. 66. The judges were unanimous, except that Judge Finch took no part. Cornell University, and Boardman, as executor of John McGraw and of Mrs. Fiske, have brought the case to this court by a writ of error, directed to the Supreme Court of the State of New York.

Mr. Edwin Countryman (with whom was *Mr. Samuel C. Halliday* on the brief) for plaintiffs in error.

Mr. Esek Cowen, for defendants in error, argued upon the jurisdiction of the court, and upon the merits of the case. On the question of jurisdiction he contended as follows:

I. In the proceedings below, Cornell University did not "claim" any "right, title, privilege or immunity," under any statute of the United States, or which was, directly or indirectly, derived from such statute.

Omitting provisions irrelevant to this case, section 709 of the Revised Statutes confers upon this court the right to review the decision of the highest court of a State, "where any title, right, privilege or immunity is claimed under . . . any statute . . . of the United States, and the decision is against the title, right, privilege or immunity, specially set up, or claimed by either party." It will be seen that the power of review is given only as to a judgment or decree, in a suit, "*where*" (that is, "in which") is claimed such title, right, privilege or immunity. The university has never in this proceeding, or otherwise, claimed any right, privilege or immunity, directly or remotely, derived from any act of Congress. It is an artificial person created by a New York statute, and must look to its charter for all its "rights, privileges and immunities." On the other hand, it does own certain lands and land contracts, the *title* to which is clearly derived from the act of Congress, granting lands to the several States for educational purposes.

But it is equally clear that the university did not claim

these lands *in the suit or proceeding* that is brought here by this writ. What the university claimed in that proceeding, what the court below denied, was the title to certain personal property formerly belonging to Mrs. Fiske and her father, and not at all the lands derived from the United States. The position of the plaintiffs in error seems to be that an appeal lies to this court whenever a state court has construed a federal statute contrary to the contention of either of the parties. But that is not the meaning of the law. A mere construction of an act of Congress by the state court does not give this court jurisdiction. One of the parties must have asserted some right, *derived from such statute*, and must have been deprived of that right by the decision of the state court.

"It is not every misconstruction of an act of Congress by a state court that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege or exemption *under an act of Congress*, and the decision is against such right, title, privilege or exemption." *Montgomery* v. *Hernandez*, 12 Wheat. 129, 132. See also *Menard* v. *Aspasia*, 5 Pet. 505, 517; *Bowman* v. *Chicago & Northwestern Railway Co.*, 115 U. S. 611.

II. Even if the judgment of the court below were binding as between Cornell University and the State of New York, (which is a stranger to these proceedings,) the title of the university to the lands and land contracts conveyed to it by Ezra Cornell, and which it *does* hold under the act of Congress, has been *affirmed*, not denied by the state court.

It must be remembered that the duty of the State of New York as trustee, to Cornell University, or to the United States as creator of the trust, was not in any sense before the court below. The sole question was one of *title*. Was Cornell University the owner of the lands and contracts conveyed to it by Ezra Cornell within the meaning of the charter of that corporation?

In order to give this court jurisdiction under Rev. Stat. § 709, the plaintiff in error must have claimed some right or title, etc., under the Constitution, or under a treaty or law of the United States, and such right or title, etc., must have been

denied by the state court. No principle is better settled than that no appeal lies where the right or title claimed has been affirmed by the state court. *Commonwealth Bank* v. *Griffith*, 14 Pet. 56; *Burke* v. *Gaines*, 19 How. 388; *Ryan* v. *Thomas*, 4 Wall. 603. In the case at bar the Cornell University did not claim in the state court any right or title under any statute of the United States, and no such right or title was, in any manner, affected by the judgment; and furthermore, that an apparent title to property, derived from the United States through an act of Congress, having by chance come in question, the decision of the state court was *in favor* of that title.

III. Assuming, as before, (what is not the fact,) that the decision below was binding as between the Cornell University and the State of New York, and that the right of the university to the lands and contracts conveyed to it by Ezra Cornell was involved in the proceeding below, still the appeal would not lie, for the state court decided not against the title of the University, but *against the title of the State of New York.*

It has been settled by repeated decisions of this court that to sustain a writ of error to a state court the latter tribunal must have denied some "right, title, privilege or immunity" claimed by the plaintiff in error *in his own right.* It is not enough that the plaintiff in error claims that such title, etc., is given to *another* by the Federal Constitution, treaty or statute, even when the denial of that right to such other person has resulted in a judgment adverse to the plaintiff in error. *Long* v. *Converse*, 91 U. S. 105; *Miller* v. *Lancaster Bank*, 106 U. S. 542; *Henderson* v. *Tennessee*, 10 How. 311; *Owings* v. *Norwood*, 5 Cranch, 344.

IV. The decision of the Court of Appeals of the State of New York did not affirm the validity of any statute of the State of New York claimed by the plaintiffs in error to be in contravention of any law of Congress, nor was the validity of any such statute "drawn in question" in the court below.

V. The plaintiffs in error did not "draw in question" in the state courts the validity of any authority exercised by or under the State of New York, nor was there any decision in the state court in favor of an authority so exercised and questioned by them.

Argument for Defendants in Error.

The state courts, in deciding upon the title to this fund, did not pass upon the validity of any statute of the State of New York, for no such question was before them; and the validity of the contract between Ezra Cornell and the State was not "drawn in question" by the plaintiffs in error, for they admitted and asserted its validity, and its invalidity would have been fatal to the case they were seeking to make.

But the act of Congress and its effect upon the *construction* of the Cornell contract *were* drawn in question. The counsel for the university insisted that, by virtue of the Cornell contract, the university, as assignee of Ezra Cornell, was bound to pay the net proceeds of the lands located by him into the treasury of the State, and that such proceeds being part of the purchase price of the land scrip, would, under the act of Congress, belong, when paid in, to the fund created by that act, which the State had agreed to accept and hold.

They argued, therefore, that the ultimate *title* to the fund was not in the university, but in the State of New York. Upon this point the decision was against them. The state courts did not deny a title claimed by the university under any law of Congress, but affirmed a title which the university attempted to disclaim. It denied a title, which the plaintiffs in error asserted to be in the State of New York, a third person, not a party to the proceedings.

But these decisions do not come within the statute allowing an appeal to this court. The writ of error should, therefore, be dismissed for want of jurisdiction.

VI. The case is not appealable because there are other grounds aside from the construction of the act of Congress of which the plaintiffs in error complain, on which the Court of Appeals based its conclusion, and which would have led to the same result if the construction of the plaintiffs in error had been adopted by the court.

The state court was certainly at liberty to hold, upon general principles of law, that, assuming that the relation of trustee and *cestui que trust* existed between the State of New York and Cornell University, the latter could not question acts of its trustee which had been done for its benefit and at

its special instance and request. And the Court of Appeals has, partially at least, placed its decision on this ground. Judge Peckham, in delivering the opinion of the court, said:

"It is exceedingly doubtful, to my mind, whether the university can be heard to claim the existence of this alleged debt under the facts of this case. The State has made and makes no claim upon the university for the property, or any portion of it. It was placed in its possession by virtue of the consent of the State, evidenced by the passage of an act authorizing and directing it. The university has claimed to be the owner of it, and no one has drawn its rightful title in question. Can it now, while enjoying, without hostile claim from any source, the full control of the property, as its absolute owner, set up, as a reason why it should be allowed to take other property, that, perhaps, hereafter, some one may make a claim that the property does not belong to the university, but that it is a trust fund, originating in the act of Congress? If the State or United States were to commence some proceeding, based on the counsel's argument, to reclaim possession of the property, there is nothing in the present attitude of the university which would necessarily estop, or in any way conclude it from denying that any such trust exists, or that any case had been made for taking this property out of its hands. So far as appears, it seems that this assumed indebtedness is entirely gratuitous on its part, and that there is no creditor who makes the claim, no one who questions its title. It is going a good ways, under such circumstances, to lay much weight on a liability which, up to this proceeding, was never admitted by the university, and is not now asserted by any one else. It would seem as if property, which was thus in the possession of the corporation, unclaimed by anyone else, *was held by it within the meaning of its charter*, and that the question with regard to the character of its holding was merely an abstract one, with which courts would not deal, at least so far as this proceeding is concerned."

Now, whether the Court of Appeals was right or wrong in this position, it is one based on general principles of law, and does not "draw in question" the construction of any act

Argument for Plaintiffs in Error.

of Congress. The decision is, that even if the act of Congress be so construed as to make the university a debtor to the State for the proceeds of the lands located by Ezra Cornell, it has been precluded, by its own conduct, from raising that question in these proceedings.

An appeal will not lie under section 709 of the Revised Statutes, if this court can see that the decision of the court below was, or may have been, placed upon some ground which did not involve the construction of the Federal Constitution, treaty or statute. *Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157; *Steines* v. *Franklin County*, 14 Wall. 15; *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23.

Mr. George F. Comstock argued for the defendants in error.

Mr. S. S. Gregory (with whom upon the brief were *Mr. James S. Harlan*, *Mr. William M. Booth* and *Mr. John G. Sears*) argued for defendants in error.

Mr. George F. Edmunds, for plaintiffs in error, in closing, after discussing the question of jurisdiction, said on the merits:

The act of Congress of 1862, 12 Stat. c. 130, 503, provided for aid to public instruction in the States a great fund in lands, if within the limits of the State, and, if not, in land scrip in other States, which the State owning the scrip could not locate in its own name, (this for obvious reasons,) but which it was provided should "be sold by said States, and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use or purpose whatever." The act also provided that though the States should not locate their own scrip in other States, "their assignees may thus locate," etc. It was provided that the expenses of location, sale of scrip, etc., should be paid by the States, "so that the entire proceeds of the sale of said lands shall be applied, without any diminution whatever, to the purposes" of the act. These purposes were "the endowment, support and maintenance of at least one college, where the leading object shall be, without

excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such a manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

This foundation both in terms and intent was made upon the idea that the State accepting the donation should make the most and best it possibly could out of the lands and land scrip thus donated.

It was a trust that expressed and implied the highest degree of duty and diligence on the part of the State in obtaining the greatest possible fund that could be got out of the lands and scrip, for the purposes named.

Had it been a private trust between citizens, established in precisely the same phrases, no one would doubt that the donee who accepted the gift would be bound in every and the highest sense to realize the largest possible sum to the ends named.

The State, acting upon the duty and trust in the sense in which I have described it, on 27th April, 1865, passed the act establishing Cornell University. It was a public educational institution, whose governing authority was the chief officers of the State, but it was provided as a due and grateful memorial of the beneficence of Mr. Cornell in the foundation gifts as well as in what it was expected he would be able to do in realizing the largest possible sum out of the land scrip for the benefit of the institution, that the eldest male lineal descendant of Mr. Cornell should be *ex officio* a member. It was also provided, as had been stated in the title of the act, that the objects and educational proceedings of the corporation should be the very ones named in the donating act of Congress.

The foundation and activity, therefore, were the foundation and activity measured precisely by the provisions of the act of Congress.

The fifth section of the incorporation act authorized it to hold real and personal property to an amount not exceeding three million dollars; but it is agreed on all hands in this controversy that that limitation has no application to such prop-

erty as falls within the purview, and is subject to the operation of the donating act of Congress. This would be apparent on acknowledged principles if the state act itself had made no further provision, but, having thus limited the general and disposable property of the corporation, it proceeded without limit to provide for all the funds that could be obtained from the land scrip, amounting to 990,000 acres.

The sixth section declared that "the income, revenue and avails, which shall be received from the investment of the proceeds of the sale of the lands, or of the scrip thereof, or any part thereof," should be paid over to the university for the purpose before named.

The seventh section provided that the trustees should fulfil the requirements of the act of Congress in respect of the buildings, etc., as part of their duty in connection with taking the fund.

The next step was the act of New York, 10th April, 1866, which provided that the comptroller should fix the price of the scrip at not less than thirty cents per acre; that he might contract for the sale thereof with the trustees of the university. It provided, further, that the trustees might make contracts to the effect that "the *whole net avails and profits from the sale of land . . . located under said scrip* shall, from time to time, as such net avails and profits are received, be paid over and devoted to the purposes of such institution, . . . in accordance with the provisions of the act of Congress hereinbefore mentioned." The act then required that *the persons to whom the scrip* "*shall be sold shall report* to the comptroller annually, under such oath and in such form as the comptroller shall direct, the amount of land or scrip sold, prices at which the same have been sold and the amount of the money received therefor," etc.

The next section provided that the comptroller should have the power of examination into the doings of the person to whom the scrip had been thus sold, in order to ascertain the net avails, etc., to the end of carrying out the purposes of the act.

The next step in the history of the transaction is the act

of New York of 24th of April, 1867, amending the charter of the university, the 7th section of which required that the trustees of the university taking the benefit of the act should comply with the act of Congress in respect of the buildings, etc., and that "they shall make all reports, and perform such other acts as may be necessary to conform to the act of Congress aforesaid."

On the 22d July, 1867, the comptroller reported to the constitutional convention of New York the history of the matter down to that time, from which it appeared that Mr. Cornell had proposed to take the land scrip and to deal with it for the benefit of the university, beginning at thirty cents an acre and all profits, and thirty cents more per acre to be added to the college fund, etc., and the balance of said profits to be placed in a separate fund, to be known as the Cornell Endowment Fund, and to be preserved and invested for the benefit of said institution, and the income derived therefrom to be paid over annually to the trustees of the said university for the general purposes of said institution.

"*The general purposes*" *of the institution were precisely those, and none other, that the donating act of Congress had required that the avails of the land scrip should be devoted to.*

The arrangement, then, instead of being a compensation or commission to Mr. Cornell for undertaking the enterprise of disposing of the scrip, was an arrangement precisely to the ends declared by the act of Congress; and the separation of the avails, and the giving a name to a part of them was simply the tribute that was justly due Mr. Cornell in respect of his contributions and exertions to the beneficent end contemplated. Things and obligations remain the same — names and ornaments were laid on to these things for the honor of the name of Mr. Cornell. That was all. The substance was the same.

It is obvious, then, if clear language can express clear intentions, that the State intended and Cornell agreed that in putting the disposition of the scrip into his hands, all the money that could be derived from the disposition of the scrip should be devoted to the purposes of the institution. That

part of it mentioned as attributable to the "Cornell Endowment Fund" was only a phrase of honor to the name and efforts of Cornell in realizing the largest possible sum for the beneficent ends designed by the act of Congress. There is no word, hint or symptom that the sum attributable to the Cornell Endowment Fund was to be considered as a compensation to Cornell, as the agent or contractor of or with the State, for his service in disposing of the scrip. Had there been any such statement or implication, it would have been, on the face of it, an apparent fraud on the donor, for the sum expected to be realized and that was in fact realized, would be out of all proportion to any honest arrangement in respect of payment for services or responsibilities in the affair.

Under this arrangement between the State and Mr. Cornell, and pursuant to the law and authority of the State then in force and no other, Mr. Cornell disposed of the scrip and realized therefrom the large sums of money that have become, in the practical sense, the pivot on which this case turns. This realization of funds and income took place before the subsequent steps in respect of legislation or contract were taken.

Under the law and agreement before mentioned Mr. Cornell then went on, took the scrip, located and sold it from time to time, and then on 4th May, 1868, the legislature of New York enacted that the moneys in question in excess of the sixty cents per acre before referred to, "which excess, in pursuance of a contract made with Ezra Cornell by the commissioners of the land office bearing date 4th August, 1866, is set apart and constituted a separate and distinct fund, to be known as the 'Cornell Endowment Fund,' shall from time to time," etc., be invested. This investment, it is true, was not such an investment as the act of Congress appeared to require, but the income was to be devoted to the uses of the university, which uses, as before stated, were precisely and only those named in the act of Congress.

Whether the State, in providing for a different investment from that which the act of Congress required, was guilty of a breach of trust or duty, is a question quite apart from the nature of the fund. The fact that a trustee misinvests the

funds confided to him does not alter the character of the trust or fund.

Following all this, in 1869 the Comptroller of the State reported the receipts from both the classes of moneys — "College Land Scrip Fund," "Cornell Endowment Fund" — as the fruits of the sale of scrip under the act of Congress, and stated the account accordingly.

The Comptroller of the State from time to time reported to the legislature the state of the accumulations under these two heads and called attention to the possibility that the State was not, in form, at least, conforming to the act of Congress in dealing with the avails of the sales of scrip in the very respect of the Cornell endowment fund matter — chiefly as it respected expenses, etc. But continually, as it appears from the official records, all the money that Mr. Cornell got in from the sale of scrip was turned over to the State in accordance with this contract, and for the purposes before named. And this was in pursuance of the acts of the legislature of New York from time to time passed on the subject. That of May 4, 1868, provided for the disposition of the "excess" arising under the contract with Cornell, and set that money apart as under state authority, and, referring to the donating act of Congress as its foundation, provided that it should be invested to the end contemplated by the act of Congress, although the mode of the investment authorized differed from the limitations of the act of Congress, but it required that the fund should still be held and devoted to the purposes of the institution, which purposes, as before stated, were precisely and no other than those mentioned in the donating act of Congress.

The sale of the scrip accordingly went on, and the money came in and was duly accounted for accordingly. There was yet left some unlocated or unrealized scrip, and Mr. Cornell, apparently becoming tired of the drudgery and detail concerning the affair, desired that his authority and mission should be turned over to the university itself. Accordingly the State, by an act of 18th May, 1880, directed the comptroller to turn over to the university all the funds, securities, etc., known as belonging to the "Cornell Endowment Fund."

Due reports and operations were had accordingly, which appear in the state records.

The next and last act of the legislature upon the subject was that of 12th May, 1882, which provided for detail of the practical management, and also provided that the university might take and hold real and personal property to such an amount as should become necessary for the proper conduct and support of the several departments of education before mentioned.

[This act was *post hoc*, and cannot perhaps be held to affect the validity of a devise depending upon the death of a person that had theretofore happened, but it was certainly, so far as the legislative power could do it, a waiver of any of the public considerations that entered into the limitation of the amount the university could hold under its charter.]

The case then, on its merits, (the very merits upon which the Court of Appeals of New York determined it,) depends upon the question whether, in view of what had transpired, the money obtained from the sale of the land scrip over which Mr. Cornell had never at any time any personal control, belonged and was subject to the trusts and purposes declared in the act of Congress, or not.

If, in the same course of disposition, the State of New York had dealt in the same way with Mr. Cornell, but had provided that the excess above the minimum price should be paid into its treasury, for the general purposes of the expenditures of the State, it could not, I take it, be thought by anybody that such a disposition could separate that money from the trust. Nor can it, I think, be doubted that, if the same donation had been made to any private person and upon the same conditions, and he had made the same engagements with another that the State did with Cornell, he could not require that the so-called "excess" above the minimum price fixed, should be paid to him for his own private use.

I submit, therefore, that it is perfectly clear (needing no citations of authorities upon the law of trusts) that the whole of the moneys derived in the way before stated, were trust moneys and belonging to a trust fund, and having no connec-

tion or relation with the limitations of the amount of property that the university might hold provided in its charter.

The fact that a donee or trustee happens to be a corporation, private or public, does not, in the least, change the nature and character of the trust.

The fact, so much relied upon on the other side, that the State provided for other modes of investment than those mentioned in the act of Congress cannot have any bearing upon the intrinsic nature of the trust itself. To hold that it can, will be to hold that a trustee may change the nature and responsibility of his duties under a trust by a misinvestment.

Mr. Justice Blatchford, having stated the case as above reported, delivered the opinion of the court.

The questions for consideration here fall within a narrow compass, for they can embrace only federal questions.

The Court of Appeals, in its opinion, discussed only two questions, (1) whether Cornell University had power to take and hold property of the value of more than $3,000,000; and (2) if it had no such power, whether it held real and personal property in the aggregate up to such limit, at the time of the death of Mrs. Fiske, on the 30th of September, 1881.

The first question was examined most elaborately by that court; and it arrived at the conclusions that the university had no power to take or hold any more real and personal property than $3,000,000 in the aggregate, at the time of the death of Mrs. Fiske; and that, under the jurisprudence of the State of New York, her husband and her heirs at law and next of kin had a right to avail themselves of the fact, if it existed, in the controversy before the court, that at the time of her death, on the 30th of September, 1881, the university already held real and personal property up to the prescribed limit. The propositions thus decided by the Court of Appeals do not involve any federal question. They depend entirely upon the construction of the provisions of the charter of the university, and upon the municipal law of the State of New York. The decision upon those questions is binding upon this

court in the present case. Therefore, the only question subject to review by us is whether the property held by the university prior to and at the time of the death of Mrs. Fiske, on the 30th of September, 1881, exceeded the amount which by law it could hold, if a federal question is involved in that proposition. The Court of Appeals decided that the property so held by the university exceeded $3,000,000.

It is contended by the defendants in error that in the proceedings in the state courts the university did not "claim" any "title, right, privilege or immunity," under any statute of the United States, or which was derived directly or indirectly from any such statute; that, even if the judgment of the Court of Appeals was binding as between the university and the State, the latter being a stranger to the proceeding, the title of the university to the lands and land contracts conveyed to it by Cornell, if held under the act of Congress involved in the controversy, has been affirmed, and not denied, by the state court; that, assuming that the decision of the Court of Appeals was binding as between the university and the State, and that the right of the university to the lands and contracts conveyed to it by Cornell was involved in the proceeding, still the writ of error will not lie, because the state court decided, not against the title of the university, but against the title of the State; that the decision of the Court of Appeals did not affirm the validity of any statute of the State which the plaintiffs in error claimed to be in contravention of any act of Congress, nor was the validity of any such statute "drawn in question" in that court; that the plaintiffs in error did not draw in question, in the state court, the validity of any authority exercised by or under the State, nor was there any decision in the state court in favor of an authority so exercised, and so questioned by the plaintiffs in error; and that, aside from any construction of the act of Congress of which the plaintiffs in error complain as that on which the Court of Appeals based any conclusion, there were other grounds which would have led to the same result, if the construction of such act of Congress insisted upon by the plaintiffs in error had been adopted by the court.

On the other hand, it is insisted by the plaintiffs in error, that this court has jurisdiction to review the judgment of the state court, under the second clause of section 709 of the Revised Statutes, because there was drawn in question the validity of statutes of the State of New York and of an authority exercised under those statutes, on the ground of their being repugnant, as they were finally construed by the state court, to the provisions of an act of Congress.

Without discussing this question of jurisdiction, it is sufficient to say, that a majority of the court are of opinion that this court has jurisdiction. As our conclusion is that the judgment of the state court must be affirmed, it is not important to discuss at any length the question of jurisdiction, because, whether the writ of error is dismissed, or whether the judgment is affirmed, the result is the same, of allowing the judgment of the state court to stand in full force.

We proceed now to give our views as to the case upon its merits. The conclusion of the Court of Appeals, in its concurrence with the Supreme Court, that the property of the university exceeded $3,000,000, was based upon the modifications made by the Supreme Court, in its judgment, of the finding of the surrogate as to the value of the buildings and grounds. The Court of Appeals, in its opinion (p. 131), states that it agrees with the Supreme Court in those modifications, although it was probably bound by the findings of that court, as there was contradictory evidence in regard to such value. This court certainly is bound by the findings of the Supreme Court and of the Court of Appeals on that subject. The remainder of the questions before us depends wholly upon documentary evidence, and upon the construction of statutes and of written papers.

The Court of Appeals, in approaching the question as to whether the property in controversy, if taken and held by the university, would exceed the amount which by law it could hold, says (p. 113): "The decision of such question depends partly upon the view which should be taken of the character of the holding under which the university now possesses certain property, which is described in the finding of the sur-

rogate as property derived from the nation and State, and which he finds amounted to $2,088,012.78, and which was made up, as he also finds, of Western land contracts, $439,834.22, and of Western lands to the amount of $1,648,178.56; and he states, as part of his finding, that this total of $2,088,012.78 was due or payable by the university to the State, or, in other words, that the university owed the State that sum, and consequently it should not be regarded as any part of its property. This finding has not been concurred in by the general term, which has modified it by holding that the same is to be taken into account as part of the property of the university. The state of facts under which the question arises is undisputed, and it becomes a question of law as to what is the proper legal inference to be drawn from the undisputed facts, and the decision of that question is reviewable in this court."

On the 2d of July, 1862, Congress passed the following act (12 Stat. 503, c. 130):

"An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act.

"SEC. 2. *And be it further enacted*, That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or subdivisions of sections, not less than one-quarter of a section; and whenever there are public lands in a State subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed

to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share; said scrip to be sold by said States, and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use or purpose whatsoever: *Provided*, That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided, further*, That not more than one million acres shall be located by such assignees in any one of the States: *And provided, further*, That no such location shall be made before one year from the passage of this act.

"SEC. 3. *And be it further enacted*, That all the expenses of management, superintendence, and taxes from date of selection of said lands, previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the States to which they may belong, out of the treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned.

"SEC. 4. *And be it further enacted*, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act,

to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

"SEC. 5. *And be it further enacted*, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

"First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.

"Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings.

"Third. Any State which may take and claim the benefit of the provisions of this act shall provide, within five years, at least not less than one college, as described in the fourth section of this act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold, and that the title to purchasers under the State shall be valid.

"Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and exper-

iments made, with their costs and results, and such other matters, including state industrial and economical statistics, as may be supposed useful: one copy of which shall be transmitted by mail free, by each, to all the other colleges which may be endowed under the provisions of this act, and also one copy to the Secretary of the Interior.

"Fifth. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the maximum price, and the number of acres proportionally diminished.

"Sixth. No State while in a condition of rebellion or insurrection against the government of the United States shall be entitled to the benefit of this act.

"Seventh. No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President.

"SEC. 6. *And be it further enacted*, That land scrip issued under the provisions of this act shall not be subject to location until after the first day of January, one thousand eight hundred and sixty-three.

"SEC. 7. *And be it further enacted*, That the land officers shall receive the same fees for locating land scrip issued under the provisions of this act as is now allowed for the location of military bounty land warrants under existing laws; *Provided*, Their maximum compensation shall not be thereby increased.

"SEC. 8. *And be it further enacted*, That the governors of the several States to which scrip shall be issued under this act shall be required to report annually to Congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same, and what appropriation has been made of the proceeds."

On the 5th of May, 1863, the legislature of the State of New York passed an act, (Laws of New York of 1863, c. 460,) entitled "An act relative to the lands granted to this State by the act of Congress entitled 'An act donating public lands to the several States and Territories which may provide

colleges for the benefit of agriculture and the mechanic arts,' approved second July, eighteen hundred and sixty-two, and authorizing the sale thereof, and the investment of the proceeds of such sales." By this act, the State duly accepted the grant and gave its assent to the conditions thereof. The Comptroller was authorized to receive the land scrip, (as the State had no public lands of the United States, unappropriated, within its borders,) and to sell the same, and to make all necessary arrangements, employ agents, etc., as he deemed expedient, for effecting a judicious sale of such scrip. Land scrip representing 989,920 acres of land was then issued by the Secretary of the Interior to the Comptroller, and was embraced in 6187 pieces of scrip for 160 acres each. The Comptroller sold scrip for 68,000 acres at the rate of 85 cents an acre, and for 8000 at 83 cents an acre.

By an act passed May 14, 1863, (Laws of New York, of 1863, c. 511,) the legislature appropriated the income and revenue which might be received from the investment of the proceeds of the sale of any of the lands granted to the State by the act of Congress of July 2, 1862, to the People's College, located at Havana, in Schuyler County, on certain conditions expressed in the act.

On the 27th of April, 1865, (Laws of New York, of 1865, c. 585,) the legislature passed an act creating Cornell University as a corporation, and appropriating to it the "income, revenue and avails which shall be received from the investment of the proceeds of the sale of the lands, or of the scrip therefor," granted to the State by the act of Congress of July 2, 1862, to be paid over to the trustees of the university "for its use and behoof, in the mode and for the purposes in said act of Congress defined." This gift was expressed in the act to be upon the condition that Ezra Cornell should give $500,000 to the university and $25,000 to the trustees of Genesee College, located at Lima, New York, and the provisions of the act were to take effect only in case of the noncompliance of the trustees of the People's College at Havana with the provisions of the act of May 14, 1863. Section 5 of the act of April 27, 1865, was in these words: "§ 5. The cor-

poration hereby created may hold real and personal property to an amount not exceeding three millions of dollars in the aggregate." Both of the gifts above specified were made by Mr. Cornell.

In this state of things, as the Court of Appeals says in its opinion (p. 116), "the great question then arising was in regard to the best means of disposing of such scrip for the best price, so that the income for the university should be increased to the greatest extent therefrom. The result of throwing into market such an enormous amount of the public lands as had been donated by Congress to the several States was a fall in the market value of the land, and, of course, of the scrip which represented it. In the fall of 1865, Mr. Cornell had purchased some scrip of the comptroller, representing 100,000 acres, for $50,000, and had given his bond for that sum upon condition that all the profits which should accrue from the sale of the land should be paid to the Cornell University."

The legislature then passed, on the 10th of April, 1866, an act (Laws of New York, of 1866, c. 481) entitled "An act to authorize and facilitate the early disposition by the Comptroller of the lands or land scrip donated to this State by the United States," and which was in the following words:

"Section 1. The Comptroller is hereby authorized to fix the price at which he will sell and dispose of any or of all the lands or land scrip donated to this State by the United States of America, by act of Congress approved July second, eighteen hundred and sixty-two, and entitled 'An act donating public lands to the several States and Territories which may provide colleges for instruction in agriculture and the mechanic arts.' Such price shall not be less than at the rate of thirty cents per acre for said lands. He may contract for the sale thereof and sell the same to the trustees of the Cornell University. If the said trustees shall not agree with the said Comptroller for the purchase thereof, then the commissioners of the land office may receive from any person or persons an application for the purchase of the whole or any part thereof at the price so fixed by the said Comptroller, and may, if they are satisfied that the said person or persons will fully carry out and perform

the agreement hereinafter mentioned, sell the same or any part thereof to the said person or persons. But said trustees or such person or persons shall at the same time make an agreement and give security for the performance thereof to the satisfaction of the Comptroller, to the effect that the whole net avails and profits from the sale of scrip or the location and use by the said trustees, person or persons, of the said lands or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the act chapter five hundred and eighty-five of the laws of eighteen hundred and sixty-five, of the State of New York, in accordance with the provisions of the act of Congress hereinbefore mentioned. And the said trustees, person or persons to whom the said lands or scrip shall be sold, shall report to the Comptroller annually, under such oath and in such form as the Comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold, and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof.

"§ 2. The Comptroller is authorized from time to time as he shall see fit, to make such examination into the actions and doings of his vendees of said lands or scrip therewith as he shall deem necessary to ascertain and determine what are the net avails of the said lands or scrip from the sale or from the location and use thereof by his said vendees.

"§ 3. This act shall take effect immediately."

Under this act, the Comptroller fixed the price of the land at fifty cents per acre, which, under all the circumstances, was considered a fair amount. The trustees of the university did not apply to purchase the scrip under the act of 1866, and on the 4th of August, 1866, the commissioners of the land office made an agreement with Ezra Cornell for the sale to him of all the remaining scrip undisposed of, represented by 5087 certificates of 160 acres each. The agreement was entered into between the commissioners and Mr. Cornell, under the authority of the above act of 1866, and was in these words:

"This agreement, made this fourth day of August, eighteen hundred and sixty-six, between the People of the State of New York, through their commissioners of the land office, acting under and by virtue of chapter 481 of the Laws of 1866, of the first part, and Ezra Cornell of Ithaca, N. Y., of the second part, witnesseth:

"That the said party of the first part hereby agrees to sell and assign and deliver to the party of the second part all of the agricultural land scrip now in the possession or ownership of the State of New York, consisting of five thousand and eighty-seven certificates, each representing one hundred and sixty acres, on the following terms and conditions:

"*First.* That said party of the second part shall receive said scrip, from time to time, as the same can be judiciously located, in parcels representing not less than twenty-five thousand acres, paying therefor into the treasury of the State, on its assignment and delivery to him by the Comptroller, at the rate of thirty cents per acre, in lawful money of the United States, or in the stocks of the United States, or of the State of New York, or in other good and safe stocks or bonds, to be approved by the Comptroller and drawing not less than five per cent interest per annum, and at the same time depositing with the Comptroller stocks or bonds to be approved by him, to an amount equal to an additional thirty cents per acre, as security for the fulfilment, by the party of the second part, of the conditions of this agreement, so far as they relate to the execution of a mortgage to the State on the land to be entered and located with said scrip, on the fulfilment of which said stock or bonds so deposited as security shall be returned to said party of the second part.

"*Second.* That whenever any parcel of scrip, sold and delivered to the said party of the second part, under and by virtue of this agreement, shall have been located by him or his agents, the said party of the second part hereby agrees that he will, without delay, furnish to the Commissioners of the Land Office of this State, or to some member thereof, to be designated by a resolution of the board, a full and complete list and description of the land so located. And said

Board of Commissioners shall, within at least sixty days thereafter, and from time to time subsequently as may be found expedient, affix a minimum valuation by quarter sections, at which the same may be sold by said party of the second part. And the said party of the second part further agrees, that he will annually, and from time to time, whenever required by the Commissioners of the Land Office, render, for their information, to the Comptroller, a full, just and true account of all sales and leases made by him, said report to be made in such form and under such oath as the Comptroller shall direct, and will pay into the treasury of the State the whole of the net profits arising therefrom, which shall be ascertained by deducting from the gross receipts on sales the original cost of thirty cents per acre, the cost and expenses attending the location, management and sale of said lands, the taxes assessed and paid on the same by the party of the second part, and the interest at the rate of seven per cent per annum on the several amounts actually expended and liabilities incurred for such purposes. But it is expressly agreed by the party of the second part that he will not sell any portion of said lands at a price below the minimum valuation thereon, which may from time to time be fixed by the Commissioners of the Land Office, without first obtaining their consent to do so in writing.

"*Third.* That the stipulations and conditions of this agreement shall apply to each and every parcel of scrip assigned and delivered to said party of the second part under this agreement, and the Comptroller shall defer or suspend further assignments and deliveries of scrip whenever the party of the second part fails to perform such stipulations and conditions in respect to any scrip sold and delivered to him under this agreement, until they have been complied with. Except, nevertheless, that stocks or bonds as security for the return and mortgage of lands located under scrip issued to the party of the second part, shall in no case be required when there shall remain in the hands of the Comptroller, by virtue of this agreement, mortgaged lands not released, equal in quantity to the scrip which may be issued to the party of the

second part, and remain not located and mortgaged as provided by this agreement.

"*Fourth.* That as often as and whenever the party of the second part shall furnish a description of any of the lands selected and located by him under and by virtue of said scrip, he shall immediately execute a mortgage thereon to the people of this State, to be approved by the Attorney General, conditioned that the said party of the second part will fully keep and perform each and every of the terms and conditions he is required to do, keep and perform. And this agreement is declared to be a continuing agreement, and a suit or suits at law or in equity may be from time to time instituted and maintained thereon, and upon any or all of said mortgages, for any violation of such terms and conditions, whenever such violation may occur. Said mortgages shall be delivered to the Comptroller, or to the Commissioners of the Land Office.

"*Fifth.* Whenever the party of the second part shall sell or dispose of any section of the lands acquired by him under this agreement, and pay into the treasury of the State the net profits resulting from such sale, after the deductions hereinbefore mentioned and provided for, the party of the first part shall execute and deliver to the party of the second part a full and sufficient release of the portion sold from the lien of the mortgage, so that a clear title can be vested in the purchaser or purchasers.

"*Sixth.* That of the moneys arising from sales or leases made by the party of the second part, and paid into the state treasury, as herein provided, a proportion equal to thirty cents per acre shall be added to and form a part of the fund known and designated on the records of the Comptroller's office as the 'College Land Scrip Fund,' and the remainder shall constitute a separate and distinct fund, which shall be the property of the Cornell University, to be known as the 'Cornell Endowment Fund,' the principal of which shall forever remain unimpaired, the income to be annually appropriated by the legislature, and paid over from time to time to the trustees of the Cornell University, to be by them devoted to the purposes of the institution.

"*Seventh.* That the said party of the second part further agrees to purchase the whole of the aforesaid scrip and select and locate lands under and by virtue thereof, and execute mortgages thereon as hereinbefore provided, within four years from the date hereof, and that he will sell the lands within twenty years from date, and pay the net profits arising from such sales into the treasury of this State, and until the same shall be so sold and the net profits so paid he will pay all taxes which may be assessed thereon, and preserve and maintain a title thereto unimpaired, to which the liens created by said mortgages shall attach. And if any event shall occur making it needful for the people of this State to incur any expense to preserve the lien of said mortgages, the same shall be paid out of the proceeds of the sales of said lands. And if, after the expiration of the period of four years hereinbefore fixed, any of said scrip shall remain with this State, and not have been paid for by the party of the second part, the same shall be released thereafter from the conditions and stipulations of this agreement."

The Court of Appeals says (p. 122): "There was no sum provided in the act of Congress for the sale of the scrip. It was in the discretion of the State to sell it at any price it could obtain, either at public or private sale; and it could sell the whole or any part of such scrip at any time, but the proceeds of such sale were to be invested under the act of Congress and the income applied as therein provided for. If there be any ambiguity in the meaning of the agreement as a whole, it is not improper to see what meaning was attached to it by the persons who executed it, if possible, and also to look at the surrounding facts, so that we may place ourselves in the same position as the contracting parties and thus learn what was in contemplation.

"It is known that at the time of the passage of the act of April 10, 1866, sales of the scrip had almost ceased. It was thought that there was a good chance that the land which might be located under this scrip would in the future greatly appreciate in value, and it was the wish of those interested in its welfare that the university should, in some way, reap the

benefit of this increase. But it had no funds to purchase the scrip, and it needed ready money as an income to aid it in the discharge of its duties as an educational institution. Hence the problem was to find some one who would purchase the scrip and pay for it, and then locate and sell the lands at the higher prices which it was hoped they would attain and give the profits to the university. A glance at the correspondence between Mr. Cornell and the Comptroller, and at the minutes of the proceedings of the Land Commissioners, and the other evidence in the case, shows that there was no one else than Mr. Cornell who was ever thought of as a person who would take upon himself such burdens, troubles, labors and responsibilities, for the purpose of giving away all the profits which might, in the future, arise from such sales. It is seen by reference to that correspondence that Mr. Cornell and the Comptroller differed in regard to the construction of the act, the Comptroller holding that the act really meant that the net avails of the scrip should be placed under the custody of the State, while it may be inferred that the idea of Mr. Cornell was that the *profits*, after paying the original thirty cents and the additional thirty cents (if realized) as the purchase price of the scrip, might be placed as he should choose, provided the university should receive the benefit of the whole income arising from such profits. Under date of June 9, 1866, Mr. Cornell, in his letter to the Comptroller, speaks of his differing with the Comptroller in his construction of the law, but adds: 'Appreciating, as I do most fully, your motives for desiring to give the utmost possible security and permanency to the funds which are, in a great degree, to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits, to be derived from the sale of the lands to be located with the college land scrip, in the treasury of the State, *if the State will receive the money as a separate fund from that which may be derived from the sale of scrip, and will keep it permanently invested and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of said institution,*

and not to hold it subject to the restrictions which the act of Congress places upon the fund derivable from the sale of the college land scrip or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University.'

"Mr. Cornell thus plainly understood that the purchase price of the scrip from the State was thirty cents an acre, with a possible thirty cents more if he should realize that sum on the sale of the land, and that any sum beyond that came to him as profits on his sale of the scrip or land to third parties, and that sum, being his own profits, he was willing to donate to the university, and for that purpose to pay the same into the treasury of the State, the same to be invested and the income therefrom to be paid by the State to the university for the general purposes of the institution, and not as part of the purchase price of the scrip to be invested under the act of Congress. It was after the receipt of this letter that the agreement was made, the subdivision six containing, in substance, the provision asked for by Mr. Cornell.

"While in some portions of this agreement, if read alone and laying aside all knowledge of the contemporary history of the events surrounding it, there might arise some doubt as to the meaning of such portion, yet when read as a whole and in the light of those events, I think no real and grave doubt can exist as to the meaning of this instrument. It seems clear to my mind that the State sold this land scrip at thirty cents per acre, with an additional thirty cents if so much should thereafter be realized upon the sale by the vendee of the State, and that this constitutes the purchase price of such scrip, which, when assigned to Mr. Cornell by the State, in accordance with the terms of the contract, he became the legal owner of. He, it is true, also agreed that his profits should be paid into the treasury of the State, but they were to be paid therein *as profits* and not as any portion of the purchase price of the scrip, and they were to be paid, and were in fact paid, as profits of Mr. Cornell, and they were received under that agreement as the property of the Cornell University, the income of which was to be paid to it for its general purposes,

and the principal was to constitute the Cornell endowment fund. I cannot see that in all this there was nothing but an agency created in behalf of the State, and that Mr. Cornell was such agent, and that the whole profits realized were really nothing but the proceeds of the sale of the lands by the State. The State, on the contrary, by the very terms of the agreement, sold the scrip, and the legal title, by patents from the government of the United States, was vested in Mr. Cornell when he located the lands under the scrip which he had purchased, and took out his patents upon such location. Neither can I see that the purchaser of the scrip gave or intended to give, or was supposed to give, his profits as part of such purchase price. His agreement is plain, and in it he stated what such purchase price was, and what he would give for the scrip, and the fact that he agreed to pay his profits, if any were realized, into the treasury of the State, as the property of the university, which was to have the income thereof paid over to it for its general purposes, does not, to my mind, render such profits any portion of the purchase price of the scrip. They were profits which he hoped to be able to realize in the future, but were entirely speculative in character and amount, dependent largely upon the judgment with which the lands were located, and the time and manner of their sale. All this Mr. Cornell was willing to do for this university, but the agreement shows that he was to do it as a gift of his own, and not as a mere agent of the State or of the United States; and that all the compensation he sought for his services, his trouble and his responsibilities, great and onerous as they were, was the fact that all this should go to the university as his gift, and the State become the custodian of the profits under a duty to appropriate the income to the trustees for the general purposes of the university.

"The counsel for the institution may be entirely right in his statements as to the law regarding this branch of the question, if he is right in the fundamental proposition as to the *profits* being a part of the purchase price or the avails of the sale of the scrip by the State; but until he can maintain the correctness of that proposition, I do not think his argu-

ment reaches the trouble. I do not think the proposition is correct. The profits were the avails of the sale of the scrip by Mr. Cornell, not in any sense the avails of the sale of the scrip by the State. I think, also, that the agreement is fully authorized by the act of April 10, 1866. It gives the right to the Commissioners of the Land Office to sell the scrip, or any part thereof, for the price which was to be fixed by the Comptroller, and not less than thirty cents per acre. The right to sell the scrip at the price fixed by the Comptroller was based upon the condition that the persons who purchased at such price should also agree to pay over the net avails or profits from the sale by them of the scrip or lands located under it, as they should be received, and that they should be 'devoted to the purposes of such institution or institutions as have been or shall be created by the act, chapter 585 of the laws of 1865,' (the charter of Cornell University,) in accordance with the provisions of the act of Congress before mentioned. This does not mean that all these possible profits are to be deposited in the state treasury, subject to the same rules that would obtain in the case of the purchase price of the scrip, but only that they shall be devoted to the institution created by the act of 1865, in accordance with the provisions of the act of Congress already mentioned. Of course the purchase price — that which was fixed by the Comptroller — was to go into the treasury and be invested as provided for by the act of Congress.

"The reference in the above section of the act of 1866 to such institution or institutions as have been or shall be created by the act, chapter 585 of the laws of 1865, can, of course, be to none but the Cornell University, and hence the provision in the agreement that the profits shall all be devoted to that institution was proper. As that university had complied with all the conditions imposed upon it by the State as a condition to its right to receive all the income from this fund, the right to it could not be taken from it. This the Commissioners of the Land Office stated in their report to the constitutional convention in answer to a request from that body for information as to this land scrip. And in this report, under date of

July 22, 1867, the Comptroller, as a member of the Board of Commissioners of the Land Office, and one of the officers who executed the contract with Mr. Cornell in August, 1866, stated as follows: 'In deciding what portion of the income of the money paid into the treasury under the agreement with Mr. Cornell would be subject to this limitation' (set forth in the act of Congress) 'as to its use and application, the Commissioners of the Land Office assumed that the prohibition applied only to the purchase-money received by the State on a sale of the scrip, and that the ultimate profits to be derived from the location and sale of the lands by the purchaser formed no part of the purchase-money, and need not, therefore, be included. The nominal price, however, which was fixed on the scrip by the act of 1866, and for which it was sold, in consideration of the stipulation to pay over the net profits, being less than the market rates, it was stipulated in the sixth section of the agreement that an additional thirty cents per acre from the net profits should, when such profits were paid into the treasury, be added to the purchase-money, thus increasing the price to sixty cents per acre, the current rate for the scrip at the date of the transaction, and limiting the purposes to which it may be applied in conformity with the terms of the grant by Congress.'

"Here, then, in addition to the language as used in the agreement itself, which when read as a whole seems to me quite plain, we find what Mr. Cornell was willing to do, as set forth in his letter to the Comptroller above quoted from, in which he claims the act permitted it, and he would donate the profits as a gift from himself to the university; and we find in an official report of one of the officers executing the contract, speaking for himself and associates, what was their understanding of this agreement. From all sources, the agreement itself and the separate views of the parties to it, it appears the construction should be, and was, that the profits formed no part of the purchase price or the avails of the sale of the scrip by the State, (over the thirty cents per acre if realized,) and that such profits belonged to the university by the gift of Mr. Cornell, the vendee of the scrip from the State,

the income to be paid to the trustees of the university for the general purposes of the same."

By an act passed May 4, 1868, (Laws of New York, of 1868, c. 554,) the legislature authorized the Comptroller to invest the moneys which might be received in excess of sixty cents per acre, under the contract of August 4, 1866, and which thereunder went into "the Cornell Endowment Fund," not only in stocks of the United States or of the State of New York, or in some other safe stocks yielding not less than five per cent per annum on the par value thereof, (according to the restriction in section 4 of the act of Congress of July 2, 1862,) but also "on bonds secured by mortgage upon unincumbered real estate, situated within this State, worth at least double the amount secured by such mortgage." The statute also provided as follows: "The said fund and the interest and income thereof, subject to the expenses of the care and management of the same, shall be held for and devoted to the purposes of the said Cornell University, in pursuance of the contract before mentioned."

As to this statute, the Court of Appeals says (p. 127): "This must be taken as a legislative recognition of the fact that the agreement of sale to Mr. Cornell was for thirty (possibly sixty) cents an acre, and that all profits belonged to Mr. Cornell, but that by an agreement he had agreed to give them to the university for the general purposes thereof. We cannot assume that the State would have run counter to the express provisions of the act of Congress, by enacting that the purchase price of the scrip might be invested in a manner forbidden by that act."

In 1873, the legislature appointed a commission consisting of William A. Wheeler, John D. Van Buren, and Horatio Seymour, to ascertain the condition of the land grant and to report whether the acts of Congress and of the legislature had been complied with in the sale and disposition of the lands. The first two named of the commissioners reported, in April, 1874, that the profits realized by Mr. Cornell from the sale of the lands formed part of the purchase price of the scrip, while Governor Seymour reported that he was of a contrary opinion.

The legislature ultimately, and by an act passed May 18, 1880, (Laws of New York, of 1880, c. 317,) directed the Comptroller, upon the request of Cornell University, to assign, transfer, pay and deliver to the latter "all moneys, securities, stocks, bonds and contracts, constituting a part of or relating to the fund known as the Cornell Endowment Fund, now held by the State for the use of said university." This was done because, under an agreement made between Ezra Cornell and his wife and the university, on the 13th of October, 1874, with the consent of the Comptroller and the Commissioners of the Land Office, Mr. Cornell and his wife had conveyed to the university all their rights under any agreement between him and the State relating to the land scrip or to any lands located or to be located under it, and the university had covenanted that it would assume and perform all the agreements made between him and the State in reference to the land scrip or the land, and would discharge his obligations held by the State. The university had paid to the State a part of the additional thirty cents per acre which the State was to receive, if realized, as the purchase price of the scrip.

On all these facts the Court of Appeals says, in its opinion (p. 128): "The State has made and makes no claim that any portion of these profits over the thirty cents an acre forms any portion of the purchase price of the sale of the scrip by it. The university, by its agreement with Mr. Cornell and by taking exactly his position, and by receiving the moneys and securities of the Cornell endowment fund by virtue of the act of 1880, clearly has taken the position that it was the owner of this fund, and was not indebted to the State therefor. Its reports show that they (the trustees of the university) claimed that it had no debts, and they acknowledged none to the State on account of this fund. If it existed, it would certainly be a somewhat onerous position for the State to be in. It must have all the proceeds of the sale of this scrip, including in such case all the profits of the past and what may hereafter arise; it must pay all expenses, etc., after location, in the way of taxes, and all incurred in the management and disbursement of the moneys, and must invest in stocks of the kind

described in the act of Congress, and must forever guarantee the whole amount, so that if any of the principal is lost it must be supplied by the State, and it must pay over the five per cent interest on the whole of this fund to the university. This, of course, does not weigh in case the decision were that the law is in that condition. For the reasons already given, I do not think it is."

On the question whether the legislation of New York, or the agreement of August 4, 1866, was in violation of the act of Congress, the Court of Appeals says (p. 129): "Interpreted as we have interpreted the agreement and the act of the legislature of New York, the remaining inquiry is, does the New York statute, or the agreement under it, run counter to the act of Congress creating this land scrip trust? I think not. It provides that all moneys derived from the sale of the land scrip by the State shall be invested, etc., as therein prescribed. The scrip is to be sold by the State, which could not itself locate the land, and the avails of such sale are to be invested. The avails of the sale of the scrip by the State were the purchase price thereof; and if I am right, that the profits formed no part of such purchase price, but were the property of the vendee of the State, which *he* agreed to give to the university for general purposes, as his gift and to form the property of the university, then the act of Congress has no concern with it.

"Another consideration may be adverted to. It is exceedingly doubtful, in my mind, whether the university can be heard to claim the existence of this alleged debt under the facts of this case. The State has made, and makes, no claim upon the university for the property or any portion of it. It was placed in its possession by virtue of the consent of the State, evidenced by the passage of an act authorizing and directing it. The university has claimed to be the owner of it, and no one has drawn its rightful title in question. Can it now, while enjoying, without hostile claim from any source, the full control of the property, as its absolute owner, set up, as a reason why it should be allowed to take other property, that perhaps hereafter some one may make a claim that the prop-

erty does not belong to the university, but that it is a trust fund originating in the act of Congress? If the State or the United States were to commence some proceeding, based on the counsel's argument, to reclaim possession of the property, there is nothing in the present attitude of the university which would necessarily estop or in any way conclude it from denying that any such trust exists, or that any case had been made for taking the possession of the property out of its hands. So far as appears, it seems that this assumed indebtedness is entirely gratuitous on its part, and that there is no creditor who makes the claim, no one who questions its title. It is going a good ways, under such circumstances, to lay much weight on a liability which, up to this proceeding, was never admitted by the university, and is not now asserted by any one else. It would seem as if property which was thus in the possession of the corporation, unclaimed by any one else, was held by it within the meaning of its charter, and that the question in regard to the character of its holding was merely an abstract one with which courts would not deal, at least so far as this proceeding is concerned.

"In all these matters it must be borne in mind the parties have all been acting in the most entire and perfect good faith. This was no scheme to avoid or evade the provisions of the act of Congress. The price of sixty cents an acre which the State got for the land was all it was worth at that time. Its future value depended upon many contingencies. The State had the right to sell the scrip for such price as it might agree on on with a purchaser. This it did. The university wanted money to pay its expenses. It could not very well wait for twenty or even five years for the purpose of seeing how the value of this scrip would appreciate, if at all. The legislature was equally in earnest in its desire for the prosperity of the institution; so were the state officers, and, above and beyond all, so was Mr. Cornell, its generous founder, and already the donor of such a large amount of money. Taking all the circumstances into consideration, the plan carried out was hit upon, and the amount of the Cornell endowment fund and the property arising therefrom must be regarded as a gift of the donor and

founder, and not as a violation of either the act of Congress, or of the act of our own legislature."

The Court of Appeals then states (p. 131) the position of the university with reference to the value of its property as follows: Funds from individuals, (including the value of the university buildings, farm, grounds, etc., at $69,683.33,) as fixed by the surrogate, $598,588.65; Western lands, $1,648,178.56; Western land contracts, $439,334.22; total, $2,686,101.43. It states that the Supreme Court advanced the $69,683.33 to "$385,000," being an advance of "$315,316.67," and that, adding this $315,316.67 to the $2,686,101.43 makes a total of $3,001,418.10, without counting as property the College Land Scrip Fund in the hands of the State.

The statement that the Supreme Court advanced the $69,683.33 to $385,000 would appear by the record to be a clerical error, for, although Judge Merwin, in his opinion in the Supreme Court, states that the appellants there were entitled to a finding that the property represented by the item of $69,683.33 was, at the date of the death of Mrs. Fiske, of the value "at least" of $385,000, the judgment of the Supreme Court expressly adjudges that the item of $69,683.33 is fixed by it at $400,000, and that it finds that the value of the property of the university held and owned by it at the death of Mrs. Fiske was $3,015,414.71. But, in either case, the amount exceeded $3,000,000.

We concur with the Court of Appeals in the conclusion that the sixty cents per acre was the purchase price of the land scrip; that, under the agreement of August 4, 1866, the profits to be made by Mr. Cornell, although to be paid into the treasury of the State, were not any portion of the purchase price of the scrip, but were to be paid in, and were in fact paid in, as his profits, and were received by the State, as the sixth section of the agreement states, as, "a separate and distinct fund, which shall be the property of the Cornell University, to be known as the 'Cornell Endowment Fund,'" and that the income of the money was to be paid to the university for its general purposes, and the principal was to constitute the "Cornell Endowment Fund."

The Court of Appeals states that it cannot see that in all this there was nothing but an agency created in behalf of the State, and that Mr. Cornell was such agent, and that the whole profits were really nothing but the proceeds of the land scrip sold by the State. In this connection, a reference may not be inappropriate to the clear and incisive statement of Governor Seymour, in his minority report before referred to. After stating that his associates were of opinion that the contract was an actual sale to Mr. Cornell, but that all profits made from the land were part of the purchase-money, and so subject to the restrictions of the act of Congress, Governor Seymour says that he is forced to the conclusion that the construction which involves merging the two funds into one is inconsistent with the pledges of the State to Congress. He adds: "When New York accepted the grant of the general government, it did so with the full knowledge of this clause in the act of Congress, viz.: 'That the grant of land and of land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts.' One of these conditions is, 'that in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State.' This State only had the right to sell its scrip. If it has no right to locate land openly and directly, can it do the same thing under cover and indirectly? If the State can claim all the proceeds of the lands entered by its scrip in the State of Wisconsin, after deducting the costs of taxes and expenses and the price of its scrip, does it not claim and get everything it would if the land had been taken up in the name of the State? Is there any stronger or clearer way of saying that a man is entitled to all there is of value in any property, than to say he has a right to all the money it will bring after paying taxes and expenses? Does any citizen of our country hold a more ample interest in land, by virtue of deeds or patents, than is held by him who has a right to all that it will bring by sales or leases, after paying taxes and expenses? All of our citizens who have lands in Western States, or elsewhere, in fact own

them upon these terms. Is the case in any way changed by using the term *profit* in place of the word *proceeds*, to express the amount the State can claim by their construction of the contract? Any construction of the contract with Mr. Cornell, which makes the State the substantial owner of these lands and converts the transactions into any agency, is not merely a technical and immaterial violation of its pledges. It conflicts with the act of Congress and infringes in a serious way upon the rights of Wisconsin and other States where the lands held by Mr. Cornell are situated. The careful way with which the law of Congress distinguishes between the proceeds of land and of land scrip was designed to protect such States. But for the restraints of the act the old States could enter all their scrip at the land offices of the West. Their wealth would enable them to pay taxes and keep the lands from market for an advance of price. For this reason the restriction was put into the act. Ownership by this State under cover, no matter what terms are used to hide its interests, or what objects or pretexts are displayed as an excuse for its action, is a violation of its pledges to Congress and of the rights and interests of other States. As a rule, individuals are unable, for any length of time, to hold large tracts of land. Nearly the whole amount of scrip given by Congress to the several States has been used by settlers to buy homes in the West, and has thus promoted their prosperity. Congress contemplated this when it forbade one State to take up land within the bounds of another. The agreement is a sale of the scrip to Mr. Cornell, and the profits made by him out of the lands taken up by him with the scrip, when given to the university, will be a gift for the general purposes of the institution, 'and not subject to the restrictions of the act of Congress.' These profits will be the result of his skill and labor. It is the intent of the act of 1862 that no State shall, under any pretence, in any manner, or in any degree, acquire title or right to lands in another State."

We are of opinion that, by the terms of the agreement, the State sold the scrip to Mr. Cornell, and that the legal title to the lands located by him under the scrip was vested in him when he took out patents upon such location. The terms of

the agreement show that the profits which Mr. Cornell hoped to realize from the sale of the lands, beyond the second thirty cents per acre, were intended by both parties to the agreement to be a gift from Mr. Cornell personally to the university, and not from him as a mere agent of the State or of the United States; and that the State became the custodian of such profits, not under the act of Congress, but under the duty which it assumed to take care of the fund as a fund belonging to the university, as the property of the university, and to appropriate the income to the trustees of the institution for its general purposes. The State has provided, as required by the act of Congress, for the investment in the manner prescribed by that act, of the moneys derived from the sale of the land scrip. It was under no obligation to treat as falling within the provisions of the act of Congress any other moneys than those derived from the sale of such scrip, or any moneys derived from the sale of the lands which the purchaser of the scrip should locate and obtain patents for.

The State could not itself, or by an agent acting in its behalf, locate or obtain patents for any land which the scrip represented. Therefore, the claim of the university and of Mr. Boardman as executor, that the act of Congress was violated in the transaction between the State and Mr. Cornell, and that the moneys and property derived from the sale of the lands by Mr. Cornell formed, on the actual facts, no part of the $3,000,000 of property held by the university, is not warranted by law.

The judgment of the Supreme Court of the State of New York, entered December 12, 1888, establishing as its judgment the judgment of the Court of Appeals of New York, rendered November 27, 1888, affirming the judgment of the Supreme Court herein, entered December 14, 1887, is

Affirmed.

Mr. Justice Brewer (with whom concurred Mr. Justice Gray) dissenting:

Mr. Justice Gray and myself dissent from the views expressed and the conclusions reached in the foregoing opinion.

By the act of Congress of July 2, 1862, making a grant, and the act of the legislature of the State of New York, of May 5, 1863, accepting the same, a trust was created in the State of New York in respect to this land scrip. This is evident from these sections: 12 Stat. c. 130, pp. 503–505.

"An Act donating the Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be granted to the several States for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act.

"Sec. 2. *And be it further enacted*, That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or sub-divisions of sections, not less than one quarter of a section; and whenever there are public lands in a State subject to a sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share; said scrip to be sold by said States and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use or purpose whatsoever: *Provided*, That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United

States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided further*, That not more than one million acres shall be located by such assignees in any one of the States: *And provided further*, That no such location shall be made before one year from the passage of this act.

* * * * *

"SEC. 4. *And be it further enacted*, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated by each State which may take and claim the benefit of this act, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

"SEC. 5. *And be it further enacted*, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

"First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminu-

tion to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act, may be expended for the purchase of lands for sites or experimental farms whenever authorized by the respective legislatures of said States.

* * * * *

"Seventh. No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President."

Under this statute, the action of the State designating one beneficiary was not final; and it could withdraw, thereafter, the income from one institution and bestow it upon another, even as it did, in fact, in this case, as shown by the record. Suppose, hereafter, Cornell University should be so conducted that its "leading object" should not be "to teach such branches of learning as are related to agriculture and the mechanic arts," as required by the act of Congress, it would be the right and the duty of the State to take the fund and apply it to that purpose by other means and instruments.

The sacredness of the duties cast upon a trustee, recognized from time immemorial, obtains; and the subsequent transaction by which the land scrip was disposed of cannot be interpreted as if it were a disposition by an absolute owner of his property. A trustee may not speculate in respect to trust property for his own benefit, or for the benefit of a friend, or in favor of any institution. The fact of a trust compels that all received as the proceeds of trust property, directly or indirectly, must be adjudged forever within the obligations of that trust.

The scrip became the property of the State in trust. The act of Congress determines the fact, the nature and extent of the trust. It grants land; or in the absence of public lands within the State, scrip to the corresponding amount. It provides, in section two, that where scrip is taken by a State, it may be sold by it, "and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use

or purpose whatsoever." Section three, while referring to the land which may be taken under the act, indicates fully the scope and intent of the trust, by enacting "that all the expenses of management, superintendence and taxes from date of selection of said lands, previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the States to which they may belong, out of the treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned." Section four provides "that all moneys derived from the sale of lands, and from the sales of land scrip, shall be invested, etc.; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, and the interest of which shall be inviolably appropriated, etc., specifying the purposes of the appropriation." Obviously the scope of this is, that all moneys derived from this property, whether land or scrip, whether obtained directly or indirectly, are consecrated to the purposes designated, and must be held by the State in trust forever. Among the limitations provided is that expressed in the second clause in the fifth section, that "no portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings." Nothing can be clearer from this statute than that a State, accepting its provisions, constituted itself a trustee, with the obligation that it should devote to the purposes of the act all the proceeds of the land or land scrip which it might obtain, directly or indirectly.

The State of New York, having no public lands within its limits, received scrip; but the scrip was subjected to the same trust that land would have been subjected to, and was subjected to, when taken by any State. All expense in respect to the location and management of the lands, or the investment of the funds, was to be borne by the State, in order that the net proceeds of this grant, no matter how obtained, should be appropriated to the purposes expressed. Hence, the State

of New York, accepting the trust, was powerless to repudiate its obligations, or to provide for an appropriation for any other purposes, or under any other conditions, of the moneys which might be received, directly or indirectly, from the disposition of this trust property. Prior to November 24, 1865, scrip to the aggregate amount of 176,000 acres was sold at prices ranging from fifty to eighty-five cents — the average being sixty-five, nearly.

The first selection of the beneficiary of this trust was the People's College of Havana; but that selection was not satisfactory; and on April 27, 1865, Cornell University was established by act of the legislature of New York, and it was designated as the beneficiary; the act providing, as a condition of this selection, that Cornell University should be endowed to the extent of five hundred thousand dollars by Ezra Cornell. The provision in § 4 in its charter, that "the corporation hereby created may hold real and personal property to an amount not exceeding three millions of dollars in the aggregate," evidently means that the property of the corporation shall not exceed three millions, after deducting the amount of all its debts and obligations, and does not include property which the State might retake at any time, and *a fortiori* property which the State, under a duty imposed upon it by law, owned upon a trust which it could not divest itself of. Here, a reference to Mr. Cornell, and his connection with this transaction, is appropriate. A man acquiring wealth by his own exertions, the dream of his later years was a university, bearing his name, and so munificently endowed as to become, like Yale and Harvard, a centre of learning; and his purchase of the scrip, and his transaction with the State, must be interpreted in the line of this thought. It was the glory of a great university which he hoped to realize — one which would link his name with its glory. The means were subordinate — the glory and strength of Cornell University was the purpose. Unquestionably inspired by his thought and wish, on April 10, 1866, the legislature passed an act for the future disposal of the scrip, and authorized the Comptroller to fix its price. That price was

not to be less than thirty cents per acre. The act also provided that he might contract for the sale thereof to the trustees of Cornell University; and that, if they did not purchase, the Commissioners of the Land Office might contract for the sale to any person or persons; but added, expressly, that "said trustees or such person or persons shall at the time make an agreement and give security for the performance thereof to the satisfaction of the Comptroller, to the effect that the whole net avails and profits from the sale of scrip or the location and use by the said trustees, person or persons of the said lands or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the act, chapter five hundred and eighty-five of the laws of eighteen hundred and sixty-five, of the State of New York, in accordance with the provisions of the act of Congress hereinbefore mentioned. And the said trustees, person or persons to whom the said lands or scrip shall be sold, shall report to the Comptroller, annually, under such oath and in such form as the Comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold, and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof."

This act has a twofold aspect: It is the legislation of a sovereign State, prescribing the duties and powers of one of its officials; and it is also a declaration of the duties cast by a trustee upon its agent in respect to trust property. In either aspect, its voice is potential in respect to that which was under the authority thereafter done by official or agent. It must be borne in mind that the State had no land — nothing but scrip. This fact was known, and must be recognized in any interpretation of the powers granted. What were they? First, to sell for cash, at a price not less than that to be fixed by the Comptroller. Second, and this was obviously in view of propositions or suggestions made by Mr. Cornell as to what he was willing to do, that if no sale for cash was made, the scrip might be disposed of to any one who would give to this

fund the full benefit of any profits made by the location of the scrip upon public lands. Can it be doubted, under such a statute, that, if no absolute sale for cash was made, and the alternative proposition was finally accepted by the official and agent of the State and trustee, the net profits of such location and sale were to become and be a part of the trust funds? If language means anything, it means this. No stipulation by official or agent could nullify or thwart the express limitations of this power. An illustration or two will make this clear: Suppose under this authority the Land Commissioners had contracted with Mr. Cornell to take the scrip and locate it upon public lands, and out of the proceeds pay thirty cents an acre to the fund, and give the balance to the commissioners for their private gain, or to the State for the public purpose of a state house, or other matter of general interest, would any court or any person uphold for a moment the validity of such a contract so far as respects the latter provisions; and would not the universal voice declare that, notwithstanding it, the entire proceeds of the location of scrip and sale of lands belonged to the fund of which the State was the trustee? That is this case. The Comptroller fixed the price at fifty cents an acre, about fifteen cents an acre less than had heretofore been realized. Not only that, but while it is in evidence that the amount of scrip authorized by the act of Congress created a temporary depression in price, so that although no land was purchasable from Congress at less than one dollar and a quarter per acre, the price of scrip was temporarily reduced to less than half that figure; yet, as appears from the report of a commission, appointed in 1874 by the State of New York to inquire into this college land grant, the cash market value of the scrip was always at least fifty cents an acre and the sales by other States of scrip, amounting in all to 5,699,600 acres, ranged from fifty to ninety cents, only 120,000 acres having been sold below fifty cents. It is thus obvious that the depression in price was only temporary. The prior experience of the State of New York, the whole experience of other States, tends to show that fifty cents was the minimum value of this scrip.

No sale was made, no contract of sale entered into at the price fixed by the Comptroller. The contract entered into was by virtue of the alternative authority given.

That contract was upon this proposition from Mr. Cornell: "Appreciating, however, as I do most fully, your motives for desiring to give the utmost possible security and permanency to the funds which are, in a great degree, to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits to be derived from the sale of the lands to be located with the college land scrip in the treasury of the State, if the State will receive the money as a separate fund from that which may be derived from the sale of scrip and will keep it permanently invested, and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of said institution, and not to hold it subject to the restrictions which the act of Congress places upon the fund derivable from the sale of the college land scrip, or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University. Acting upon the above basis, I propose to purchase said land scrip as fast as I can advantageously locate the same, paying therefor at the rate of thirty cents per acre in good seven per cent bonds and securities, and obligating myself to pay the profits as specified in chapter 481, of the laws of 1868, into the treasury of the State, as follows: Thirty cents per acre of said profits to be added to the College Land Scrip Fund, and the balance of said profits to be placed in a separate fund, to be known as the Cornell University Fund and to be preserved and invested for the benefit of said institution, and the income derived therefrom to be paid over annually to the trustees of said university for the general purposes of said institution."

It is unnecessary to notice other portions of the correspondence, or to review the contract, for all of significance is expressed in this proposition. It is not an absolute sale of the scrip for so much money. The obligation assumed by Mr. Cornell, to the State was thirty cents an acre, and the net prof-

its of the location of the scrip on public lands, and sale of the lands. In briefer words, thirty cents an acre and net profits was his offer. True, he proposed that only part of the profits, to wit, thirty cents an acre, should pass to the fund: but what authority had the commissioners for making such a limitation in the contract? Suppose, after the making of the contract, the commissioners had declined to transfer the scrip to him, could he have compelled the specific performance, by mandamus, of that contract? Would not a clear and satisfactory answer have been that the commissioners had no authority to partition the profits? The limit of their authority was a contract by which the agent and locator should pay to the State the whole net profits of the location. As Mr. Cornell could not have compelled, by mandamus, the performance by the commissioners of the contract, so, on the other hand, having received the scrip and located it, and disposed of the land, and paid the money into the State, that unauthorized stipulation becomes surplusage. It cannot relieve the State of New York from its liability as trustee. It is not potent to turn a portion of the proceeds of this scrip into other channels, or to other uses. The fact that all the proceeds were going to the selected beneficiary, doubtless led the commissioners to indifference as to the stipulations of the contract; but such indifference did not enlarge their powers nor make valid the stipulation in excess thereof. It seems strange that a trustee can avail itself of a disregard by its agent of his instructions so as to relieve itself of responsibility for about four-fifths of the proceeds of the trust property; yet such is the result of the conclusions reached by this court.

We are sustained in this view by a report of a majority of the commission, appointed in 1874 by the legislature of the State of New York, to inquire into this fund; for they say: "The question was raised in the Comptroller's report of 1869, and earlier, whether this agreement of 4th August, 1866, was a sale of the scrip to Mr. Cornell; whether it was not, 'in substance, an agency with a transfer of title for the purpose of facilitating the object in view.' We are of the opinion that the agreement was an actual sale to Mr. Cornell; but that all his profits, made from these lands, are part of the purchase-

money, and so subject to the restrictions of the act of Congress. Everything that forms a part of the consideration for the sale of the trust property by the State belongs to the trust fund created by Congress." And again: "We are asked, finally, to recommend 'what legislation is necessary to properly secure said funds in compliance with the act of Congress.' None seems to be necessary in reference to the fund to be derived from what are called the ultimate net profits from the location and sale of the lands by Mr. Cornell, under the agreement of August, 1866. By his contract with the State he is to pay these profits into its treasury, and he has twenty years in which to complete the sale of the lands. This fund is, in our opinion, a part of the proceeds of the scrip within the purview of the act of Congress, and cannot be legally distinguished from the other fund. Mr. Cornell seems to have taken this view before entering into the contract; for, in a public communication, dated October 26, 1869, referring to a letter from himself to Comptroller Hillhouse in June, 1866, he says: 'I volunteered to create a fund three or four times as large as that which the State could produce, for the same object that Congress intended, and at my own risk and expenses, without charging a single dime to anybody for my services.' He could not impose on the state treasury a new and distinct trust as to any part of the consideration he was to pay. Unless these profits are part of the purchase-money, the State gave to him for the college bearing his name a monopoly of the scrip on long credit for a price much less than its cash value. The second thirty cents per acre, provided for in the agreement, being dependent solely on contingent profits, which might not be realized, if at all, for twenty years, and then without interest, was not, at the date of the agreement, equivalent to more than from seven to ten cents. These profits, being part of the purchase-money, the State is bound to receive them, when, from time to time, realized, and invest them in the manner prescribed by the act of Congress, and to appropriate the income to the educational purposes in the act defined."

It is true, a minority of that commission dissented; but the

reasoning of the minority makes the contract of no validity, except as to the sale of the scrip for thirty cents an acre, and leaves only that amount as the fund for which the State is responsible. The reasoning is that the State was not authorized under the act to itself locate scrip on lands in another State; and if the profits of the location were to belong to the State, it would follow that the State was the beneficial owner of the lands thus located, and therefore there was a direct evasion of the act of Congress. Concede the force of that reasoning, and who can take advantage of it? Can the State which has received the proceeds of such location say that it had no authority to receive them; and can it, after receiving them, repudiate its liability as trustee for that which it has received as the proceeds of the trust property?

It scarcely need be said that no subsequent legislation on the part of the State of New York, and no agreement between it and Cornell University as to the possession of these funds, can have the effect to relieve the State from its liability as trustee, or place the title to those funds elsewhere than in the State.

UNITED STATES v. NORTH CAROLINA.

ORIGINAL.

No. 3. Original. Argued April 2, 1890. — Decided May 19, 1890.

A State is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers.

On bonds of the State of North Carolina, expressed to be redeemable on a day certain at a bank in the city of New York, with interest at the rate of six per cent a year, payable half-yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed;" and issued by the Governor and Treasurer of the State under the statute of December 22, 1852, c. 10, which provides that the principal of such bonds shall be made payable on a day named therein, that coupons of interest shall be attached thereto, and that both bonds and coupons shall be made payable at some bank or place in the city of New York, or at the public treasury in the capital of the State, and makes no mention of interest after the date at which the principal is payable; the State is not liable to pay interest after that date.

Statement of the Case.

THIS was an action of debt, brought in this court, on November 5, 1889, by the United States against the State of North Carolina, upon one hundred and forty-seven bonds under the seal of the State, signed by the Governor, and countersigned by the Public Treasurer, for one thousand dollars each, payable in thirty years from date, with interest at the yearly rate of six per cent, alleged in the declaration to be payable half-yearly until payment of the principal; nineteen of the bonds, dated January 1, 1854, and payable January 1, 1884, and seven bonds dated January 1, 1855, and payable January 1, 1885, issued under the statutes of North Carolina of January 27, 1849, and December 22 and 27, 1852; and the remaining one hundred and twenty-one bonds, dated April 1, 1855, and payable April 1, 1885, issued under the statute of North Carolina of February 14, 1855; and all these bonds, differing only in date of execution and in day of payment, being in the following form:

"It is hereby certified that the State of North Carolina justly owes to the North Carolina Railroad Company or bearer one thousand dollars, redeemable in good and lawful money of the United States at the Bank of the Republic, in the city of New York, on the first day of January, 1884, with interest thereon at the rate of six per cent per annum, payable half-yearly at the said bank on the first days of January and July of each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

"In witness whereof the Governor of the said State, in virtue of the power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her Public Treasurer hath countersigned the same, this first day of January, 1854."

The material provisions of the statutes under which the bonds were issued are copied in the margin.[1]

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[1] The act of January 27, 1849, c. 82, entitled "An act to incorporate the North Carolina Railroad Company," contains the following provisions:

"SEC. 36. That whenever it shall appear to the Board of Internal Im-

The declaration alleged that, at the dates when the bonds became payable, payment of the principal was demanded by

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provements of this State, by a certificate, under the seal of said company, signed by their treasurer and countersigned by their president, that one-third have been subscribed for and taken, and that at least five hundred thousand dollars of said stock has been actually paid into the hands of said treasurer of said company, the said Board of Internal Improvements shall be and they are hereby authorized and required to subscribe, on behalf of the State, for stock in said company to the amount of two millions of dollars to the capital stock of said company; and the subscription shall be paid in the following manner, to wit, the one-fourth part as soon as the said company shall commence work, and one-fourth thereof every six months thereafter, until the whole subscription in behalf of the State shall be paid: Provided, the treasurer and president of said company shall, before they receive the aforesaid instalments, satisfactorily assure the Board of Internal Improvements, by their certificates, under the seal of said company, that an amount of the private subscription has been paid in equal proportion to the stock subscribed by the State.

"SEC. 37. That if in case the present legislature shall not provide the necessary and ample means to pay the aforesaid instalments on the stock subscribed for on behalf of the State, as provided for in the thirty-sixth section of this act, and in that event, the Board of Internal Improvements aforesaid shall, and they are hereby authorized and empowered to borrow, on the credit of the State, not exceeding two millions of dollars, as the same may be needed by the requirements of this act.

"SEC. 38. That if in case it shall become necessary to borrow the money by this act authorized, the Public Treasurer shall issue the necessary certificates, signed by himself and countersigned by the Comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued; but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the instalment required to be paid by the State at that time.

"SEC. 39. That the Comptroller shall register the said certificates at large in a book to be by him kept for that purpose, at the time he countersigns the same."

"SEC. 41. That, as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof; and, in addition thereto, all the stock held by the State in the North Carolina Railroad Company hereby created shall be, and the same is hereby, pledged for that purpose; and any dividends of profits which may, from time to time, be declared on the stock held by the State

the United States and refused by the State of North Carolina. The State of North Carolina pleaded payment of the prin-

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as aforesaid, shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the Treasurer, and he is hereby authorized and directed to pay all such interest, as the same may accrue, out of any moneys in the Treasury not otherwise appropriated.

"SEC. 42. That the certificates of debt, hereby authorized to be issued, shall be transferable by the holders thereof, their agents or attorneys, properly constituted, in a book to be kept by the Public Treasurer for that purpose; and in every instance, where a transfer is made, the outstanding certificate shall be surrendered and given up to the Public Treasurer, and by him cancelled, and a new one, for the same amount, issued in its place to the person to whom the same is transferred." Laws of North Carolina of 1848–49, pp. 153, 154, 155.

The act of December 22, 1852, c. 10, entitled "An act to regulate the form of bonds issued by the State," contains the following provisions:

"SEC. 1. That all certificates hereafter to be issued for any money to be borrowed for the State, by virtue of any act now in force authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the Governor and countersigned by the Public Treasurer, and sealed with the great seal of the State, and shall be made payable to——— or bearer; and the principal shall be made payable by the State at a day named in the certificate or bond; and coupons of interest in such form as may be prescribed by the Public Treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto shall be made payable at such bank or place in the city of New York as he, the Public Treasurer, may think proper, or at the office of the Public Treasury at Raleigh, if preferred by the purchaser; Provided, however, that no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value.

"SEC. 2. That it shall be the duty of the Public Treasurer to enter in a book, to be kept for that purpose, a memorandum of each bond or certificate, issued by virtue of this act, the numbers, date of issue, when and where payable, to whom issued, or to whom sold, and at what premium, if any, the same was sold by him." Laws of North Carolina of 1852, pp. 45, 46.

By the act of December 27, 1852, c. 9, entitled "An act to increase the revenue of the State by the sale of its bonds," "it shall be the duty of the Public Treasurer to have coupons attached to all the bonds of the State hereafter sold by him." Laws of North Carolina of 1852, p. 45.

The act of February 14, 1855, c. 32, entitled "An act for the completion of the North Carolina Railroad," contains the following:

"SEC. 1. That the Public Treasurer is authorized and instructed to subscribe, in behalf of the State, for ten thousand additional shares of capital

cipal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable.

The United States moved for judgment, as by *nil dicit*, because the plea did not answer so much of their demand as was for interest after the bonds became payable.

The case was submitted to the decision of the court upon a case stated, signed by the Attorney General of the United States, and by the Attorney General of North Carolina, as follows:

"The parties to the above-entitled case stipulate that upon the issue joined the facts are that payment of the bonds was demanded and refused at the several times in the years 1884 and 1885 in the declaration alleged; but subsequently, upon or about the 2d day of October, 1889, all coupons upon the bonds were paid, and that, besides, $147,000 was paid upon account of whatever might then remain due upon the bonds; the United States then contending that because of interest at six per cent per annum, which at that time had accrued upon the principal of the bonds since their maturity, such payment left still unpaid upon the debt the sum of $41,280; whilst the State then contended that no interest had accrued upon the principal of the bonds after their maturity, and therefore that such payment was in full of such debt.

"The parties submit to the court that, in case as matter of law the principal of said bonds did so bear interest after maturity, judgment is to be entered for the plaintiff for $41,280; but that if it did not so bear interest, judgment is to be entered for the defendant."

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stock in the North Carolina Railroad Company, and that he make payment for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized that were given for those issued under the direction of said act: Provided, nevertheless, that the whole amount of principal money of such bonds or certificates of debt shall not exceed the sum of one million of dollars." Laws of North Carolina of 1854–55, p. 64.

Mr. Attorney General (with whom was *Mr. S. F. Phillips*, *Mr. J. G. Zachry* and *Mr. F. D. McKenney* on the brief) for plaintiff.

Mr. T. F. Davidson, Attorney General of the State of North Carolina, and *Mr. S. G. Ryan* for defendant.

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

This is an action brought in this court by the United States against the State of North Carolina upon bonds issued by the State and held by the United States. By the case stated, it appears that the State, some time after the maturity of the bonds, paid the principal, together with interest thereon to the time when the bonds became payable; and the only question presented for our decision is whether, as matter of law, the principal of the bonds bore interest after maturity, and according to our opinion upon this question judgment is to be entered for the one party or the other.

Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *In re Gosman*, 17 Ch. D. 771.

In *Gosman's Case*, just cited, where the personal property of a deceased person had been taken possession of by the Crown for want of known next of kin, and was afterwards recovered by petition of right by persons proved to be the next of kin, who claimed interest for the time the Crown held the property, Sir George Jessel, Master of the Rolls, speaking for the Court of Appeal, summed up the law of England in this short judgment: "There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract."

In *United States* v. *Sherman*, the Circuit Court of the United States for the District of South Carolina had certified that there was probable cause for an act done by an officer of the United States, for which judgment had been recovered against him in that court; and consequently, by express acts of Congress, "the amount so recovered" was to "be provided for and paid out of the proper appropriation from the treasury." Acts of March 3, 1863, c. 76, § 12, 12 Stat. 741; July 28, 1866, c. 298, § 8, 14 Stat. 329. This court held that the judgment creditor was entitled to receive from the United States the amount of the judgment only, without interest; and Mr. Justice Strong, in delivering the opinion, said: "When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government; but not until then. Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government; and the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." 98 U. S. 567, 568.

In *Angarica* v. *Bayard*, this court held that on money received by the Secretary of State from a foreign government under an international award, invested by him in interest-bearing securities of the United States, and ultimately paid to the petitioner, interest was not payable, because the money was in effect withheld by the United States; and Mr. Justice Blatchford, delivering judgment, said: "The case, therefore, falls within the well settled principle that the United States

are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration, or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages." 127 U. S. 260.

In *United States* v. *McKee*, where a claim against the United States for moneys and supplies furnished during the Revolutionary War had been referred by Congress to the Court of Claims with directions to be governed in its adjustment and settlement "by the rules and regulations heretofore adopted by the United States in the settlement of like cases," interest was allowed by that court, and by this court on appeal, because Congress was shown to have allowed interest in many private acts for the settlement of similar claims. 10 C. Cl. 231, 235; 91 U. S. 442, 451.

In *United States* v. *Bank of Metropolis*, 15 Pet. 377, cited at the bar, no question of interest was suggested by counsel, or considered by the court.

In North Carolina, as elsewhere, in an action against a private person, to recover a sum certain and overdue, interest may doubtless be recovered, either according to the dictum in *Devereaux* v. *Burgwin*, 11 Iredell, 490, 495, on the ground of a "promise to pay being implied from the nature of the transaction;" or, as more accurately stated in other cases, as damages for nonperformance of the defendant's contract. *State* v. *Blount*, 1 Haywood, 4; *Hunt* v. *Jucks*, 1 Haywood, 173; *McKinlay* v. *Blackledge*, 2 Haywood, 28. See *Young* v. *Godbe*, 15 Wall. 562, 565; *Holden* v. *Trust Co.*, 100 U. S. 72, 74; *Price* v. *Great Western Railway*, 16 M. & W. 244, 248; *Cook* v. *Fowler*, L. R. 7 H. L. 27, 32, 36, 37; *Union Institution for Savings* v. *Boston*, 129 Mass. 82.

But it is equally well settled, by judgments of the Supreme

Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.

In *Attorney General* v. *Cape Fear Navigation Co.*, 2 Iredell Eq. 444, 454, decided in 1843, in a suit on behalf of the State to recover dividends due to it as a stockholder, the corporation, by way of set-off, claimed interest for the State's failure to pay its subscription at the time when it was payable; and Chief Justice Ruffin, in delivering judgment, laid down, as undoubted law, that "the general rule is, that the State never pays interest, unless she expressly engages to do so."

In *Bledsoe* v. *State*, 64 No. Car. 392, 397, decided in 1869, under a clause in the Constitution of the State providing that "the Supreme Court shall have original jurisdiction to hear claims against the State; but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next General Assembly for its action;" a claim was made for fuel and provisions furnished to the State Insane Asylum, under written contract of the superintendent, from October, 1863, to April, 1865, with interest from the times of delivery. Upon the question of interest, the court said: "It was decided by this court, in *Attorney General* v. *Cape Fear Navigation Co.*, 2 Iredell Eq. 444, that the State is not bound to pay interest, unless there is a special contract to that effect. The contract, in this case, must be understood to have been made with reference to the law, as it then stood. But because of the changes in and the disturbed condition of the government, and because payment has been delayed for a long time, we recommend a departure from the rule, so far as to allow interest from the end of the war, say May 1, 1865, until January 1, 1869, when the plaintiff presented his claim to the General Assembly."

Whether interest not stipulated for in a contract is to be awarded as damages for nonperformance of the contract, or on the ground of an implied promise to pay it, a private person is no less chargeable with interest on debts certain and overdue for money or goods, than on promissory notes or

bonds obligatory; and the State is no more chargeable with interest in the one case than in the other.

The scope and effect of the bonds now sued on cannot be determined without a careful consideration of the provisions of the statutes from which the officers who executed the bonds derived their authority.

Under the original act of January 27, 1849, the obligations of the State for money borrowed were required to be signed by the Treasurer and countersigned by the Comptroller, "in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued."

There is nothing in that statute to show that certificates issued under it are to be negotiable from hand to hand, or assignable by the mere act of the holder, so as to create a contract between the State and any assignee. On the contrary, the statute requires that they shall be registered at large by the Comptroller at the time of his countersigning them; and the only transfer provided for is on the books of the Treasurer, and by surrender of the old certificate and issue of a new one instead thereof to the assignee.

In that act, as no other date is mentioned for the payment of the principal than the date at which it "shall be redeemable," it would be difficult (as is admitted by the learned counsel for the United States, citing *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 145) to attribute to the word "redeemable" any other meaning than "payable;" and the provision that the interest shall be "payable semi-annually at such times and places as the Treasurer may appoint," naturally relates to interest before the date fixed for payment of the principal, and could hardly be extended to imply an authority to the Treasurer and the Comptroller to bind the State to pay interest after that date.

But any doubt upon this point is removed by the act of De-

cember 22, 1852, pursuant to the provisions of which the bonds in suit were issued.

This act makes new requirements, differing in many respects from, and in so far superseding, the requirements of the former act. It requires all certificates, thereafter issued for money borrowed by the State, to be under seal of the State signed by the Governor and countersigned by the Treasurer. It clearly shows that they are to be negotiable, as well by requiring them to "be made payable to —— or bearer," as by requiring a registry of a memorandum of their original issue only. It omits the provision that the principal "shall be redeemable" at the end of thirty years, and instead thereof prescribes that "the principal shall be made payable by the State at a day named in the certificate or bond." It requires "coupons of interest to be attached to the certificates;" and both the certificates and the coupons are required to be made payable, either at such bank or place in the city of New York as the Treasurer may designate, or at the public treasury in Raleigh, if preferred by the purchaser.

From the general principle, that an obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute, it appears to us to follow as a necessary consequence that no authority to the officers of the State to bind it by such an obligation can be implied from the act of 1852, requiring the certificates or bonds issued under it to be made payable at a day named in them, and to have coupons of interest attached to them, and making no mention whatever of interest after the date at which the principal is payable.

In the light of the provisions of this statute, the agreement in the bonds sued on, that the principal sum shall be "redeemable in good and lawful money" at the place and day therein designated, must be deemed equivalent to an agreement that they shall be payable on that day; and if the further provision by which interest is payable half-yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed," could, upon the face of

the bonds, and without regard to the laws under which they were issued, be construed to include interest after the date at which the principal is payable, and for which interest there were no coupons to be surrendered, it cannot be allowed such an effect, because the State of North Carolina has never authorized its officers to incur any such obligation in its behalf.

This disposes of all the suggestions made in behalf of the United States, except the argument that, the bonds being payable in New York, the payment of interest is to be governed by the law of New York, according to which it is said that the State would be liable to pay interest, like a private person. *People* v. *Canal Commissioners*, 5 Denio, 401.

But these bonds are obligations of the State of North Carolina; they were executed, delivered and registered in North Carolina by high officers of the State; the rate of annual interest is fixed at six per cent, the legal rate in North Carolina, and not seven per cent, the then legal rate in New York; and the fact that the bonds were made payable at a particular bank in New York, pursuant to the authority conferred by the statute of North Carolina upon its Public Treasurer, instead of being made payable, as by that statute they might have been, at Raleigh, the capital of the State, cannot affect the extent of the obligation of the State of North Carolina. The manifest object of the alternative, allowed by the statute, of making the bonds payable either at New York or at Raleigh, was to promote the convenience of bondholders; and not to submit the obligation, the construction or the effect of the bonds to the operation of different laws, according to the place at which they should actually be made payable. The case, therefore, falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 453. *Judgment for the defendant.*

Mr. Justice Miller, Mr. Justice Field and Mr. Justice Harlan dissented.

UNION BANK OF CHICAGO *v.* KANSAS CITY BANK.

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

No. 13. Argued October 16, 17, 1889. — Decided May 19, 1890.

Upon appeal from a decree in equity of the Circuit Court of the United States, accompanied by a certificate of division in opinion between two judges before whom the hearing was had, in a case in which the amount in dispute is insufficient to give this court jurisdiction, its jurisdiction is confined to answering the questions of law certified.

Upon the question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, the decisions of the highest court of the State are of controlling authority in the courts of the United States.

Section 354 of the Revised Statutes of Missouri of 1879, concerning voluntary assignments for the benefit of creditors, does not invalidate a deed of trust, in the nature of a mortgage, by an insolvent debtor, of all his personal property, to secure the payment of preferred debts, reserving a right of redemption.

By the law of Missouri, one partner has power to bind his copartners by a mortgage of all the personal property of the partnership to secure the payment of particular debts of the partnership.

A receiver derives his authority from the act of the court, and not from the act of the parties; and the effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession.

By the law of Missouri, a mortgage by one partner of the personal property of an insolvent partnership, to secure the payment of particular debts of the partnership, is valid, and does not operate as a voluntary assignment for the benefit of all its creditors under § 354 of the Revised Statutes of 1879; although another partner does not assent to the mortgage, and has previously authorized the making of a voluntary assignment under the statute; and although the partner making the mortgage procures a simultaneous appointment of a receiver of all the partnership property.

This was a petition, in the nature of a bill in equity, filed in a court of the State of Missouri by citizens and corporations of other States, judgment creditors (each of them in the sum of less than $2500) in behalf of all the creditors of James

B. Melone, of Macon in the State of Missouri, Richard A. Melone and Charles H. Benedict, of Kansas City in that State, and all three citizens of Missouri, and doing business at Kansas City as partners, under the name of Benedict, Melone & Co., against those three partners, three banking corporations of Missouri, and Charles Stewart, likewise a citizen of Missouri.

The bill alleged that on February 16, 1882, Richard A. Melone, in behalf of the partnership, executed a deed of trust, a copy of which was annexed to the bill, purporting to be by and between the partnership of the first part, Stewart of the second part, and the three banks of the third part, and to convey to Stewart the personal property and choses in action of the partnership; provided that if the partnership should pay certain specified debts which it owed to each of the banks, "then these presents and everything herein shall cease and be void; but if they, the said Benedict, Melone & Co., shall fail or make default in the payment of such indebtedness to said three above-mentioned banks, or any part thereof, when the same shall have become past due and payable for five days, then it shall be lawful for said party of the second part to sell said property in any manner he shall think fit, and out of the proceeds arising from said sale pay off said indebtedness or so much thereof as shall be unpaid, together with the costs and expenses of said sale, and the overplus, if any there be, shall be paid to said parties of the first part. Said party of the second part shall take immediate possession of said property."

The bill further alleged that this deed included all the partnership property; that the partnership and each partner were then, as all the defendants well knew, hopelessly insolvent; that on the same day, and simultaneously with the execution of this deed, Benedict, upon a suit commenced by him in a court of Missouri to wind up the partnership, procured the appointment of Stewart as receiver of its property, and he immediately qualified and entered upon his duties as such; that James B. Melone had previously authorized his copartners to make a general assignment for the benefit of all

the partnership creditors without any preferences, and never authorized or approved the deed of trust; that the action of the two other partners in executing that deed to Stewart and having him appointed receiver was a fraudulent attempt on their part to evade the statute of Missouri concerning voluntary assignments; that by reason of the premises, and of that statute, the deed of trust operated as a voluntary assignment of all the property of the partnership for the benefit of all its creditors; that all the partnership property was delivered to Stewart and taken possession of by him under the deed of trust; that out of the property Stewart had realized the sum of $58,000, enough to pay all the creditors of the partnership about sixty per cent of their debts if the preferences in the deed of trust should be set aside; but that Stewart, instead of performing the duties required of him by the aforesaid statute of Missouri, had treated the deed of trust as a valid mortgage, and had paid the debts of the banks in full, amounting to about $19,000, and was proceeding to distribute as receiver the rest of the trust fund in his hands.

The bill prayed that the deed of trust might be declared to be a general assignment for the benefit of all the creditors of the partnership in proportion to their respective claims; that Stewart be ordered to make distribution accordingly; and that the banks be ordered to pay the sums received by them into the registry of the court.

Stewart and the three banks demurred to the petition; and before further proceedings in the cause, it was removed, on application of the plaintiffs, into the Circuit Court of the United States; and that court, upon a hearing on bill, answers, replication and proofs, before Mr. Justice Miller and Judge Krekel, ordered the bill to be dismissed, and they certified a division of opinion on the following questions:

"1. Is the instrument of writing in this case, called a deed of trust, which we find, as a matter of fact, conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart as trustee, as security for the banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?

"2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under section 354 of the Revised Statutes of Missouri of 1879.

"3. Does the making of that deed of trust and appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceeding to administer the assets of the insolvent partnership, to which the banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors, and require the receiver to administer the funds in his hands in that manner?"

A final decree was entered for the defendants, in accordance with the opinion of the presiding justice; and the plaintiffs appealed to this court.

Mr. S. C. Douglass (with whom was *Mr. C. L. Dobson* on the brief) for appellants.

I. Treating the instrument as a deed of trust with preferences, it is not properly executed to make it the act of the firm, having been made without the assent of one of its members, and the preferences therein attempted to be created are void and should be set aside.

The authorities are unanimous in holding that, by the act of co-partnership, the implied power of a partner over the partnership assets is limited to transactions within its business scope and objects; and they are, practically, as unanimous in holding that this implied authority is personal to the partner and cannot be delegated to another person without the assent of the other partners, and that neither party is authorized, by virtue of the partnership relation, to appoint a trustee and interpose him between the partnership, its property and creditors, thereby, *ipso facto*, dissolving the partnership, and placing its property in the hands of third persons for sale and disposition. Transfers, made in conducting the business of the

firm, are in exercise of a power to preserve, while such as mean dissolution are in the exercise of a power to destroy, and, to validate them, a special authorization must be shown. *Hitchcock* v. *St. John*, 1 Hoffman Ch. 511; *Wetter* v. *Schleiper*, 15 How. Pr. 268; *Dana* v. *Lull*, 17 Vermont, 390; *Rogers* v. *Batchelor*, 12 Pet. 221; *Welles* v. *March*, 30 N. Y. 344; *Palmer* v. *Myers*, 43 Barb. 509; *Deming* v. *Colt*, 3 Sandf. (N. Y.) 284; *Hayes* v. *Heyer*, 3 Sandf. (N. Y.) 293; *Coope* v. *Bowles*, 18 Abb. Pr. 442; *Bowen* v. *Clark*, 1 Bissell, 128; *Pearpoint* v. *Graham*, 4 Wash. C. C. 232; *Holland* v. *Drake*, 29 Ohio St. 441; *Bull* v. *Harrison*, 18 B. Mon. 195; *Kirby* v. *Ingersoll*, Harrington Ch. (Mich.) 172; *Maughlin* v. *Tyler*, 47 Maryland, 545; *Stein* v. *La Dow*, 13 Minnesota, 412; *Dunklin* v. *Kimball*, 50 Alabama, 251; *Pettee* v. *Orser*, 6 Bosworth, (N. Y.,) 123; *Loeb* v. *Pierpoint*, 58 Iowa, 469; *Havens* v. *Hussey*, 5 Paige, 30; *Ormsbee* v. *Davis*, 5 R. I. 442; *Wooldridge* v. *Irving*, 23 Fed. Rep. 676; *Nat. Bk. of Baltimore* v. *Sackett*, 2 Daly, (N. Y.,) 395; *Loeschigk* v. *Hatfield*, 5 Robertson, (N. Y.,) 26; *Kemp* v. *Carnley*, 3 Duer, (N. Y.,) 1; *Haggerty* v. *Granger*, 15 How. Pr. 243; *Everson* v. *Gehrman*, 10 How. Pr. 301; *Hughes* v. *Ellison*, 5 Missouri, 463; *Drake* v. *Rogers*, 6 Missouri, 317; *Clark* v. *Rives*, 33 Missouri, 579; *Hook* v. *Stone*, 34 Missouri, 329; *Keck* v. *Fisher*, 58 Missouri, 532.

II. Treating the instrument as a deed of general assignment, it is properly executed to make it the firm act, inasmuch as the two resident partners participated in the transfer, and the absent one directed the assignment to be made, and ratified the transfer only as such assignment.

Section 354, Rev. Statutes of Mo. of 1879, Vol. I page 54, is as follows: "Every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims, and every such assignment shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed." This term "voluntary" is applied to assign-

ments to distinguish them from such as are made by the compulsion of the law, as under statutes of bankruptcy and insolvency, or by order of some competent court. *Manny* v. *Logan*, 27 Missouri, 528.

"Voluntary assignments for the benefit of creditors are transfers, without compulsion of laws, by debtors of some or all of their property, to an assignee or assignees in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor." Burrill on Assignments, 4th ed. § 2.

When a debtor has made a general disposition of all his property and effects, and suspended his whole business in consequence thereof, thereby declaring insolvency, his act in so doing constitutes a voluntary assignment under the Missouri statute; and it is immaterial whether that act be effectuated by one or more instruments, provided they are parts of one and the same transaction, in and by which the debtor so disposes of his property. The assignment statute is remedial in its nature and intended to prevent preferences, as the statute of fraudulent conveyances is aimed at frauds, and both must be liberally construed, in the very nature of things, in order to accomplish the purposes for which they were enacted. The courts look beyond the mere form of instruments, and, with the aid of parol proof, construe them according to their real meaning and effect. *Martin* v. *Hausman*, 14 Fed. Rep. 160; *Kellogg* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812; *State ex rel. Feldkamp* v. *Morse*, 27 Fed. Rep. 262; *Weil* v. *Polack*, 30 Fed. Rep. 813; *Crow* v. *Beardsley*, 68 Missouri, 435; *State* v. *Benoist*, 37 Missouri, 500; *Sexton* v. *Anderson*, 95 Missouri, 373; *Berry* v. *Cutts*, 42 Maine, 445; *Downing* v. *Kintzing*, 2 S. & R. 326; *Holt* v. *Bancroft*, 30 Alabama, 193; *Livermore* v. *McNair*, 34 N. J. Eq. 478; *Watson* v. *Bagaley*, 12 Penn. St. 164; *S. C.* 51 Am. Dec. 595; *Miners' National Bank's Appeal*, 57 Penn. St. 193; *Burrows* v. *Lehndorf*, 8 Iowa, 96; *Cole* v. *Dealham*, 13 Iowa, 551; *Van Patten* v. *Burr*, 52 Iowa,

518; *Harkrader* v. *Leidy*, 4 Ohio St. 602; *Dickson* v. *Rawson*, 5 Ohio St. 218; *Englebert* v. *Blanjot*, 2 Wharton, 240; *Mussey* v. *Noyes*, 26 Vermont, 462; *Thompson* v. *Heffner*, 11 Bush, 353; *Perry* v. *Holden*, 22 Pick. 269.

Mr. Henry H. Ess and *Mr. O. H. Dean* (with whom were *Mr. William Warner* and *Mr. James Hagerman* on the brief) for appellees.

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

The claim of each plaintiff being for less than $5000, and the amount in dispute, therefore, insufficient to give this court jurisdiction of the whole case, our jurisdiction is confined to answering the questions of law presented by the certificate of division of opinion between the judges before whom the case was heard in the Circuit Court. Rev. Stat. §§ 650, 652, 693; Act of February 16, 1875, c. 77, § 3, 18 Stat. 316; *Dow* v. *Johnson*, 100 U. S. 158; *United States* v. *Ambrose*, 108 U. S. 336; *Jewell* v. *Knight*, 123 U. S. 426.

The determination of these questions is governed by the law of Missouri, where the deed of trust was made, and the parties to it resided. In ascertaining the construction and effect of section 354 of the Revised Statutes of the State of 1879, which is supposed to affect the case, it is important to bear in mind the law of Missouri as it existed before those statutes were enacted.

The Supreme Court of Missouri in 1852, speaking by Mr. Justice Gamble, said: "It is not necessary to quote books for the purpose of showing that a debtor in failing circumstances may give a preference to one or more of his creditors to the exclusion of others; and that such disposition of his effects is not impeachable on the ground of fraud, because it embraces all his property;" and accordingly upheld assignments by insolvent debtors of all their property to pay particular creditors. *Cason* v. *Murray*, 15 Missouri, 378, 381; *Richards* v. *Levin*, 16 Missouri, 596, 599.

It was also well settled by the decisions of that court, that each partner, by virtue of the relation of partnership, and of the community of right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose within the scope of the partnership business, and might therefore, without the concurrence of his copartners, mortgage the partnership property by deed of trust, to secure the payment of a partnership debt; *Clark* v. *Rives*, 33 Missouri, 579; *Keck* v. *Fisher*, 58 Missouri, 532; although one partner, without the concurrence of his copartners, could not delegate to a stranger the right of the partnership to administer the partnership effects, and therefore could not make a general assignment of all the property of the partnership for distribution by the assignee among the partnership creditors, retaining no equity of redemption in the partnership. *Hughes* v. *Ellison*, 5 Missouri, 463; *Hook* v. *Stone*, 34 Missouri, 329.

The statutes of Missouri restricting voluntary assignments have always been construed rather strictly by the Supreme Court of the State.

By the earliest statute upon the subject, "in all cases in which any person shall make a voluntary assignment of his lands, tenements, goods, chattels, effects and credits, or any part thereof, to any person, in trust for his creditors or any of them, it shall be the duty of the assignee" to file an inventory of the assigned property in the office of the clerk of the Circuit Court of the county in which the assignee resides. Missouri Rev. Stat. of 1845, c. 10, § 1; reënacting Act of February 15, 1841, § 1, Missouri Laws of 1840–41, p. 13.

In the Revised Statutes of 1855, c. 8, § 1, that section was reënacted, and at the end of the chapter this section was added: "§ 39. Every provision in any assignment, hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities, within the provisions of the assignment, shall be paid *pro rata* from the assets thereof."

The Supreme Court of Missouri repeatedly and uniformly held that, taking those two sections together, § 39 only pro-

hibited preferences among the creditors designated in an assignment, either of the whole or of part of the debtor's property, but did not invalidate partial assignments for the benefit of some of the creditors of the assignor, and was so far inefficient to prevent preferences among creditors; and the court observed: "If the legislature wish to strike at the root of the evil, they must go back to an old principle of the common law, which permits a debtor to prefer one creditor to another, and which privilege can be effected in a variety of modes other than those referred to in our statutes concerning assignments." *Shapleigh* v. *Baird*, 26 Missouri, 322, 326; *Johnson* v. *McAllister*, 30 Missouri, 327; *Many* v. *Logan*, 31 Missouri, 91; *State* v. *Benoist*, 37 Missouri, 500, 516.

An act of February 13, 1864, repealed § 39 of the act of 1855, and enacted that "every assignment hereafter made in this State," under the provisions of the act of 1855, "shall be for the benefit of all creditors who shall present and prove up their claims under the provisions of said act, and all debts and liabilities so proved and allowed shall be paid *pro rata* from the assets thereof." Act of February 13, 1864, §§ 8, 9, Missouri Laws of 1863–64, p. 6.

In 1865 this provision was reënacted in this form: "Every voluntary assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims." Gen. Stat. of 1865, c. 112, § 1; 1 Wagner's Stat. (3d ed.) 150.

In 1878 the construction and effect of this provision were drawn in judgment before the Supreme Court of Missouri in *Crow* v. *Beardsley*, 68 Missouri, 435, where a debtor had conveyed his stock of merchandise by a deed of trust, in no respect differing from the one now before us, to secure the payment of certain of his creditors. It was contended that the provision of the statute, just quoted, avoided all conveyances of property which gave a preference among creditors. But it was held that while that provision had a wider scope than § 39 of the act of 1855, and was designed to prevent any preference of creditors "by assignment," yet it did not avoid deeds of

trust, in the nature of mortgages, which were only securities for the payment of debts. The court clearly pointed out the distinction between assignments and deeds of trust in the nature of mortgages, saying: "An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment." "The distinction is that an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The deed in question here is, therefore, a deed of trust in the nature of a mortgage." 68 Missouri, 437, 438. Upon these reasons it was adjudged that the deed was not within the statute concerning assignments, and could not be avoided by a creditor not named in it, except for fraud.

The section there construed was afterwards reënacted, in the same words, in § 354 of the Revised Statutes of 1879, which were the statutes in force when the deed of trust in this case was made.

The only embarrassment in the present case has been occasioned by the course of decision in the Circuit Court of the United States within the State of Missouri, originating in a case decided in 1882 by an opinion of Judge Krekel with the concurrence of Judge McCrary. *Martin* v. *Hausman*, 14 Fed. Rep. 160.

In that case, the debtors assigned and transferred their whole stock in trade by a deed which declared that it was made to secure certain debts therein mentioned, but directed the assignee to proceed at once to sell the property, and out of the proceeds to pay the debts as they matured, and provided that after they had been fully paid "this deed shall be released," and reserved no right of redemption to the assignors. Upon a review of the decisions of the Supreme Court of Missouri, and especially *Shapleigh* v. *Baird*, *State* v. *Benoist* and *Crow* v. *Beardsley*, above cited, it was held that, as the deed did not purport to be a security for a debt, leaving an equity of redemption in the grantors, and empowering the trustee to sell only if the debts specified should not be paid

at maturity, but conveyed the property absolutely to the trustee, to be sold for the payment of the debts named and preferred in it, it was not a mortgage security, but an assignment for the benefit of creditors; and Judge Krekel laid down this general rule: "A debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them; but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the assignment laws, and as for the benefit of all creditors, whether named in the assignment or not." 14 Fed. Rep. 166.

The rule thus laid down has since been followed by the same and other judges in the Federal courts within the State of Missouri, and has been extended (in disregard of the adjudication of the Supreme Court of the State in *Crow* v. *Beardsley*) so as to hold a deed of trust, in the nature of a mortgage, of all the personal property of the debtor, to be a voluntary assignment, within the meaning and effect of the Missouri statute. *Dahlman* v. *Jacobs*, 16 Fed. Rep. 614; *Kellog* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812, and 27 Fed. Rep. 248; *State* v. *Morse*, 27 Fed. Rep. 261.

That rule, as thus construed and applied, has not, however, always been approved in the Circuit Court. In *Clapp* v. *Dittman*, above cited, Mr. Justice Brewer, then Circuit Judge, confessed that, if it were a new question, his own conclusion would be different, and in harmony with the decisions in *National Bank* v. *Sprague*, 3 C. E. Green, 13, 28; *Farwell* v. *Howard*, 26 Iowa, 381; *Doremus* v. *O'Hara*, 1 Ohio St. 45; *Atkinson* v. *Tomlinson*, 1 Ohio St. 237, and other cases; and declared that he should follow the rule, as having been established by the course of the decisions in the courts of the United States within the State of Missouri, until there should be some authoritative construction of the statute by the Supreme Court of the United States, or by the Supreme Court

of the State. 21 Fed. Rep. 17. See also *Perry* v. *Corby*, 21 Fed. Rep. 737; *Freund* v. *Yaegerman*, 27 Fed. Rep. 248; *Elgin Co.* v. *Meyer*, 30 Fed. Rep. 659; *Weil* v. *Polack*, 30 Fed. Rep. 813.

The decision in *Crow* v. *Beardsley* has always been treated in all the courts of the State as settling the law of Missouri upon the subject. It has been followed by the St. Louis Court of Appeals in *Holt* v. *Simmons*, 16 Mo. App. 97, and by the Kansas City Court of Appeals in *Sampson* v. *Shaw*, 19 Mo. App. 274, and in *Smith & Keating Co.* v. *Thurman*, 29 Mo. App. 186; and it has been approved and acted on by the Supreme Court of Missouri in a very recent case, in which the court, after repeating and enforcing the reasoning upon which *Crow* v. *Beardsley* proceeded, said: "The assignment law of Missouri is not, in letter or spirit, a bankrupt or insolvent debtor's act. A debtor, whether solvent or insolvent, may, in good faith, sell, deliver in payment, mortgage or pledge the whole or any part of his property for the benefit of one or more of his creditors, to the exclusion of others, even though such transfer may have the effect of delaying them in the collection of their debts. Its terms in no way qualify the rule by which the character of this instrument is to be determined. Reading the instrument then as a whole, in the light of the circumstances under which it was executed, was it intended as a security, or as an absolute unconditional conveyance, *in præsenti*, to the grantee of all the grantor's interest in the property, both legal and equitable, to the exclusion of any equitable right of redemption?" And it was accordingly adjudged that the assignment law was inapplicable to a deed of trust, conveying all the debtor's property, real and personal, (except his homestead and household furniture, and a horse and buggy,) to a trustee in trust to secure the payment of part of his debts for which he was liable either as principal or as surety, which appeared to the court, upon a view of all its provisions as applied to the facts of the case, to be "not an absolute indefeasible assignment of all the grantor's title, both legal and equitable, in the property 'in trust for his creditors;' but a deed of trust to secure the pay-

ment of debts and other liabilities, in which the grantor has an interest in the property conveyed," for the protection of which "equity gives him a right of redemption, though no clause of defeasance was inserted in the deed." *Hargadine* v. *Henderson*, 97 Missouri, 375, 386, 387, 389.

The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States. *Brashear* v. *West*, 7 Pet. 608, 615; *Allen* v. *Massey*, 17 Wall. 351; *Lloyd* v. *Fulton*, 91 U. S. 479, 485; *Sumner* v. *Hicks*, 2 Black, 532, 534; *Jaffray* v. *McGehee*, 107 U. S. 361, 365; *Peters* v. *Bain*, 133 U. S. 670, 686; *Randolph's Executor* v. *Quidnick Co.*, 135 U. S. 457. The decision in *White* v. *Cotzhausen*, 129 U. S. 329, construing a similar statute of Illinois in accordance with the decisions of the Supreme Court of that State as understood by this court, has therefore no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by Mr. Justice Field, speaking for this court, "The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other." *Christy* v. *Pridgeon*, 4 Wall. 196, 203. See also *Detroit* v. *Osborne*, 135 U. S. 492.

In the present case, there can be no doubt that the deed of trust, conveying the personal property of the partnership to secure the payment of its debts therein named, and reserving in the clearest terms a right of redemption to the grantors, by providing that if they shall pay those debts the deed shall be void, as well as by authorizing the trustee to sell the property only in case of their failing to pay those debts or any part thereof for five days after they become payable, was, according to the settled course of decision in the courts of the State

of Missouri, a mortgage only, and not an assignment under the statute relied on; and therefore, according to the decisions in Missouri, cited at the beginning of this opinion, (no fraud being proved or suggested,) an instrument which one partner had the inherent authority to bind the partnership by, although his copartners did not join in it.

The deed of trust, executed by and with the consent of two of the three partners, being a valid mortgage, and not an assignment, within the meaning of the statute, the fact that the third partner had authorized his copartners to execute an assignment, which was never executed, cannot affect the validity or the operation of the deed of trust.

Nor did the simultaneous appointment of a receiver of the partnership property at the suit of one of the partners alter the nature of the deed of trust, or transform it into a voluntary assignment, within the meaning of the statute of Missouri, as construed by the Supreme Court of the State. A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property. *Skip* v. *Harwood*, 3 Atk. 564; *Anon.* 2 Atk. 15; *Wiswall* v. *Sampson*, 14 How. 52, 65; *Ellis* v. *Boston, Hartford & Erie Railroad*, 107 Mass. 1, 28; *Maynard* v. *Bond*, 67 Missouri, 315; *Herman* v. *Fisher*, 11 Mo. App. 275, 281. And in the present case, the three banks have claimed and received payment of the full amount of their debts from Stewart as trustee under the mortgage, and not as receiver under the appointment of the court.

The necessary conclusion is, that each of the questions certified must be answered in the negative, and that the decree of the Circuit Court dismissing the bill must be

Affirmed.

Statement of the Case.

THE CHIEF JUSTICE, having been of counsel, and MR. JUSTICE BREWER, not having been a member of the court when the case was argued, took no part in its consideration or decision.

SMITH MIDDLINGS PURIFIER COMPANY *v.* McGROARTY.

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

No. 28. Argued April 15, 16, 1889.— Decided May 19, 1890.

An appeal from a decree of the Circuit Court of the United States, dismissing a bill filed by creditors to set aside a mortgage by their debtor, is within the jurisdiction of this court as to those creditors only whose debts severally exceed $5000.

The filing of a voluntary assignment for the benefit of creditors, and of the assignee's bond, in a probate court, under the statutes of Ohio, does not prevent a creditor, who is a citizen of another State, and has not become a party to the proceedings in the state court, from suing in equity in the Circuit Court of the United States to set aside a mortgage made by the debtor contemporaneously with the assignment.

In Ohio, a mortgage by an insolvent trading corporation to prefer some of its creditors, having been held by the Supreme Court of the State to be invalid, under its constitution and laws, against general creditors such a mortgage must be held invalid in the courts of the United States.

THIS was a bill in equity, filed November 4, 1885, by a corporation of Michigan against the Simpson and Gault Manufacturing Company, a corporation of Ohio, Sayler, a citizen of Ohio and assignee of that company, under the laws of Ohio, McGroarty, Simpson, Gault and Fitch, also citizens of Ohio, and Charles, a citizen of New York.

The bill alleged that the defendant company, on May 25, 1885, by a deed of assignment filed in the probate court of Hamilton County in the State of Ohio, granted and assigned all its property, real and personal, to Sayler, in trust to sell and dispose of it, and to apply the proceeds, after paying the

expenses of executing the trust, to the payment of all its creditors; that Sayler accepted the trust, and gave bond as required by the laws of Ohio, and entered on his duties as assignee under that deed, and sold all the property, and was about to distribute the proceeds; that the company then and still was indebted to the plaintiff in the sum of $1461.72, and interest from February 3, 1885; that on May 23, 1885, the company, being deeply insolvent, and contemplating and intending to make a general assignment of all its property to Sayler as aforesaid, and as part of one and the same transaction with that assignment, and by the procurement of Simpson, who was president of the defendant company, and of one O'Hara, its treasurer, executed and delivered mortgages of all its property to the five individual defendants, Simpson, McGroarty, Gault, Fitch and Charles, severally, in fraud of the plaintiff and other creditors of the company, and with a fraudulent intent to prefer the mortgagees as creditors of the company, contrary to the provisions of the statutes of Ohio regulating assignments for the benefit of creditors; and that the company, and Sayler as its assignee, had been requested by the plaintiff, and had refused, to take proceedings to have the mortgages set aside.

The bill prayed that the mortgages might be declared to enure to the benefit of the plaintiff and all other general creditors of the company; and that Sayler might be ordered to distribute the fund in his hands accordingly, and be restrained from applying it to the payment of the debts secured by the mortgages, and for further relief.

No service was made upon Charles; and, upon the plaintiff's motion, the bill was dismissed as to him, and was amended by joining as plaintiffs three citizens of the State of New York, partners under the name of W. & F. Livingston, and by alleging that they had recovered judgment against the defendant company in November, 1885, for the sum of $10,822.89, which remained unreversed, and upon which execution had been issued and returned unsatisfied.

Sayler, Simpson, McGroarty, Fitch and Gault demurred to the bill, for want of equity, and because the matters stated in

the bill, and all questions touching the validity of the mortgages and the distribution of the proceeds of the sale of the property, were within the exclusive jurisdiction of the probate court of Hamilton County. The court sustained the demurrers and dismissed the bill, and the plaintiffs appealed to this court.

Mr. Joseph Wilby and *Mr. J. C. Harper* for appellants.

Mr. Thomas McDougall for appellee.

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

The claim of the plaintiff company, being for less than $5000, is insufficient to give this court jurisdiction, and the appeal must therefore be dismissed as to that company. *Stewart* v. *Dunham*, 115 U. S. 61; *Gibson* v. *Shufeldt*, 122 U. S. 27.

But the claim of W. & F. Livingston, citizens of New York, who by leave of the Circuit Court and amendment of the bill were joined as plaintiffs, is more than $10,000, which is sufficient to give this court jurisdiction of the appeal, so far as concerns their claim; and Charles, also a citizen of New York, who was originally joined as defendant, not having been served with process, and the bill having been dismissed as to him, the case in regard to the citizenship of the parties was within the jurisdiction of the Circuit Court.

The plaintiffs, in the brief filed in their behalf, expressly "disclaim any intention to impeach the transaction in controversy, as one made with intent to hinder, delay or defraud creditors;" and seek to maintain their bill on the sole ground "that the transaction shown by the bill is within the operation of section 6343 of the Revised Statutes, and that therefore the attempted preferences should be decreed to enure to the benefit of the general creditors."

By § 6335 of the Revised Statutes of Ohio of 1880, "when any person, partnership, association or corporation shall make an assignment to a trustee of any property, money, rights or credits, in trust for the benefit of creditors, it shall be the

duty of said assignee" to file the assignment in the probate court of the county in which he resides, and to give bond, with sureties approved by that court, for the performance of his duties as assignee.

By § 6343, "all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall enure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

Subsequent sections provide for publishing notice of the appointment of the assignee, and for an appraisement and inventory of the property, the examination of the assignor and assignee on oath, the conversion of the property into money, the discharge of incumbrances, the proof of debts and the distribution of the property among the creditors.

The objection taken to the jurisdiction of the Circuit Court of the United States, upon the ground that the probate court of Hamilton County had exclusive jurisdiction of the matters in controversy, cannot be sustained. Upon the allegations of the bill, admitted by the demurrer, nothing appears to have been done in that court, before the commencement of this suit, except to file the voluntary assignment of the debtor, and the bond of the assignee; and the Circuit Court clearly had jurisdiction of a bill by citizens of other States, (who did not, so far as appears by this record, become parties to the proceedings in the state court,) to set aside the mortgages as fraudulent or invalid as against them. *Shelby* v. *Bacon*, 10 How. 56; *Green* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 425; *Arrowsmith* v. *Gleason*, 129 U. S. 86.

The defendants rely on the decision in *Sayler* v. *Simpson*, 45 Ohio St. 141, in which it appears that in a controversy to which these assignees, these mortgagees and W. & F. Livingston were parties, the Supreme Court of Ohio held that the probate court had jurisdiction to determine the rights of the mortgagees. But neither that decision, nor the facts stated in that report, have been pleaded or appear of record in this case.

The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and admitted by the demurrer; and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio. *Union Bank* v. *Kansas City Bank*, *ante*, 223, 235.

In the recent case of *Rouse* v. *Merchants' Bank*, 46 Ohio St. 493, that court, upon a similar state of facts, adjudged that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, were invalid and ineffectual against its creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute.

That decision, it is true, proceeded in part upon a theory that the property of an insolvent incorporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. *Graham* v. *Railroad Co.*, 102 U. S. 148, 161; *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587, 594; *Richardson* v. *Green*, 133 U. S. 30, 44; *Fogg* v. *Blair*, 133 U. S. 534, 541; *Peters* v. *Bain*, 133 U. S. 670, 691, 692. But it also proceeded in large part, as the opinion clearly shows, upon the constitution of Ohio, and the law and policy of that State as declared in previous decisions of its highest court, and should therefore be accepted by this court as decisive of the law of Ohio upon the subject.

It would be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the rights of citizens residing in different States, should hold such a conveyance to be valid against citizens of other States as the Supreme Court of Ohio holds to be void as against its own citizens.

Decree reversed, and case remanded for further proceedings in conformity with this opinion.

Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in its decision.

HAMILTON *v.* LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

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

No. 326. Argued May 2, 1890. — Decided May 19, 1890.

A condition in a policy of fire insurance, that any difference arising between the parties as to the amount of loss or damage of the property insured shall be submitted, at the written request of either party, to the appraisal of competent and impartial persons, whose award shall be conclusive as to the amount of loss or damage only, and shall not determine the question of the liability of the insurance company; that the company shall have the right to take the whole or any part of the property at its appraised value; and that, until such appraisal and award, no loss shall be payable or action maintainable; is valid. And if the company requests in writing that the loss or damage be submitted to appraisers in accordance with the condition, and the assured refuses to do so unless the company will consent in advance to define the legal powers and duties of the appraisers, and against the protest of the company asserts and exercises the right to sell the property before the completion of an award, he can maintain no action upon the policy.

The construction and effect of a correspondence in writing, depending in no degree upon oral testimony or extrinsic facts, is a matter of law, to be decided by the court.

This was an action upon a policy of insurance, numbered 2,907,224, against fire for a year from September 5, 1885, upon a stock of tobacco in the plaintiff's warehouse at 413 and 415 Madison Street in Covington in the State of Kentucky. Among the printed "conditions relating to the methods of adjustment of loss and the payment thereof," were the following:

The tenth condition, after provisions relating to proofs of loss, certificate of a magistrate, submission to examination on oath, and production of books and vouchers and certified copies of lost bills and invoices, further provided: "When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles

according to their kinds, separating the damaged from the undamaged; and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter or thing so submitted, but shall not decide the liability of this company; and until such proofs, declarations and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole or any part thereof at its appraised value."

By the eleventh condition, "it is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The answer put in issue the amount of loss; and set up that the plaintiff had not performed the conditions of the policy on his part; but had refused to submit a difference between the parties, as to the amount of loss, to appraisal and award as provided in the policy; and, against the defendant's protest, had sold the property insured, and deprived the defendant of its right under the policy to have an appraisal made and to take the property or any part thereof at its appraised value; and had thereby waived the right to recover under the policy.

At the trial, the plaintiff offered evidence tending to prove

the execution of the policy; a loss by fire on April 16, 1886, occasioned by the tobacco becoming saturated and impregnated with smoke, and thereby greatly damaged; and proofs of loss, in accordance with the policy. The only other evidence introduced was a correspondence between the parties at Cincinnati, the material parts of which were as follows:

April 23, 1886. Defendant to plaintiff. "If any claim for loss is to be made under policy No. 2,907,224 of this company, you will be expected to conform strictly to the conditions of said policy respecting the method of presenting claims for loss; and no conditions of the policy, or rights of the Liverpool and London and Globe Insurance Company thereunder, are in any manner waived or abandoned by that company. You will, of course, understand the necessity of not removing or disposing of any part of said stock, upon which loss is proposed to be claimed, pending the settlement of the claim, unless by agreement with the insurance companies."

April 24, 1886. Plaintiff to defendant. "It is necessary that I should have the room in which the property now is for the purpose of prosecuting my business. I propose to the company, furnishing it with the invoice of the cost or value of the property before the loss, to send the entire stock to be sold at auction." "If this is not assented to by the company, I shall be obliged to remove the property from my warehouse and put it in storage; and, in my judgment, the expense attending it and the disposition of it will considerably increase the amount of the loss. The property is ready for examination by your company. I desire that such examination as you wish to make shall be made at once, and that you will advise me forthwith whether you assent to the sale of the property by public auction in the manner proposed, as the fairest and most satisfactory mode of ascertaining its present value."

April 24, 1886. Defendant to plaintiff. "This company will be pleased to have your claim presented in due course and form, giving" (among other things) "the amount of loss or damage you claim on the whole, and also as against this

company, as it may be necessary to have the stock appraised by disinterested appraisers after receipt of proofs. We cannot consent to its removal, unless it be at your own expense. It should, if possible, be left where it is, though there can be no objection to your removing it to some other warehouse at your own expense, where it can be readily inspected by appraisers. We cannot consent to your disposal of it by sale. The matter of determining the value or damage will be one for mutual conference and agreement."

April 26, 1886. Plaintiff to defendant. "I inclose proof of loss under policy of your company, with invoice attached, in compliance with the requirements of the policy." "The property described and damaged has been invoiced and arranged, and is ready for examination by your company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies."

April 27, 1886. Defendant's agent to plaintiff. "I beg to acknowledge receipt of papers purporting to be proofs of loss under our policies 2,907,224 and 2,823,517. The same will have prompt examination and attention. Noting your purpose soon to sell the stock, permit us to say that we protest against such disposition of it at this stage, and against this *ex parte* way of determining the loss sustained. Conditions of our policy provide the manner and mode of determining the loss or damage; and we hereby formally demand an appraisal of the stock, as to value and damage, under each policy, each party to name a competent and disinterested party."

April 27, 1886. Plaintiff's counsel to defendant. "Mr. Hamilton is obliged, for the prosecution of his business, to remove at once the property covered by the insurance from his factory in which the property was insured." "I do not find any provision in your policy, restricting the assured, under such circumstances, from removing or selling the damaged

property. If you claim that any such provision has that force, I should be glad if you should at once call my attention to it." "The property covered by the policy above referred to will require at least two weeks from this date to remove and bring to sale, and during that time it will be subject to whatever examination you may wish to make." "It does not occur to me that there can be any impediment in ascertaining the amount of the loss by an arbitration, in the manner provided by the policy, from the course which Mr. Hamilton indicates that he proposes to pursue."

April 28, 1886. Defendant to plaintiff's counsel. "It may be sufficient to point out that the appraisement provided by the terms of our policies, in the printed clause referred to, contemplates the possibility of the company exercising the right therein reserved to take the property or any part thereof 'at its appraised value.' A sale of the property prior to such appraisement would deprive the company of this right. We have refused and still refuse to consent to any disposition of the property, prior to the appraisement, or to any *ex parte* method of fixing the amount of the loss, which our policies provide shall be determined 'by agreement between the company and the assured,' and by appraisement in case of difference. As to the removal of the property, your client has stated that the loss would thereby be materially increased. You will understand, therefore, that such additional loss would necessarily be borne by him, and not by the company whose protest against such removal has been made. The proposed removal is expressly designed by Mr. Hamilton for his own advantage in the ordinary prosecution of his business, and the indemnity furnished by insurance does not extend to losses sustained in that direction. We protest against this removal, furthermore, because it takes away from the view of the appraisers the actual surroundings, location and condition of the property at the time difference of opinion arose, and would thus materially affect the judgment of the appraisers as to the loss sustained. We ask you for a direct answer to our request for an appraisement, and desire that any further communication be directed to that point only. You will please take

notice that any disposition of the property by sale prior to the appraisement will be understood and accepted by us as a refusal upon the part of your client to permit such appraisement and as a relinquishment of all claims under the policies of this company."

April 28, 1886. Defendant and other insurance companies to plaintiff. "The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison Street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale or other disposition of the property, until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such *ex parte* action."

April 29, 1886. Plaintiff's counsel to defendant and other insurance companies. "Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies. He has believed that, in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent of the leaf-tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is in substance and effect an appraisement in detail of every package by the entire trade in this city. But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitra-

tors selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." "If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you and submit to me the form of agreement of arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him."

April 30, 1886. Defendant and other insurance companies to plaintiff's counsel. "We must insist upon arbitration, in accordance with the terms of our several contracts, without importing into it any conditions as to the sale of the property. Such conditions would be incompatible with the provisions of our several policies of insurance and the rights of the insuring companies thereunder. As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for, we will submit the name of an arbitrator, and also a form of agreement for arbitration."

April 30, 1886. Plaintiff's counsel to insurance companies. "Mr. Hamilton, and I in his behalf, deny that the arbitration in the manner indicated is in violation of the terms of any of the policies, or imports any condition into it which the insured is not entitled to insist upon, or which is incompatible with the provisions of the several policies of insurance, or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed me to express his readiness, to proceed at once with an arbitration, which, as he understands it, is in substantial compliance with the arbitration provided for in all the several policies." "I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award,' does not in any wise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of

selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made."

May 3, 1886. Insurance companies to plaintiff's counsel. "We herewith enclose a form of agreement for 'submission to appraisers,' which is in practical accordance with the conditions of the policies of the several companies, and which all the companies are willing to sign and abide by the award reached thereunder. We must again decline to entertain your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information, and the forming of their own judgments as to the value and damage of the goods; but we insist that under the conditions of the several policies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value. The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto."

The principal part of the form of submission to appraisers, enclosed in this letter, was as follows: "It is hereby agreed by Robert Hamilton, of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that —— —— and —— —— shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below and as hereinafter provided. In case of disagreement

said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers or any two of them, made in writing in accordance with this agreement, pursuant to the terms of the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property before the fire, and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies."

May 4, 1886. Plaintiff's counsel to insurance companies. "There can be no misunderstanding as to the position taken by the companies and the assured in this matter. 1st. I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do. 2d. Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement through their own appraisers of the value of the stock, and that they shall jointly, or either of them with the consent of the rest, have the right to take the stock, in whole or in part, at their appraisal. 3d. Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock."

Enclosed in this letter, and signed by the plaintiff's counsel, was the following: "To the Liverpool and London and Globe Insurance Company and the companies jointly acting with it in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison Street, Covington, Ky.: Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th of April, and will select an arbi-

trator to represent him in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss."

May 5, 1886. Insurance companies to plaintiff's counsel. "Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party,' (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evidence based on a sale of the property,) we must accept your communication as a refusal to comply with our request and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter."

May 7, 1886. Insurance companies to plaintiff's counsel. "Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to wit: 'The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information.' What we do object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining

the duties of the appraisers and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party."

May 8, 1886. Defendant to plaintiff's counsel. "On behalf of the Liverpool and London and Globe Ins. Company, we demand an appraisal of the value of and damage to the goods insured under our policies Nos. 2,823,517 and 2,907,224, issued to Robert Hamilton, of Covington, Ky., as the same could not be determined by mutual agreement between us, and we take exceptions to the amount of loss and damage as stated in your claim. We herewith submit a form of agreement of submission to appraisers which we deem in strict accordance with the terms and conditions of our policies, and upon your assent thereto will be prepared to name our appraiser."

The form enclosed in this letter did not materially vary from that enclosed in the letter of May 3, 1886.

May 10, 1886. Plaintiff's counsel to defendant. "In view of the number and diverse provisions of the several policies upon Mr. Hamilton's property, and of what has transpired, I do not conceive that the several companies are now entitled each to demand a separate submission to arbitration by Mr. Hamilton. It does not seem to me that any provision in the policies of your company provides for a submission to appraisers in the manner expressed in the form of agreement enclosed; and I have already expressed in the correspondence, upon the joint demand of all the companies, my reasons for this opinion, and my objections to this form of submission."

May 13, 1886. Defendant to plaintiff. "Objecting to the amount of your claim for loss and damage under policies 2,823,517 and 2,907,224, we demand, according to condition 10 of the policies, that the differences which have arisen between us as to sound value and loss or damage to the goods covered by said policies shall be submitted, at equal expense between us, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall elect an umpire to act with them in case of their disagreement. We

name as our appraiser Wm. Spear, of St. Louis, and upon the naming of your appraiser we will meet you to sign an agreement embodying the provisions of our policies without any conditions. Please take notice that this company reserves the right to take the whole or any part of the property insured at its appraised value; and you are further notified that until such an appraisal is permitted and had, our loss, if any, will not be payable."

May 15, 1886. Plaintiff's counsel to defendant. "Mr. Hamilton adheres to the position taken by him in the joint correspondence between the insurers and Mr. Hamilton and myself in his behalf. Mr. Hamilton has acted upon the conclusion reached in that correspondence, and I do not understand that your company proposes to change its own attitude as taken in that correspondence."

May 20, 1886. Plaintiff's counsel to defendant. Enclosing a notice in a newspaper of the sale by auction on May 29, 1886, at the plaintiff's warehouse in Covington, of the tobacco insured by the policy in suit.

June 3, 1886. Plaintiff's counsel to defendant. "Mr. Hamilton has disposed of the property claimed to have been damaged in the fire of April 16, by sale at public auction, in pursuance of the notice communicated to your company. If your company really desire to submit to arbitration the question of the amount of loss sustained by Mr. Hamilton, notwithstanding all that has transpired, Mr. Hamilton is quite ready now to submit that question to competent and impartial arbitrators. He simply demands, the arbitrators being chosen, that in the agreement for submission it shall be provided that the company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered."

June 7, 1886. Defendant to plaintiff's counsel. "As you have, in spite of our protest, sold and scattered the goods, so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take

the property or any part thereof at its appraised value, we must accept your action as a refusal to accede to our demand for submission of the differences that have arisen between us. By the course pursued, Mr. Hamilton has, in our judgment, waived any rights he may have had under the policies, and this company will stand upon its legal rights in the premises."

The court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff in writing to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do; and instructed the jury to return a verdict for the defendant, which was accordingly rendered. The plaintiff excepted to these instructions, and, after judgment on the verdict, sued out this writ of error:

Mr. Joseph Wilby for plaintiff in error. At the close of Mr. Wilby's argument, the court declined to hear further argument.

Mr. Channing Richards, *Mr. Rufus King*, *Mr. Charles H. Stephens*, *Mr. S. J. Thompson*, *Mr. Thomas B. Paxton* and *Mr. Ledyard Lincoln* filed briefs for defendant in error.

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

The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and

such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. *Scott* v. *Avery*, 5 H. L. Cas. 811; *Viney* v. *Bignold*, 20 Q. B. D. 172; *Delaware & Hudson Canal* v. *Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed* v. *Washington Ins. Co.*, 138 Mass. 572, 576; *Wolff* v. *Liverpool & London & Globe Ins. Co.*, 21 Vroom, 453; *Hall* v. *Norwalk Ins. Co.*, 57 Conn. 105, 114. The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." *United States* v. *Robeson*, 9 Pet. 319, 327. See also *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549.

Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree, (as in *Uhrig* v. *Williamsburg Ins. Co.*, 101 N. Y. 362, cited for the plaintiff,) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court. *Turner* v. *Yates*, 16 How. 14, 23; *Bliven* v. *New England Screw Co.*, 23 How. 420, 433; *Smith* v. *Faulkner*, 12 Gray, 251.

Opinion of the Court.

That correspondence clearly shows that the defendant explicitly and repeatedly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent, in advance, to define the legal powers and duties of the appraisers, (which the defendant was under no obligation to do,) and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property before the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy.

The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action.

If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented.

Judgment affirmed.

IN RE PALLISER.

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

No. 1538. Argued May 1, 1890.— Decided May 19, 1890.

A sale by a postmaster of postage stamps on credit is a violation of the act of June 17, 1878, c. 259, § 1, forbidding him to "sell or dispose of them except for cash."

Sending a letter to a postmaster, asking him whether, if the writer of the letter will send him five thousand circulars in addressed envelopes, he will put postage stamps on them and send them out at the rate of one hundred daily, and promising him, if he will do so, to pay to him the price of the stamps, is a tender of a contract for the payment of money to the postmaster, with intent to induce him to sell postage stamps on credit and in violation of his duty, and is punishable under § 5451 of the Revised Statutes.

The offence of tendering a contract for the payment of money in a letter mailed in one district and addressed to a public officer in another, to induce him to violate his official duty, may be tried in the district in which the letter is received by the officer.

Charles Palliser, being detained by the United States marshal for the Southern District of New York, under a warrant from a commissioner of the Circuit Court of the United States for that district, obtained from that court a writ of *habeas corpus*, as well as a writ of *certiorari*, to the marshal and commissioner, both returnable at a stated term of the court, in obedience to which the commissioner returned a record of proceedings had before him under § 1014 of the Revised Statutes, which enacts that "for any crime or offence against the United States the offender may," by any commissioner of the Circuit Court, "be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence;" and that where any offender "is committed in any district other than that where the offence is to be tried," a warrant may be issued by the District Judge and executed by the marshal of that district, "for his removal to the district where the trial is to be had." The proceedings stated in the return were as follows:

First. The complaint, of which the following is a copy:

Statement of the Case.

"United States of America, Southern District of New York, ss. John H. Bario, being duly sworn, deposes and says that he is an inspector of the Post Office Department; that on October 23d, 1888, Charles Palliser of the city and State of New York, then and there doing business under the name and style of Palliser, Palliser & Co., at Old Lyme, in the county of New London, in the State and District of Connecticut, with force and arms unlawfully and wilfully did tender to one W. R. De Wolf, who then and there was and thereafter continued to be until the 4th day of March, 1889, a postmaster of the United States at a certain post office known as Black Hall, in said county of New London, a certain contract in the words and figures following:

'New York, October 23, 1888.

'Postmaster, Black Hall, Conn.

'Dear Sir: We desire in each county a place through which to send out mail matter, as we want to reach every business man, mechanic and real-estate owner in every State by circular. If we ship to you from our printing department, located in the country in your State, say 5000 or 10,000 circulars in envelopes, and each addressed, will you give the same your careful attention, sending out daily 50 to 100 during the coming months until they are all out, and then render us statement of same, with account for stamps used, and we will remit. We are doing this at other general store post-offices in adjoining counties to yours, and it is perfectly legitimate, and we await your reply in addressed and stamped envelope enclosed herewith, as, if you cannot attend to same, we must at once send elsewhere.

'Yours very truly,

'Palliser, Palliser & Co.'

with the intent of him, the said Palliser, to induce him, the said De Wolf, as such postmaster, to do certain acts in violation of his lawful duty as such postmaster — that is to say, to sell him, the said Palliser, postage stamps of the United States otherwise than for cash, to wit, upon the credit of said Palliser, against the peace of the United States and contrary

Statement of the Case.

to the statutes thereof in such case made and provided. Deponent further says that said Charles Palliser is now within the Southern District of New York.

"JOHN H. BARIO.

"Subscribed and sworn to before me this 27th day of September, 1889.

"JOHN A. SHIELDS, U. S. Commissioner."

Second. The warrant of arrest, dated September 27, 1889, reciting the substance of the complaint, and that it had been satisfactorily proved to the commissioner "that the said Charles Palliser is now within the Southern District of New York."

Third. The bringing of the prisoner before the commissioner, and his discharge on bail pending his examination.

Fourth. The evidence taken before the commissioner, tending to prove the following facts: Palliser was a member of the firm of Palliser, Palliser & Co., architects and publishers of works on building, having their principal place of business in the city of New York, and a printing-office at Bridgeport in the State of Connecticut. The letter set forth in the complaint was signed and mailed by Palliser at New York in a sealed envelope; and was received at Black Hall in the county of New London and State of Connecticut by De Wolf, postmaster at that place, who was a postmaster of the fourth class, receiving no salary, and compensated upon the basis of, among other things, the amount of stamps cancelled at his office. Act of March 3, 1883, c. 142, § 2, 22 Stat. 602. At the same time, Palliser sent similar letters from New York or Bridgeport to many other postmasters of the same class in Connecticut. About a fortnight afterwards, De Wolf received by freight a box of circulars; and on November 26, 1888, he sent by mail to Palliser, Palliser & Co., at the city of New York a reply to their letter in these words: "Gentlemen: Have received a case of circulars from you, which I did not order, as cannot handle them. They are here subject to your order. Take notice of sec. 515 of postal laws and regulations, 1887.

"Yours, etc.,

"W. R. DE WOLF, P. M."

Fifth. An order of the commissioner, dated November 26, 1889, committing the prisoner, upon his surrender by his bail, to the custody of the marshal.

Sixth. The final order of the commissioner, dated December 3, 1889, by which, after reciting the arrest and examination, and "it appearing to me from the testimony offered that there is probable cause to believe the said Charles Palliser guilty of the offence charged in said warrant, the said Charles Palliser is hereby committed for trial at the District of Connecticut, the district in which the offence is alleged to have been committed, and he is hereby remanded to the custody of the United States marshal for the Southern District of New York until the warrant for his removal shall issue by the United States District Judge for the Southern District of New York, or he be otherwise dealt with according to law."

The record transmitted to this court, after setting forth the proceedings above stated, further set forth: 1st. An opinion of the Circuit Judge, filed December 3, 1889, treating the case as before him, and not before the Circuit Court, and directing the writ of *habeas corpus* to be dismissed; 2d. An order of the Circuit Court, at a stated term held on the same day, ordering the writ of *habeas corpus* to be dismissed and the prisoner remanded to the custody of the marshal; 3d. An appeal from that order to this court.

Mr. Roger Foster for the petitioner.

I. The sending of the letter described in the complaint did not constitute a crime, even if it were unlawful for the postmasters to sell postage stamps upon credit.

(1) The circular contains no offer upon the part of Mr. Palliser to send the circulars in case the postmasters should agree to sell the stamps for them on credit.

(2) The request of a public officer to aid the party making the request in the performance of an act in violation of such officer's duty, through which each will make a profit, is not the offer of a bribe. For the principles for construing such statutes see *Harding* v. *Stokes*, 1 M. & W. 354; *People* v. *Smith*, 28 Hun, 626; *People* v. *Emerson*, 6 Conn. Crim. Rep. (N. Y.)

Argument for Petitioner.

157; *Dunn* v. *People*, 29 N. Y. 523; *Commonwealth* v. *Willard*, 22 Pick. 476; *State* v. *Hopkins*, 4 Jones N. C. 305; *Rawles* v. *State*, 15 Texas, 581; *Stabler* v. *Commonwealth*, 95 Penn. St. 318; *Stampler* v. *Commonwealth*, 7 Bush, 612.

II. The sale of postage stamps upon credit is not a violation of a postmaster's official duty. The government is amply protected by his bond. Rev. Stat. § 3834. This is a penal statute and must be construed strictly. See *The Enterprise*, 1 Paine, 32; *Commonwealth* v. *Standard Oil Co.*, 101 Penn. St. 119; *Commonwealth* v. *Martin*, 17 Mass. 359; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Reese*, 92 U. S. 214; *Henderson* v. *Bise*, 3 Starkie, 158; *Wells* v. *Porter*, 2 Bing. N. C. 722: *Thomas* v. *Stevenson*, 2. El. & Bl. 108; *Coe* v. *Lawrance*, 1. El. & Bl. 516; *Broadhead* v. *Holdsworth*, 2 Ex. D. 321; *Southwestern Railroad Co.* v. *Cohen*, 49 Georgia, 627; *St. Louis Type Foundry* v. *Union Printing Co.*, 3 Missouri App. 142; *Hoffman* v. *John Hancock Ins. Co.*, 92 U. S. 161; *United States* v. *Williamson*, 26 Fed. Rep. 690; *United States* v. *Douglass*, 33 Fed. Rep. 381.

III. The District Court of Connecticut has no jurisdiction to try Mr. Palliser for the offence charged against him. *United States* v. *Guiteau*, 1 Mackey, 498. The offence was complete when the letter was mailed. The fact that the person to whom it was addressed lived in Connecticut makes no difference. Mr. Palliser has a constitutional right to a trial in the Southern District of New York, where he resides and is known.

The Sixth Amendment to the Constitution is as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." This amendment is to be construed liberally in view of its history and the rights which it is designed to protect. *Boyd* v. *United States*, 116 U. S. 616.

It is supplementary to a clause of the Constitution as originally ratified in section 2 of Article III. "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed."

These constitutional provisions cannot be nullified by any statute of the United States. Consequently, if section 731 of the Revised Statutes conflicts with them, it is unconstitutional and void.

But that statute does not cover the case at bar. Mr. Palliser's alleged crime was complete when the letter was mailed in New York. *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Bickford*, 4 Blatchford, 337; *United States* v. *Plympton*, 4 Cranch C. C. 309; *Dana's Case*, 7 Benedict, 1; *United States* v. *Comerford*, 25 Fed. Rep. 902; *State* v. *Bunker*, 38 Kansas, 737; *United States* v. *Britton*, 2 Mason, 464; *Ripley* v. *State*, 9 Humphrey, 646.

Mr. Solicitor General opposing.

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

Upon the record before us, the final order dismissing the writ of *habeas corpus*, and remanding the prisoner to the custody of the marshal, appears to have been a decision of the Circuit Court at a stated term, and therefore clearly subject to an appeal to this court, under the act of March 3, 1885, c. 353. 23 Stat. 437; *Carper* v. *Fitzgerald*, 121 U. S. 87.

But he was rightly remanded to custody, because the return shows that he was charged with a crime against the laws of the United States and within the jurisdiction of the courts of the United States for the District of Connecticut.

By section 5451 of the Revised Statutes, "every person who promises, offers or gives, or causes or procures to be promised, offered or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value to any officer of the United

States," "with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished" by fine and imprisonment.

By the act of June 17, 1878, c. 259, § 1, "no postmaster of any class, or other person connected with the postal service, entrusted with the sale or custody of postage stamps, stamped envelopes or postal cards, shall use or dispose of them in the payment of debts or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash," on pain of being deemed guilty of a misdemeanor and punished accordingly. 20 Stat. 141.

By this statute, postmasters are peremptorily forbidden, not only to dispose of postage stamps in the payment of debts or in the purchase of commodities, or to pledge them, but to "sell, or dispose of them except for cash." The word "cash" in this statute, as in common speech, means ready money, or money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money, and does not include promises to pay money in the future. A sale on credit is not, ordinarily speaking, and in the absence of any evidence of usage, a sale for cash, within the meaning of that word as used in statutes or contracts. *Muller* v. *Norton*, 132 U. S. 501; *Bliss* v. *Arnold*, 8 Vermont, 252; *Steward* v. *Scudder*, 4 Zabriskie, 96; *Foley* v. *Mason*, 6 Maryland, 37; *Blair* v. *Wilson*, 28 Grattan, 165, 175; *Farr* v. *Sims*, Rich. Eq. Cas. 122, 131; *Meng* v. *Houser*, 13 Rich. Eq. 210, 213.

The petitioner relies on the following passage in an opinion delivered by Mr. Justice Swayne: "Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies." *Hoffman* v. *Hancock Ins. Co.*, 92 U. S. 161, 164. But the only point decided in that case was that an agent of an insurance company could not, unless authorized by the company, accept personal property as

money in payment of a premium; no question arose or was considered as to the premium note; and it cannot reasonably be inferred that the learned justice meant to intimate that a premium note was cash or money, before the amount thereof was paid by the insured and received by the insurance company, according to the terms of their contracts.

The substance and effect of the letter written and sent by the petitioner, in behalf of himself and his partners, to De Wolf as postmaster, was to ask him whether, if they should send him from five to ten thousand circulars in addressed envelopes, he would put postage stamps on them and send them out, at the rate of fifty to one hundred daily; and to promise him that, if he would do so, and would render them a statement of his doings and an account of the stamps used, they would remit to him the price of the stamps. If we take five thousand, the smallest number of circulars proposed to be sent by the petitioner to the postmaster, and one hundred, the largest number suggested to be sent out by the postmaster daily, it would require fifty days for the postmaster to send out the circulars; and the petitioner would thus be allowed an average credit of at least twenty-five days on his payments to the postmaster for five thousand postage stamps; and the postmaster would receive and retain a commission on the sale of as many stamps, which neither he nor any other postmaster would retain if the circulars were mailed by the petitioner at the post-office in New York or any other post-office where the postmaster was paid by a salary.

If this letter was not an offer of money to the postmaster, it was clearly a tender of a contract for the payment of money to him, with intent to induce him to sell postage stamps for credit, in violation of his lawful duty; and therefore came within § 5451 of the Revised Statutes, above quoted. A promise to a public officer, that if he will do a certain unlawful act he shall be paid a certain compensation, is an offer to bribe him to do the unlawful act; and an offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the statute, because the portion of that money which he would

ultimately have the right to retain, by way of commission, from the United States, would be no greater than he would have upon a lawful sale for cash of an equal amount of postage stamps.

The remaining and more interesting question is whether the petitioner can be tried for this offence in the District of Connecticut.

The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the State and District wherein the crime shall have been committed. Art. 3, sect. 2; Amendments, Art. 6.

But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed."

Reference was made in argument to the question, often disputed, Where an indictment for murder shall be tried, when a person mortally wounded in one jurisdiction afterwards dies in another jurisdiction? See *Commonwealth* v. *Macloon*, 101 Mass. 1, and authorities there cited; *The Queen* v. *Keyn*, 2 Ex. D. 63; 11 Amer. Law Rev. 625; *State* v. *Bowen*, 16 Kansas, 475; *United States* v. *Guiteau*, 1 Mackey, 498. But there the original unlawful act is not only done by the offender, but reaches the person at whom it is aimed, in one jurisdiction; and it is the subsequent effect only which takes place in another jurisdiction. We have no occasion now to consider such a case, beyond observing that before the Declaration of Independence provision had been made by statute, both in England and in Ireland, for trying such cases in either jurisdiction, and was never supposed to be inconsistent in principle with the provision of Magna Charta, c. 14, for trial by a jury of the vicinage. 1 East P. C. 366; 1 Gabbett's Crim. Law, 501. It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect, and the only doubt is whether he can be tried

where the shot is fired. *Rex* v. *Coombes*, 1 Leach, (4th ed.) 388; *United States* v. *Davis*, 2 Sumner, 482; *People* v. *Adams*, 3 Denio, 190, 207, and 1 N. Y. 173, 176, 179; Cockburn, C. J., in *The Queen* v. *Keyn*, 2 Ex. D. 233, 234.

When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and Congress has accordingly provided that "when any offence against the United States is begun in one judicial district and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner and as if it had been actually and wholly committed therein." Rev. Stat. § 731.

When an offence is committed by means of a communication through the post-office, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter. *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Bickford*, 4 Blatchford, 337; *Rex* v. *Williams*, 2 Campbell, 506; *The King* v. *Burdett*, 3 B. & Ald. 717, and 4 B. & Ald. 95; *Perkin's Case*, 2 Lewin, 150; *Regina* v. *Cooke*, 1 Fost. & Finl. 64; *The Queen* v. *Holmes*, 12 Q. B. D. 23; *S. C.* 15 Cox Crim. Cas. 343. But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed: and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post-office consists in its being a threatening letter; *The King* v. *Girdwood*, 1 Leach, 142; *S. C.* 2 East P. C. 1120; *Esser's Case*, 2 East P. C. 1125; or a libel; *The King* v. *Johnson*, 7 East, 65; *S. C.* 3 J. P. Smith, 94; *The King* v. *Burdett*, 4 B. & Ald. 95, 136, 150, 170, 184; *Commonwealth* v. *Blanding*, 3 Pick. 304; *In re Buell*, 3 Dillon, 116, 122; or a false pretence or fraudulent representation; *Regina* v. *Leech*, Dearsly, 642; *S. C.* 7 Cox Crim. Cas. 100; *The Queen* v. *Rogers*, 3 Q. B. D. 28; *S. C.* 14 Cox Crim. Cas. 22; *Peo-*

ple v. *Rathbun*, 21 Wend. 509; *People* v. *Adams*, 3 Denio, 190, and 1 N. Y. 173; *Foute* v. *State*, 15 Lea (Tenn.) 712.

The only decision to the contrary, cited for the petitioner, is one in which the Circuit Court of the District of Columbia, upon the authority of a former case in the same court in which no opinion is reported, held that where a letter containing a forged check was put in the post-office at Baltimore, addressed to a person in Washington, there was no uttering of the forged paper in Washington. *United States* v. *Plympton*, 4 Cranch C. C. 309; citing *United States* v. *Wright*, 2 Cranch C. C. 296. In *Dana's Case*, 7 Ben. 1, a warrant to remove to the District of Columbia a person alleged to have printed a libel in a newspaper published in New York, and circulated by his authority in the District of Columbia, was refused by Mr. Justice Blatchford, then District Judge, not because the offence could not be punished in the District of Columbia, but because the law of that District provided for its prosecution by information only, and was therefore unconstitutional. In *United States* v. *Comerford*, 25 Fed. Rep. 902, an indictment on § 3893 of the Revised Statutes, for "knowingly depositing or causing to be deposited" in the post-office at New York a letter containing obscene matter in a sealed envelope addressed to a person in Texas, was quashed, not merely for want of jurisdiction in Texas, but because the court held that the act did not constitute an offence under that statute, in accord with the decision of this court at the present term in *United States* v. *Chase*, 135 U. S. 255.

In the case before us, the offence charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offence against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offence was committed in New York, the offence continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offence was committed in New York,

an offence was committed in Connecticut; and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal.

Order affirmed.

CHICAGO RAILWAY EQUIPMENT COMPANY *v.* MERCHANTS' BANK.

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

No. 64. Argued November 4, 5, 1889. — Decided May 19, 1890.

The maker executed in the State of Illinois and delivered to the promisee a series of notes, one of which was acquired by a *bona fide* endorsee, and was as follows: "$5000. Chicago, Ill., January 20, A.D. 1884. For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars, at First Nat. Bank of Chicago, Illinois, with interest thereon, at the rate of — per cent per annum, from date until paid. This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249, inclusive, and marked on the side thereof with the words and letters Blue Line C. & E. I. R. R. Co.; and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars. No. 1. Geo. B. Burrows, Vice-President. Countersigned by E. D. Buffington, Treas."; *Held:*

(1) That this was a negotiable promissory note according to the statute of Illinois, where it was made, as well as by the general mercantile law;

(2) That its negotiability was not affected by the fact that the title to the cars for which it was given remained in the vendor until all the notes of the same series were fully paid, the title being so

retained only by way of security for the payment of the notes, and the agreement for the retention for that purpose being a short form of chattel-mortgage;

(3) That its negotiability was not affected by the fact that it might, at the option of the holder, and by reason of the default of the maker, become due at a date earlier than that fixed.

Mr. Justice Harlan, in the opinion of the court, stated the case as follows:

This action was brought by the Merchants' National Bank of Chicago against the Chicago Railway Equipment Company, a corporation of Wisconsin, upon two written instruments, one of which is in the words and figures following:

"$5,000. Chicago, Ill., *January* 20, A.D. 1884.

"For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid.

"This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249 inclusive, and marked on the side thereof with the words and letters Blue Line C. & E. I. R. R. Co.; and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

"No. 1. Geo. B. Burrows, *Vice-President.*"

"Countersigned by E. D. Buffington, Treasurer."

This writing is endorsed: "Northwestern Manufacturing and Car Co., per J. C. Gorman, Treas."

The other instrument bears the same date, and is in all respects similar to the first one. No question is made as to the genuineness of the signatures to these instruments of the vice-president and treasurer of the defendant, nor as to the plaintiff having paid value for them before maturity. They were declared upon as negotiable promissory notes. In support of the defence certain evidence was offered that was excluded, and the jury pursuant to the direction of the court returned a verdict in favor of the plaintiff for the full amount of the two instruments. 25 Fed. Rep. 809.

Mr. Greenleaf Clark for plaintiff in error.

The issue is a simple one, the defendant in error claiming that they are negotiable promissory notes, the plaintiff in error that they are not.

The requisites of a negotiable promissory note are few and simple. There must be an absolute unconditional promise in writing to pay a specified sum at a definite time therein limited. *Nunez* v. *Dautel*, 19 Wall. 560; *Cayuga Co. Bank* v. *Purdy*, 56 Michigan, 6.

The time of payment of each of the instruments is by the terms thereof so indefinite, uncertain and contingent, as to destroy the negotiable character that might otherwise attach thereto.

Each of the instruments in question is an entirety, and to ascertain its character and what is represented by it, resort must be had to all the terms and conditions therein contained, — the promise to pay a certain sum four months after date is in each instance to be taken in connection with and as modified and changed by what follows. The promise to pay, in four months from date, is subject at all times to the contingency that no default occurs as to either of the other twenty-four notes of the series, the terms and conditions of which do not appear from the instrument in question.

The first case in which the principle that the time of payment should be definite and ascertainable from the instrument itself was *Andrews* v. *Franklin*, (1717,) 1 Strange, 24. This

was followed by *Evans* v. *Underwood*, 1 Wilson, 262. These cases would not now be considered law. *Weidler* v. *Kauffman*, 14 Ohio, 455, 460.

Colehan v. *Cook*, (1743,) Willes, 393, followed these cases. On the authority of *Andrews* v. *Franklin*, it was there held that a note payable ten days after the death of the maker's father was negotiable. The authority of this case is seriously impeached, if not overthrown, by *Alexander* v. *Thomas*, 16 Q. B. 333.

It obtained, however, a foothold in this country through *Cota* v. *Buck*, 7 Met. 588, which has been since overruled. See *Way* v. *Smith*, 111 Mass. 523; *Stultz* v. *Silva*, 119 Mass. 137; *Mahoney* v. *Fitzpatrick*, 133 Mass. 151. Some of the cases in which it was followed were *Ernst* v. *Steckman*, 74 Penn. St. 13; and *Walker* v. *Woollen*, 54 Indiana, 164. See *Charlton* v. *Reed*, 61 Iowa, 166; *Cisne* v. *Chidester*, 85 Illinois, 523.

Another class of cases which will doubtless be urged as holding a doctrine adverse to that we here contend for, is those holding notes payable "on or before" a day named to be negotiable. To this class belong *Jordan* v. *Tate*, 19 Ohio St. 586; *Mattison* v. *Marks*, 31 Michigan, 421.

There is also a series of decisions with reference to notes payable in instalments, with a proviso that the entire amount shall become due on failure to pay any one. The leading case is *Oridge* v. *Sherborne*, 11 M. & W. 374. It was followed by *Carlon* v. *Kenealy*, 12 M. & W. 139, in which the court held itself bound by *Oridge* v. *Sherborne*. If *Carlon* v. *Kenealy* shall be considered to rest alone on the authority of *Oridge* v. *Sherborne*, it can have but little weight; if it be considered as standing alone its weight as an authority of principle is materially lessened by Pollock, C. B., in *Miller* v. *Biddle*, in 1865, an action upon a note like the one in question in *Carlon* v. *Kenealy*.

Opposed to the theory, however, that instruments promising to pay a definite sum of money at a specified time when coupled with an agreement that they may or shall become due upon the happening of some uncertain event before the

date mentioned are negotiable, are many well considered authorities, all of which enunciate the principle that such additional agreement operates to make the time when payment will become due so indefinite and uncertain as to nullify the otherwise negotiable character of the paper, reducing it to a mere chose in action assignable only subject to equities between the original parties.

Hubbard v. *Mosely*, 11 Gray, 170; *Way* v. *Smith*, 111 Mass. 523; *Stultz* v. *Silva*, 119 Mass. 137; *Mahoney* v. *Fitzpatrick*, 133 Mass. 151; *Brooks* v. *Hargreaves*, 21 Michigan, 254; *First National Bank* v. *Carson*, 60 Michigan, 432; *Bank of New Windsor* v. *Bynum*, 84 No. Car. 24; *Chouteau* v. *Allen*, 70 Missouri, 290, 339. See also, having bearing on the subject: *Lamb* v. *Story*, 45 Michigan, 488; *Smith* v. *Van Blarcom*, 45 Michigan, 371; *Nunez* v. *Dautel*, 19 Wall. 561; *Smith* v. *Marland*, 59 Iowa, 645; *Cayuga Co. Bank* v. *Purdy*, 56 Michigan, 6.

The instruments in question were not negotiable promissory notes, but merely executory agreements evidencing the terms and conditions of a conditional sale of personal property, as such assignable, but not negotiable in the commercial sense.

It is a cardinal principle in the law of negotiable paper needing no authorities in its support that bills and notes must be for the payment of money absolutely at the time specified, and with nothing upon the face of the paper that expressly or by implication will alter or modify this absolute obligation; and if the instrument, though otherwise a good promissory note or bill of exchange, does contain any such matter, the additional provisions will destroy the negotiable character that might otherwise attach to the instrument and reduce it to the level of an ordinary agreement.

So, too, if a note contains any stipulation or provision creating any obligation, duty or right on the part of either party aside from the simple obligation to pay a fixed sum at a certain time on the one part, and the right to receive it on the other, its negotiability will be thereby destroyed, and its character changed from that of a note to a mere agreement.

Parsons Bills and Notes, 30; Chitty on Bills, 12 Am. ed. 134 *et seq.*; Story on Bills, §§ 4-47.

The statute of Illinois does not change the ordinary rules further than to allow a note to be payable in personal property as well as money.

These cardinal principles are undisputed, and the only difficulty that has ever arisen has been in their application.

That instruments of the character of those in question here evidence a conditional sale by which no title passes until conditions are performed rather than an absolute sale with mortgage back for the purchase price, was held by this court in the recent case of *Harkness* v. *Russell*, 118 U. S. 663, where in an exhaustive decision considering an instrument very similar in its provisions to those in question in the present case, it reviews nearly all the authorities in this country on the subject.

While in that case, as well as many others where this class of papers has come up, the question was as to the title to the property acquired by the maker of the instrument, and the holding that, prior to compliance with the conditions, he had none whatever, regardless of where the possession might be, it follows as a logical sequence that his final obligation to pay must be dependent upon his getting what forms the consideration for the promise, otherwise there is an absolute want or failure of consideration. Until the executory agreement is performed, and the conditions fulfilled or waived, there is a contingency, it may be more or less remote, that the property may be destroyed or the vendor incapacitated from performance when the time for performance arrives. The obligation to pay is affected by this contingency from the time the agreement is made, and is not changed by its subsequent transfer. See *Third Nat. Bank* v. *Armstrong*, 25 Minnesota, 530; *Sloan* v. *McCarty*, 134 Mass. 245; *Swallow* v. *Emery*, 111 Mass. 355; *Killam* v. *Schaeps*, 26 Kansas, 310; *South Bend Iron Works* v. *Paddock*, 37 Kansas, 510; *Stevens* v. *Johnson*, 28 Minnesota, 172; *Deering* v. *Thom*, 29 Minnesota, 120; *Fletcher* v. *Thompson*, 55 N. H. 308; *Bannister* v. *Rouse*, 44 Michigan, 428.

Apparently opposed to this application of the rule is *Mott* v. *Havana Bank*, 22 Hun, 354; *Heard* v. *Dubuque County Bank*, 8 Nebraska, 10; and *Newton Wagon Co.* v. *Diers*, 10 Nebraska, 284.

Had the transaction been in the nature of sale absolute, with mortgage back to secure deferred payments, the instruments might be said to come within the authorities holding that the negotiable character of promissory notes is not to be affected by an agreement that is merely collateral to the promise to pay. But here the parties have by the express terms of their agreement evidenced a positive intention that the title should not pass until all the conditions of payment were fully complied with, and there is nothing in the instruments that will operate to modify or change this positive intention so expressed. See *Call* v. *Seymour*, 40 Ohio St. 670; *Fosdick* v. *Schall*, 99 U. S. 235; *Harkness* v. *Russell*, 118 U. S. 663, and cases cited; *Dom. Sewing Mach. Co.* v. *Arthurhultz*, 63 Indiana, 322; *Cole* v. *Mann*, 62 N. Y. 1.

The vendor, who seeks to protect himself may do this either by a conditional sale retaining the ownership with or without the possession until all the conditions are complied with and full payment made, or by an absolute sale and transfer of the title with a mortgage back; and no matter what the form of the instrument the question is one of intention, as evidenced by the instrument itself. *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Murch* v. *Wright*, 46 Illinois, 487; *Fosdick* v. *Schall*, 99 U. S. 235; *Call* v. *Seymour*, 40 Ohio St. 670; *Harkness* v. *Russell*, 118 U. S. 663.

As this is not a question between claimants of the property sold, the chattel mortgage act of Illinois cannot affect the matter one way or the other.

The Illinois statute on negotiable instruments does not interfere with either of the positions here taken.

In several cases determined by the Supreme Court of that State, it has been held that to come within the operation of the statute the promise must be an absolute and unconditional one. See *Husband* v. *Epling*, 81 Illinois, 172; *Turner* v. *Peoria &c. Railroad*, 95 Illinois, 134; *Canadian Bank* v. *McCrea*, 106 Illinois, 281.

Mr. John P. Wilson for defendant in error.

Mr. Charles Noble Gregory and *Mr. J. C. Gregory* filed a brief for defendant in error.

Mr. Justice Harlan, after stating the case in the opinion of the court as above reported, continued:

Are the writings in suit to be regarded as promissory notes to be protected, in the hands of *bona fide* holders for value, according to the rules of general mercantile law as applicable to negotiable instruments, or are they anything more than simple contracts subject, in the hands of transferees, to such equities and defences as would be available between the original parties? This is the question upon which, it is conceded, depends the correctness of the several rulings to which the assignments of error refer.

By the statute of Illinois revising the law in relation to promissory notes, bonds, due bills and other instruments in writing, approved March 18, 1874, and in force July 1, 1874, (Rev. Stats. Illinois 1874, p. 718; 2 Starr & Curtis' Anno. Stat. 1651, c. 98; Rev. Stats. 1845, p. 384,) it is provided:

"Sec. 3. All promissory notes, bonds, due bills and other instruments in writing, made or to be made, by any person, body politic or corporate, whereby such person promises or agrees to pay any sum of money or articles of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person, shall be taken to be due and payable, and the sum of money or article of personal property therein mentioned shall, by virtue thereof, be due and payable as therein expressed.

"Sec. 4. Any such note, bond, bill or other instrument in writing, made payable to any person named as payee therein, shall be assignable, by endorsement thereon, under the hand of such person, and of his assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

Other sections of the statute throw some light on the ques-

tion before us. The fifth section provides that any assignee to whom such sum of money or personal property is by endorsement made payable, or, he being dead, his executor or administrator, may, in his own name, institute and maintain the same kind of action for the recovery thereof against the person making and executing the note, bond, bill or other instrument in writing, or against his heirs, executors or administrators, as might have been maintained against him by the obligee or payee, in case it had not been assigned. By the sixth section no maker of, or other person liable on, such note, bond, bill or other instrument in writing, is allowed to allege payment to the payee, made after notice of assignment, as a defence against the assignee. The eighth section provides: "Any note, bond, bill, or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof. Every endorser of any instrument mentioned in this section shall be held as a guarantor of payment unless otherwise expressed in the endorsement." The ninth section allows the defendant, when sued upon a note, bond or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, to prove the want or failure of consideration, "provided that nothing in this section contained shall be construed to affect or impair the right of any *bona fide* assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due." The eleventh section provides that "if any such note, bond, bill or other instrument in writing, shall be endorsed after the same becomes due, and any endorsee shall institute an action thereon against the maker of the same, the defendant, being maker, shall be allowed to set up the same defence that he might have done had the action been instituted in the name and for the use of the person to whom such instrument was originally made payable, or any intermediate holder." Under the twelfth section, if the instrument has been assigned or transferred by delivery to the plaintiff after it became due, "a set-off to the amount of the plaintiff's debt may be made of a demand existing against any

person or persons who shall have assigned or transferred such instrument after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him." If the instrument is assigned before the day the money or property therein mentioned becomes due and payable, then, by the thirteenth section, the defendant, in an action brought by the assignee, is allowed to give in evidence at the trial any money or property actually paid on the note, bond, or bill or other instrument in writing, before it was assigned to the plaintiff, on proving that the plaintiff had "sufficient notice of the said payment before he accepted or received such assignment."

It is contended by the defendant that these statutory provisions, so far as they embrace instruments not negotiable at common law, relate only to the manner of their endorsement or transfer, and that the endorsee takes them, as before the statute, subject to all the defences that might be interposed in an action between the original parties. This view is inconsistent with the decisions of the Supreme Court of Illinois. Some of these decisions will be referred to as indicating the scope and effect of the local statute, as well as the views of that court upon the general principles of commercial law involved in this case.

In *Stewart* v. *Smith*, 28 Illinois, 397, 406, 408, the principal question was as to the negotiability under the above statute of the following instrument: "Chicago, 21st of January, 1859. Received from teams in our pork-house, No. 114 West Harrison Street, 280 hogs, weighing 45,545 pounds, the product of which we promise to deliver to the order of Messrs. Stevens & Brother endorsed hereon. G. & J. Stewart." The court said: "Testing the writing by this statute, there cannot be a doubt upon its assignability. It is an instrument in writing; it purports to be made by persons; by it, those persons promise and agree to deliver a certain article of personal property, to the order of certain other persons. By force of the statute, this article of personal property mentioned in the instrument of writing so made, by virtue of its being so mentioned and in such form of words, must be

taken to be due and payable to the person to whom the instrument in writing is made. The statute does not require that the note or instrument in writing shall be payable at any particular time or place, or be expressed to be for value received, or that any consideration whatever should appear in the writing — an acknowledgment of indebtedness, in the simplest form, would seem to be all the statute requires to give it the character of negotiability. A writing in this form, probably the simplest, would be a perfect negotiable note under this statute: Due John Brown, ten dollars, July 4, 1862, and signed by the maker. Such an instrument is clothed with all the attributes of negotiability, and imports a consideration, and no averments or proofs are necessary on those points. . . . The other point made by plaintiffs, that the instrument was overdue on the 26th of January, 1859, when it was endorsed, to such an extent as to put a prudent man upon inquiry in respect to all equities which the makers might have against it in the hands of the promisee, we do not consider a strong one. . . . The endorsement being in season cut off all equities, if there were any, in defendant's favor, and the only hazard incurred in holding it back for payment, was that the release of the endorsers might have been caused by it, but not the release of the maker."

In *Cisne* v. *Chidester*, 85 Illinois, 524, the action was upon the following note: "$120. May 2, 1871. On the first day of September, 1871 (or before, if made out of the sale of J. B. Drake's horse hay fork and hay carrier), I promise to pay James B. Drake, or to order, one hundred and twenty dollars, for value received, with use." On this note was an endorsement by Drake to Chamberlain, and by the latter to Chidester. The trial court instructed the jury that, in the hands of an assignee before maturity, the question of consideration did not arise until it was shown by evidence that the assignee purchased the note with actual knowledge of the want of consideration; and, also, that the note was, in its effect, payable absolutely on the 1st day of September, 1871, with interest at six per cent from date. The Supreme Court of Illinois said: "The pleas were, the general issue, and fraud and circumven-

tion in obtaining the making of the note. There was no evidence whatever as to the time of the endorsement of the note, or of any want of good faith in or notice to the endorsee in respect to the consideration of the note, or the circumstances under which it was given, more than appears upon the face of the note itself. The plaintiff was presumed to be a *bona fide* endorsee of the note for a valuable consideration. As against the plaintiff, there was, under the evidence, no question of consideration before the jury, and the giving of the first instruction could form no just cause of complaint. The construction of the note was a question of law and for the court. The proper construction was put upon the note."

In *White* v. *Smith*, 77 Illinois, 351, 352, the principle was said to be undoubted, that to constitute a valid promissory note it must be for the payment of money, which will certainly become due and payable one time or another, though it may be uncertain when that time will come. In *Canadian Bank* v. *McCrea*, 106 Illinois, 281, 289, 292, the court, construing the local statute, said that it did not embrace "covenants or agreements for the performance of individual services in and about property — mutual, dependent and conditional covenants and agreements, or covenants and agreements to pay money or deliver property upon uncertain contingencies or events" — but applied "only to absolute and unconditional promises to pay money or deliver property." It was further said to be clear, under previous cases, that "the promise or undertaking must be restricted to the payment of money or delivery of property at a time that will certainly happen." "It may be," the court added, "unknown, in advance, when it will be, but it must be absolutely certain that it will be at some time; and although it may be within the power of the party to whom the promise is made to render it certain, by his subsequent act, that the time will happen, this will not be sufficient — it cannot depend upon his will or pleasure." See also *Harlow* v. *Boswell*, 15 Illinois, 56; *McCarty* v. *Howell*, 24 Illinois, 341; *Bilderback* v. *Burlingame*, 27 Illinois, 338; *Houghton* v. *Francis*, 29 Illinois, 244; *Baird* v. *Underwood*, 74 Illinois, 176.

It is clear from these cases that the statute of Illinois has a much wider scope than the counsel for the defendant supposes. It evidently intended to place negotiable promissory notes in the hands of *bona fide* holders for value on the same footing substantially, that they occupy under the general rules of the mercantile law. It does not, in our judgment, do anything more. So that we are to inquire whether the notes in suit are not negotiable securities according to the custom and usages of merchants.

The defendant insists, that, in view of the agreement for the retention by the payee of the title to the cars until all the notes of the same series, principal and interest, are fully paid, the transaction was only a conditional sale of the cars. It is contended that the promise to pay the notes given for the price, so far from being absolute as required by the mercantile law, is subject to the condition, running with the notes, that the title to the cars should not pass until all the notes were paid, which could not occur if, before payment, the cars had been destroyed or sold to other parties. The fact that, by agreement, the title is to remain in the vendor of personal property until the notes for the price are paid, does not necessarily import that the transaction was a conditional sale. Each case must depend upon its special circumstances. In *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 245, 246, the question was as to whether a certain instrument, relating to cars supplied to a railway company, and for the price of which the latter gave its notes, showed a conditional sale, which did not pass the ownership until the conditions were performed, or whether, taking the whole instrument together, the seller reserved only a lien or security for the payment of the price, or what is sometimes called a mortgage back to the vendor. In that case, the instrument construed provided that until a certain payment was made, the railway company should have no right, title, claim, or interest in the cars delivered to it, "except as to their use or hire," or any right or authority in any way to dispose of, hire, sell, mortgage, or pledge the same, but that they "are and shall remain the property" of the manufacturing company, and be redelivered to it when de-

manded, upon default in the above payment. This court, after observing that the true construction of the contract was not to be found in any name which the parties may have given to the instrument, nor alone in any particular provisions it contained, disconnected from all others, but in the ruling intention of the parties, gathered from all the language used, said: "It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company *for hire*, for four months, and delivering them for use *for hire*, it is manifest that no mere bailment for hire was intended. No price for the hire was mentioned or alluded to, and in every bailment or letting for hire a price or compensation for the hire is essential. . . . It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that if possible, or so far as is possible, they may all harmonize. Thus construed, it is quite plain these stipulations were inserted to enable the manufacturing company to enforce payment, not of any rent or hire, but of the selling price of the cars for which the company took the notes of the railroad company. They were intended as additional security for the payment of the debt the latter company assumed. This is shown most clearly by the other provisions of the contract. The notes became the absolute property of the vendors. As has been stated, they all fell due within four months, and it was expected they would be paid. The vendors were expressly allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by the vendors for their own use. No part of the money was to return to the railroad company in any event, not even if the cars should be returned. . . . What was this but treating the notes given for the sum agreed to be the price of the cars as a debt absolutely due to the vendors? What was it but treating the cars as a security for the debt? . . . In view of

these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving property as security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

It is a mistake to suppose that there is any conflict between these views and those expressed in the subsequent case of *Harkness* v. *Russell*, 118 U. S. 663, 680, where the whole doctrine of conditional sales of personal property was carefully examined, and in which the particular instrument there in question was held to import not an absolute sale but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. With the principles laid down in the latter case we are entirely satisfied. But as pointed out in *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69, 77, 78, the agreement in *Harkness* v. *Russell* was upon the express condition that neither the title, ownership, nor possession of the engine and saw-mill which was the subject of the transaction should pass from the vendor until the note given by the vendee for the stipulated price was paid. Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully paid. The notes, upon their face, show they were given for the "purchase price" of cars "sold" by the payee to the maker and they are "secured" equally and ratably on the cars, in order to prevent the holder of one of the notes from obtaining out of the common security a preference over holders of others of the same series. This provision placed the parties

upon the same footing they would have occupied if a chattel mortgage, covering all the notes, had been executed by the purchaser of the cars. If the notes had been in the usual form of promissory notes, and the maker had given a mortgage back to the payee, the title would, technically, have been in the payee until they were paid. But they would, in such case, have been negotiable securities protected in the hands of *bona fide* holders for value against secret defences, and their immunity from such defences would have been communicated to the mortgage itself. In *Kenicott* v. *Supervisors*, 16 Wall. 452, 469, it was said that where a note secured by a mortgage is transferred to a *bona fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defences are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note. To the same effect are *Carpenter* v. *Longan*, 16 Wall. 271, 274. See also *Swift* v. *Smith*, 102 U. S. 442, 444; *Collins* v. *Bradbury*, 64 Maine, 37; *Towne* v. *Rice*, 122 Mass. 67, 73.

The agreement that the title should remain in the payee until the notes were paid — it being expressly stated that they were given for the price of the cars sold by the payee to the maker, and were secured equally and ratably on the property — is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement, of the same kind, embodied in a separate instrument, in the form of a mortgage. So far as the notes upon their face show, the payee did not retain possession of the cars, but possession was delivered to the maker. The marks on the cars showed that they were to go into the possession of the maker, or of its transferee, to be used. The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is

without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price. The reservation of the title as security for such payment was not the reservation of anything in favor of the maker, but was for the benefit of the payee and all subsequent holders of the paper. The promise of the maker was unconditional.

Without deciding whether the notes here in suit would or would not have been negotiable securities if the transaction between the parties had been a conditional sale, we are of opinion that they are of the class of instruments that are negotiable according to the mercantile law, and which, in the hands of a *bona fide* holder for value, are protected against defences of which the maker might avail himself if sued by the payee. They are promises in writing to pay a fixed sum of money to a named person or order, at all events, and at a time which must certainly arrive. *Ackley School District* v. *Hall*, 113 U. S. 135, 139, 140; Story on Promissory Notes, § 27; *Cota* v. *Buck*, 7 Met. 588. It is true that, upon the failure of the maker to pay the principal and interest of any note of the whole series of twenty-five, the others would become due and payable; that is, due and payable at the option of the holder. But a contingency under which a note may become due earlier than the date fixed is not one that affects its negotiability. In *Ernst* v. *Steckman*, 74 Penn. St. 13, 15, cited with approval in *Cisne* v. *Chidester*, 85 Illinois, 525, the question was whether the following instrument was a negotiable promissory note: "$375. Paradise, Lancaster Co., Pa., June 11, 1869. Twelve months after date, (or before if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine,) I promise to pay J. S. Huston, or bearer, at the First National Bank of Lancaster, three hundred and seventy-five dollars, without defalcation, for value received, with interest." It was there contended that the character of the instrument was changed by the fact that in the contingency of the sum being sooner realized from the sale of the machinery it might become

payable within the year. The court, after observing that the general rule, to be extracted from the authorities, undoubtedly requires that to constitute a valid promissory note, it must be for the payment of money at some fixed period of time, or upon some event which must inevitably happen, and that its character as a promissory note cannot depend upon future events, but solely upon its character when created, said: "Yet it is an equally well settled rule of commercial law that it may be made payable at sight, or at a fixed period after sight, or at a fixed period after notice, or on request, or on demand, without destroying its negotiable character. The reason for this, said Lord Tenterden, in *Clayton* v. *Gosling*, 5 B. & C. 360, is that it 'was made payable at a time which we must suppose would arrive.'" To the same effect are *Cota* v. *Buck*, 7 Met. 588; *Walker* v. *Woollen*, 54 Indiana, 164; *Woolen* v. *Ulrich*, 64 Indiana, 120; *Charlton* v. *Reid*, 61 Iowa, 166; *Andrews* v. *Franklin*, 1 Strange, 24; *Cook* v. *Horn*, 29 Law Times, (N. S.,) 369.

Upon like grounds it has been held that the negotiability of the note is not affected by its being made payable on or before a named date, or in instalments of a particular amount. In *Ackley School District* v. *Hall*, 113 U. S. 135, 140, it was held that municipal bonds, issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable; for, the court said: "By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for non-payment until that day passed." In *Mattison* v. *Marks*, 31 Michigan, 421, which was the case of a note payable "on or before" a day named, it was said: "True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings." *Carlon* v. *Kenealy*, 12 M. & W. 139; *Colehan* v. *Willes*, Willes, 393; *Jordan* v. *Tate*, 19 Ohio St. 586; *Curtis* v. *Home*, 58 N. H.

504; *Howard* v. *Simpkins*, 60 Georgia, 340; *Protection Ins. Co.* v. *Bill*, 31 Connecticut, 534, 538; *Goodloe* v. *Taylor*, 3 Hawks, 458; *Ricker* v. *Sprague Manuf. Co.*, 14 R. I. 402. In the last-named case it was said that if the time of payment named in the note must certainly come, although the precise date may not be specified, it is sufficiently certain as to time. It was, consequently, held that a reservation in a note of the right to pay it before maturity in instalments of not less than five per cent of the principal at any time the semi-annual interest becomes payable, did not impair its negotiability; the court observing that a note is negotiable if one certain time of payment is fixed, although the option of another time of payment be given. In view of these authorities, as well as upon principle, we adjudge that the negotiability of the notes in suit was not affected by the provision that upon the failure of the maker to pay any one of the notes of the series to which those in suit belonged, the rest should become due and payable to the holder.

Our conclusion is that the court below did not err in holding the notes in suit to be negotiable according to the custom and usage of merchants. They bear upon their face evidence that they were so intended by the maker and the payee. It was well said by Judge Bunn, at the trial, that the inference that any one contemplating the purchase of the notes would naturally and properly draw, would be, 25 Fed. Rep. 809, 811, "that the freight cars had already been sold by the payee to the maker, and that the payee was to retain a lien and security upon them, in the way of mortgage, for the payment of the purchase price, which would enure equally and ratably to all the holders of the notes, according to their several amounts, without regard to the time when such notes should fall due. If this be so, the contract was an executed one, the consideration for the notes had already passed, and the payment of the notes would not be made to depend upon any condition whatsoever." *Judgment affirmed.*

Mr. Justice Miller and Mr. Justice Gray dissented.

Mr. Justice Brewer was not a member of the court when this case was argued, and took no part in its decision.

Syllabus.

THOMPSON *v.* PHENIX INSURANCE COMPANY.

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

No. 311. Argued April 29, 30, 1890. — Decided May 19, 1890.

Under some circumstances a receiver would be derelict in duty if he did not cause to be insured the property committed to his custody, to be kept safely for those entitled to it.

If a receiver, without the previous sanction of the court, applies funds in his hands to pay insurance premiums, the policy is not, for that reason, void as between him and the company; but the question whether he has rightly applied such funds is a matter that concerns only himself, the court whose officer he is, and the parties interested in the property.

Where a receiver uses moneys in his hands without the previous order of the court, the amount so expended may be allowed to him if he has acted in good faith and for the benefit of the parties.

When, by inadvertence, accident or mistake, a policy of insurance does not correctly set forth the contract personally made between the parties, equity may reform it so as to express the real agreement.

A policy of fire insurance, running to a particular person as receiver in a named suit, provided that it should become void "if any change takes place in title or possession, (except in case of succession by reason of the death of the assured,) whether by legal process, or judicial decree, or voluntary transfer or conveyance;" *Held*,

(1) That this clause does not necessarily import that a change of receivers during the life of the policy would work a change either in title or possession;

(2) That the title is not in the receiver, but in those for whose benefit he holds the property;

(3) That in a legal sense the property was not in his possession, but in the possession of the court, through him as its officer.

The principle reaffirmed that when a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, that one will be adopted which is most favorable to the insured.

Although the policy in this case provided that no action upon it should be maintained after the expiration of twelve months from the date of the fire, yet the benefit of this clause might be waived by the insurer, and will be regarded as waived if the course of conduct of the insurer was such as to induce the insured to delay bringing suit within the time limited: and if the insured delayed in consequence of hopes of adjustment, held out by the insuring company, the latter will not be permitted to plead the delay in bar of the suit.

In equity. Decree dismissing the bill. The plaintiff appealed. The case is stated in the opinion.

Mr. J. M. Wilson (with whom was *Mr. Samuel Shellabarger* on the brief) for appellant.

Mr. Robert Rae for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought, July 10, 1885, by the appellant, who is the receiver in the case of *Holladay* v. *Holladay* in the Circuit Court of the county of Multnomah, in the State of Oregon. He seeks a decree reforming a policy of insurance issued by the Phenix Insurance Company of Brooklyn, New York, on the 21st day of April, 1884, and which purported, in consideration of the sum of three hundred dollars, and subject to the conditions named in the policy, to insure, for the term of one year, "E. S. Kearney, receiver for *Holladay* v. *Holladay*, against loss or damage by fire to the amount of five thousand dollars," of which sum, four thousand dollars was on one-half interest in the Clarendon Hotel, in Portland, Oregon, and one thousand dollars on a like interest in the furniture in the hotel building; and, the policy being reformed, for a decree for the amount insured with interest from the time when the loss was payable. The loss occurred on the night of May 19, 1884. A demurrer to the original bill was sustained. 25 Fed. Rep. 296. Subsequently an amended bill was filed, to which also a demurrer was sustained, and the suit dismissed. From that decree the present appeal was prosecuted.

By the terms of the policy the amount of the loss was payable sixty days after the required proofs were received at the company's office in Chicago, and the loss ascertained in accordance with the conditions prescribed, unless the property was replaced or the company gave notice of their intention to rebuild or repair the damaged premises.

The policy contained these among other provisions: "1. . . . If the property be sold or transferred, or upon the commence-

ment of foreclosure proceedings against or sale under a trust deed of or the existence of a judgment lien upon or the issue or levy of an execution against any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change take place in title or possession, (except in case of succession by reason of the death of the assured,) whether by legal process or judicial decree or voluntary transfer or conveyance, . . . then and in every such case this policy is void."

"4. If the interest of the assured in the property be any other than the absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, . . . it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. . . . *Note.* — By 'property held in trust' is intended property held under a deed of trust or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property."

"9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance had been made on the same property, giving copies of the written portion of all policies thereon.

"10. . . . It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates, are produced and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable."

"13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery until after an award

shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

It will not be necessary to set out the allegations of the original bill because the case turns upon the question whether the amended bill states facts sufficient to constitute a cause of action. The latter makes substantially the following case:

From the 17th of November, 1883, up to and including the 19th of May, 1884, Edward S. Kearney was the receiver in the above suit of *Holladay* v. *Holladay*. From the first of those dates continuously to the time of the fire, the hotel building, with its furniture and the land upon which it stood, was in the joint possession and under the control of Kearney as receiver, and of R. Koehler and J. N. Dolph, the owners of one undivided half interest, the title to the remaining half being involved in the above suit, and in the possession and under the control of Kearney as receiver. By the order appointing the receiver he was directed and empowered to take possession of, manage, control and keep the property safely and for the best interests of the parties who should be adjudged entitled thereto, or as the court might direct. Kearney being desirous to effect insurance for himself and his successors in the receivership, as well as for the benefit of whom it might concern, on an undivided half interest in the hotel building for the sum of four thousand dollars, and on a like interest in the furniture for one thousand dollars, pending the suit of *Holladay* v. *Holladay*, and having been solicited by the defendant to take insurance in his capacity as receiver, it was understood and agreed, on the 21st of April, 1884, between the company and himself as receiver, that the former would insure, as above indicated, against loss or damage by fire, for the full term of one year from April 27, 1884, noon, making the loss and the policy payable to him as receiver and

to his successors, as well as for the benefit of whom it might concern, and that it would take from him, as receiver, the sum of three hundred dollars as premium. On the day last named the company, with the intent to carry this agreement into effect, made the policy in question and delivered it to Kearney. At the time of this agreement it was distinctly informed that the property agreed to be insured was in dispute in the above suit, and that Kearney had no interest in it except as receiver. Nevertheless, by accident and mistake of both Kearney and the company, the loss was made payable to Kearney, receiver in the above suit, instead of to the receiver and his successors, and for the benefit of whom it might concern; and the policy was issued without the usual clause, commonly inserted in such policies and agreed upon, namely, that the insurance was effected for whom it might concern. It was delivered by the company, and received by Kearney, in the full belief and understanding that the interests of the parties to that suit were insured and protected by it in accordance with the direction of Kearney and with the above understanding and agreement between him and the company. The company did not at once collect the premium, but extended the customary credit therefor to the receiver as such and not otherwise.

On the 14th of May, 1884, an order was made, accepting the resignation of, and removing, Kearney as receiver, and appointing the present plaintiff in his stead, such resignation to take effect when the latter duly qualified and entered upon the performance of his duties as receiver. The order directed the delivery to plaintiff, upon his qualification, of all property held or controlled by Kearney as receiver, which embraced, among other things, the policy in suit and the property insured or intended to be thereby insured. The plaintiff qualified as receiver on the 19th of May, 1884, but the fire resulting in the loss sued for occurred before Kearney surrendered the possession and control of the property. Subsequently to May 19, 1884, the policy was delivered by Kearney to the plaintiff.

The plaintiff immediately after the fire delivered to the company written notice of it, and as soon as possible there-

after, and more than sixty days prior to the commencement of this suit, rendered, under oath, a particular account of the loss, in which was included a statement of other policies, with the written portions thereof. The proofs of loss were delivered to the company and were accepted and retained by it without making any objections to them.

About thirty days after the fire and after the acceptance of the proofs of loss, the plaintiff threatened to commence suit, and informed the company's agent that he would do so. The defendant thereupon, by its duly authorized agents, stated to the plaintiff that under the provisions of the policy no suit could be brought until sixty days had elapsed after the receipt of the proofs of loss, and directed the plaintiff's attention to the provisions of the policy. These agents then and there further represented to the plaintiff that no question was made as to the loss or its payment, except that the company was considering the fact that a change had occurred in the receivership. They also asserted and represented to him that they had written to the company advising payment, and informed him that it would undoubtedly so do. Afterwards, on the 27th of June, 1884, the defendant, by its agents, demanded the payment of the premium upon the policy of insurance, assuring the plaintiff at the time that the loss would undoubtedly be paid as soon as the home office could act thereon. Relying on that representation, the plaintiff, on the day just named, paid to the company the sum of three hundred dollars as premium on the policy, and three dollars for the state stamp thereon. These sums were paid to the company out of the funds in his hands as receiver. Subsequently, and after the expiration of sixty days from the receipt of the proofs of loss, the company, by its agents, repeatedly assured the plaintiff that it would pay the loss. By reason of those repeated assurances and promises he neglected, failed and was prevented, for some time after sixty days from the delivery of the proofs of loss, to bring suit for the amount insured. Long prior to the commencement of this suit the plaintiff applied to and requested the company to act toward him in such a way as was fair, equitable and just,

to correct and reform the policy, and to adjust and pay to him as receiver the sum named in the policy; but it has neglected and refused to comply with any of those requests.

By an order entered July 9, 1885, in the suit of *Holladay* v. *Holladay*, the plaintiff was directed to institute this suit, and take all necessary steps to have the policy reformed and to recover the amount due thereon.

Do these facts, which are admitted by the demurrer, make a case for reforming the policy, and entitle the plaintiff to a decree for the amount insured?

The first contention of the company is that the receiver, Kearney, had no authority, without special instructions from the court, to incur expenses or liability for insurance premiums. In support of this proposition its counsel cites *Cowdrey &c.* v. *Galveston &c. Railroad Co.*, 93 U. S. 352, where one of the questions was whether a receiver of a railroad company should be allowed for expenditures made by him, without the previous sanction of the court, in defeating a proposed municipal subsidy in aid of the construction of a railroad parallel with the one in his hands. It was held that such expenses were properly disallowed, although the proposed road, if constructed, might have diminished the future earnings of the one in his charge. This court said that to permit a receiver to determine questions of that character, and, upon such determination, appropriate funds in his custody, would sanction a principle that would open the door to all sorts of abuses. It added that "a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment." Of the soundness of this general principle no doubt can exist, though difficulty may sometimes arise in its application to particular cases. Due regard must always be had not only to the nature and surroundings of the property in the custody of the receiver, but to the exigencies of the moment when he may be required to take action involving the safety of property in his charge. We do not doubt that under some circumstances a receiver would be derelict in duty, if he did

not cause property in his hands to be insured against fire. The case last cited is authority for the principle that, without the previous sanction of the court, a receiver may incur expenses that are absolutely essential for the preservation of the property in his custody. But if this were not so, and if, without the previous order of the court, he applies funds in his hands for such a purpose, the contract of insurance will not, for that reason, be void, as between him and the insurance company. It appears from the policy that the company was informed as to the capacity in which Kearney acted, namely, "as receiver for *Holladay* v. *Holladay*." According to the amended bill, it knew the precise nature and extent of the interest represented by him, and that he had no personal interest in the property insured. If the court, whose officer he was, had directed him to procure insurance, the present objection could not be urged with the slightest expectation of its being sustained. And yet, whether Kearney exceeded his authority, or rightly applied the funds in his hands, are questions in which no one is concerned, except himself, the court to which he was amenable, and the parties interested in the property in his charge. If he was not, technically, authorized to use the funds in his hands to pay for insurance, still, upon the settlement of his accounts, if he acted in good faith, the court might allow him any sums paid out for that purpose. He held such relations to, and was under such personal responsibility for the safety of the property, that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court. In *Tempest* v. *Ord*, 2 Merivale, 55, Lord Chancellor Eldon said that "formerly, the court never permitted a receiver to lay out money without a previous order of court. But now, where the receiver had laid out money without such previous order, it was usual to refer it to the master to see if the transaction was beneficial to the parties; and if found so, the receiver was allowed the money so laid out." Upon this point, *Brown* v. *Hazelhurst*, 54 Maryland, 26, 28, is instructive. In that case, objections were made to allowing a receiver for sums paid by him, without the previous

sanction of the court, for insurance. The court said: "There is no doubt of the general rule, and it is a wholesome one, that a receiver will not be permitted to lay out more than a small sum at his own discretion, in the preservation or improvement of the property under his charge; but he should, in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expenses, apply to the court for authority for so doing. But this general rule, however salutary it may be, should not be so rigidly and sternly enforced as to work wrong and injustice, where the receiver has acted in good faith, and under such circumstances as will enable the court to see that if previous authority had been applied for, it would have been granted. The justice and right of the matter must depend, to a great extent, upon the special circumstances of each case that may be presented." In the present case, the only question that should concern the insurance company is whether, under the terms of the contract, it is liable for the loss. That question is to be determined by the contract it made, without inquiring where the receiver got the money with which to pay premiums, or as to his authority to use the funds in his hands for the purpose of effecting insurance. If the company is not compelled to pay for the loss in question except as the contract provides, it ought to be satisfied; especially as the demurrer admits that, after the loss, it collected from the plaintiff the premium of three hundred dollars which it knew or had reason to believe came out of funds in his hands as the successor of Kearney in the receivership.

The next question to be considered is whether the amended bill makes a case for the reformation of the policy. Its allegations, which are admitted by the demurrer to be true, show that before the policy was issued, the agreement between Kearney and the company was, that the insurance should run to him as receiver, and to his successors, and also to those whom it might concern; and that by inadvertence, accident and mistake, upon the part both of Kearney and the company, the policy was not so framed. The policy runs to "E. S. Kearney, receiver for *Holladay* v. *Holladay*." Whether

Kearney's successor in the receivership might not recover upon the policy as it is, (there being no question of limitation in the case,) especially upon proof that the parties intended the insurance to cover the interest which the receiver (whoever he was at the time of the loss) represented, is a question that need not be considered. If, by inadvertence, accident or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed, so as to express the real agreement, without the necessity of resorting to extrinsic proof. The case made by the amended bill is within the decision in *Snell* v. *Insurance Company*, 98 U. S. 85, 88, where the court said: "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a material mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities."

It is said that a decree reforming the policy ought not to be made, because it appears from one of its clauses, in respect to which no mistake is alleged, that the policy is void. If this position be correct there is an end of the case; for, as was well said by the learned judge below, the court will not reform a contract merely for the sake of reforming it, but only to enable some party to assert rights under it as reformed. The clause alluded to is the one declaring that if "any change takes place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, . . . then and in every such case this policy is void." It is contended that there was a change in title and possession before

the fire, and that such change occurred when, under the order of the court, the plaintiff qualified as the successor of Kearney in the receivership. If this position be well taken, it only renders clearer the right of the plaintiff to a decree correcting the policy; for, if it be made to conform to the original agreement, there would be no pretence to say that the accession of the plaintiff to the receivership would have been a change in title or possession, within the meaning of the parties. But it is not true that the amended bill shows a change of possession before the fire. It distinctly alleges that Kearney had not surrendered possession of the property when the fire occurred. By the order appointing him, his resignation took effect when his successor entered upon his duties. It may, therefore, be said that the plaintiff had not, when the fire occurred, actually entered upon the performance of his duties. But, in our judgment, the above clause of the policy does not necessarily import that a mere change of receivers would work a change either in title or possession. The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the court, by him as its officer. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Heidritter* v. *Elizabeth Oil Cloth Co.*, 112 U. S. 294, 304; *Chicago Union Bank* v. *Kansas City Bank*, just decided, *ante*, 223. So that where a policy runs to a receiver in a designated suit, a mere change of receiver does not involve a change in title or possession. If an insurance company intends its policy to mean otherwise it must express that intention more distinctly than was done by the defendant. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company. *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678.

It remains only to consider the question arising out of that clause of the policy limiting the time within which a suit or action against the company for the recovery of a claim arising

out of its provisions may be sustained. While the validity of such a stipulation cannot be disputed, *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386, 389, we do not doubt that it may be waived by the company. And such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured. It is to be observed that, by the terms of the policy, the company is not obliged to pay any claim until after the expiration of sixty days from the receipt of the proofs of loss at its office in Chicago, and the ascertainment of the loss in accordance with the terms of the policy. A suit, therefore, within the sixty days after the loss is so ascertained would, upon the theory of the company, be of no avail to compel payment if it chose to plead the above clause in bar of the action. So that, practically, the assured is limited to ten months within which he may sue as of right. And yet the twelve months within which suit must be brought is made to commence at "the date of the fire," not from the date when the loss is payable. There are, it is said, adjudged cases that would authorize such a construction of this policy as would give the insured the whole term of twelve months from the date when he could demand, as of right, that his claim for loss be satisfied. *Vette* v. *Clinton Fire Ins. Co.*, 30 Fed. Rep. 668; *Steen* v. *Niagara Fire Ins. Co.*, 89 N. Y. 315, 322; *Spare* v. *Home Mut. Ins. Co.*, 17 Fed. Rep. 568, 570; *Mayor &c.* v. *Hamilton Fire Ins. Co.*, 39 N. Y. 45, 48; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y. 235, 244; *Chandler* v. *St. Paul Fire & Marine Ins. Co.*, 21 Minnesota, 85; May on Insurance, § 479, notes 2d ed. We waive, however, any expression of opinion, in the present attitude of the case, as to the view announced in those cases, for its disposition only requires us to hold, as we do, that the allegations of the amended bill, bearing upon this point, sustain the right of the plaintiff to bring this action, although it was not commenced until after the expiration of twelve months from the date of the fire. Those allegations are to the effect that the company, by its duly authorized agents, assured the plaintiff about thirty days after the fire

and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss, the company, by its agents, repeatedly gave the same assurances; and that, by reason of such promises and assurances, he neglected, for some time after sixty days from the delivery of proofs of loss to bring suit for the recovery of the loss sustained. We need not stop to consider the suggestion that the agents referred to had no authority to give those assurances or to make those promises. No such question can arise upon the amended bill, for it alleges that the company, by its duly authorized agents, made the promises and gave the assurances. What the fact may be, in respect to the authority of the agents, or whether the plaintiff had the right to rely upon those assurances and promises, and, if he did, whether the company's rights were thereby affected, are questions not now to be decided. Their determination will depend upon the answer and the evidence at the trial. If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the company, it cannot avail itself of the limitation of twelve months. *Curtis* v. *Home Ins. Co.*, 1 Bissell, 484, 487; *Ide* v. *Phœnix Ins. Co.*, 2 Bissell, 333; *Grant* v. *Lexington Ins. Co.*, 5 Indiana, 23, 25; *Mickey* v. *Burlington Ins. Co.*, 35 Iowa, 174, 180. In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defence to the action when brought.

Syllabus.

We are of opinion that the court erred in sustaining the demurrer to the amended bill.

The decree is reversed with directions for such further proceedings as may be consistent with this opinion.

ALLEN *v.* HANKS.

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

No. 316. Submitted April 30, 1890. — Decided May 19, 1890.

A and B intermarried in Arkansas in 1859, during which year a child was born to them alive, capable of inheriting, and died in 1862. In 1864, C died, the owner of estate, real and personal in Arkansas, leaving as sole heirs at law, his father, D, his brother, A, and a sister, E. The two latter became the owners in common of decedent's realty, subject to a life estate in D, their father. In 1870, D died, after which in 1871, A and E agreed upon a partition. A desiring to vest the title to his share in his wife — he being then solvent — conveyed (his wife uniting with him to relinquish dower) to his sister, E, all his interest in the lands inherited from his brother. By deed of date January 2, 1871, E (her husband joining her) conveyed to A's wife what was regarded as one-half in value of the lands formerly owned by C, including those in dispute in this suit. This deed was recorded May 24, 1875, in the county where A's wife then and ever since resided. No other schedule of it, nor other record nor intention to claim the lands in dispute as her separate property was ever filed by her. After the date of the deed to A's wife, the lands in dispute were cultivated by him as agent of his wife, and in her name, for her and not in his own right. In 1884, his creditors obtained a judgment against him, and another on a debt contracted in 1881, sued out execution, and caused it to be levied upon the lands in dispute, and advertised them to be sold. A's wife brought a suit in equity to enjoin the sale upon the ground that the lands were not subject to her husband's debts, and that a sale would create a cloud upon her title; *Held*,

(1) The constitution of Arkansas of 1868 placed property thereafter acquired by a married woman, whether by gift, grant, inheritance or otherwise, as between herself and her husband, under her exclusive control, with power to dispose of it or its proceeds, as she pleased;

(2) The deed by E and her husband to A's wife was subject to the constitution of 1868, which made any property acquired by the wife,

after it went into operation, her separate estate, free from his control;

(3) When the deed of 1871 was recorded in 1875, if not before, the lands in dispute became free from the debts of A, and therefore were not liable for the debt contracted in 1881;

(4) Neither the constitution of 1868 nor that of 1874 could take from the husband any rights vested in him prior to the adoption of either instrument. But when the constitution of 1868 was adopted A had no estate by the curtesy in these lands in virtue of his marriage; for his wife had then no interest in them. In Arkansas, as at common law, except when from the nature and circumstances of the real property of the wife she may be regarded as constructively in possession, marriage, actual seisin, issue and death of the wife are all requisite to create an estate by the curtesy;

(5) It is competent for a State, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman, shall constitute her separate estate, not subject to the control, nor liable for the debts, of the husband;

(6) It is the right of those who have a clear, legal and equitable title to land, connected with possession, to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.

In equity. The case is stated in the opinion.

Mr. Jacob Trieber for appellants.

Mr. James C. Tappan and *Mr. John J. Hornor* for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This suit involves the title to certain lands in Arkansas, which the appellee, a married woman, claims to constitute her separate estate, and, as such, not liable for the debts of her husband, James M. Hanks.

By the laws of Arkansas in force when the appellee and her husband were married, (Rev. Stat. Ark. 1858; Gould's Dig. 765, c. 111,) it was provided that (§ 1) "any married woman may become seized and possessed of any property, real and personal, by direct bequest, devise, gift or distribution in her own right and name and as of her own property: *Provided*, The same does not come from the husband after coverture;" that (§ 7) "before any married woman shall be entitled to the

privileges and benefits of the provisions of this chapter, she shall cause to be filed in the recorder's office, in the county where she lives, a schedule of the property derived through her, and no property belonging to any married woman shall be exempt from the payment of any debts contracted by her husband previous to the filing of the schedule aforesaid," and that (§ 8) "whenever the deed, bequest, grant, decree or other transfer of property of any kind to any married woman shall expressly set forth that the same is designed to be held exempt from the liabilities of her husband, such property with the natural increase thereof shall be deemed and considered as belonging exclusively to such married woman, under the provisions of this chapter, and shall not be liable to execution or sale for the payment of debts of her husband, whether contracted before or after the accruing of the title of the wife: *Provided*, That no conveyance from any married man to his wife, either directly or indirectly, shall entitle her to any benefits or privileges of this act."

In 1868 a new constitution was adopted, and among its provisions was one declaring: "The real and personal property of any female in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain the separate estate and property of such female, and may be devised or bequeathed by her, the same as if she were a *feme sole*. Laws shall be passed providing for the registration of the wife's separate property, and when so registered, and so long as it is not entrusted to the management or control of the husband otherwise than as an agent, it shall not be liable for any of his debts, engagements or obligations." Art. XII, § 6.

This was followed in 1873 by an act providing that (Gantt's Dig. Stat. Ark. 1874, § 4193, p. 756) "the property, both real and personal, which any married woman now owns or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person;

that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this State holds or owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent;" that, § 4201, "before any married woman shall be entitled to the privileges of this act in respect to property held by her separately as aforesaid, she shall cause her said separate property to be recorded in her name in the county where she lives or has a residence;" and that, § 4203, "the property of a woman, whether real or personal, and whether acquired before or after marriage, in her own right, shall not be sold to pay the debts of the husband contracted or damages incurred by him before marriage."

By the constitution of Arkansas of 1874, it was declared that "the real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband." Art. IX, § 7.

The present suit depends upon the construction of these statutory and constitutional provisions, as applied to certain facts disclosed in this case, in respect to which there is no dispute. These facts will now be stated.

James M. Hanks and the appellee were married in the State of Arkansas in the year 1859. During that year a child was born to them, alive, and capable of inheriting. It died in 1862. John F. Hanks, the owner of considerable property, real and personal, in the State of Arkansas, including the lands in dispute, died in 1864, his sole heirs at law being his father, Fleetwood Hanks, and his brother, James M. Hanks,

the husband of appellee, and his sister, Ann A. Porter, the wife of William Porter. Fleetwood Hanks took a life interest in the estate left by his son; James M. Hanks and Mrs. Porter inheriting subject to that interest. The father died in 1870, whereupon the brother and sister of the decedent became the owners in common of the realty. In 1871 they agreed upon a partition; and James M. Hanks, for the purpose of having the title to his share vested in his wife — he being then perfectly solvent — executed, January 2, 1871, a deed conveying all his interest in the lands so inherited to Mrs. Porter, his wife joining in it for the purpose of relinquishing her dower. At the same time Mrs. Porter, her husband joining with her, conveyed to the appellee what was regarded as one-half in value of the lands inherited from John F. Hanks, including those here in controversy. From the date of that deed forward the lands in dispute have been cultivated by James M. Hanks "as agent of his wife and in her name, for her and not in his own right." The deed from Porter and wife to Mrs. Hanks was filed for record, and recorded May 24, 1875, in the county where the lands are situated, and in which the appellee then, and has ever since, resided, and had her home; but "no other schedule of it, nor other record, nor intention to claim it as her separate property, was ever filed by her."

On the 14th of October, 1884, the appellants, J. H. Allen, Thomas H. West and John C. Bush, constituting the firm of Allen, West & Bush, recovered in the court below a judgment against W. L. Nelson and James M. Hanks for $14,645.29, with interest at the rate of six per cent per annum from the above date. The judgment was for a debt contracted in 1881. Execution upon that judgment having been levied on the interest of James M. Hanks in the lands in dispute, and the marshal, Fletcher, having advertised the same to be sold in satisfaction of the execution, the appellee brought the present suit, and seeks a decree perpetually enjoining the sale. The appellants, Allen, West & Bush, answered, insisting that James M. Hanks had an interest in the lands subject to their execution. The decree asked by the appellee was entered, and is now here for review.

The question to be determined is, whether the appellee's husband has any interest in these lands that may be seized and sold for the debt due Allen, West & Bush, contracted in 1881.

The contention of the appellants is, that upon the marriage of the appellee and her husband in 1859, he acquired, at once, a right to take the rents and profits of all lands owned by the wife at any time during coverture, unless the deed or devise under which she held them expressly excluded his marital rights, or unless the property was "scheduled" in conformity with the laws then in force; and, as to the latter, not even then if acquired either directly or indirectly from the husband; that upon issue born of the marriage in 1859, capable of inheriting, he at once acquired an estate by the curtesy initiate or an estate for life, which he could convey without his wife's consent, was subject to execution for his debts, and was not, and could not be, affected by any subsequent change in the law. The contention of appellee is, that she owned no property at the time of marriage or at the birth of her child, or when it died; that before she acquired any lands whatever, the married woman's law was changed by the constitution of 1868, so as to vest in her an absolute title to all property subsequently acquired by her, exempt from any estate in the husband that would be subject to seizure by his creditors; that the only limitation upon such right was that she should comply with the acts of the legislature passed in reference thereto; and that when the act of 1873 was passed, and she recorded her deed under its provisions, the real estate acquired by her under the constitution of 1868 was free from liability for the debts and contracts of her husband.

If the case depended entirely upon the statutes in force prior to the adoption of the constitution of 1868, it may be that the law would be for the judgment creditors of the appellee's husband, because the provisions of the Revised Statutes of 1858, (Gould's Digest, c. 111, p. 765,) declaring that any married woman might become seized and possessed of property by direct bequest, devise, gift or distribution in her own right and as of her own property, did not apply where the property

came from the husband after coverture, or was conveyed by him to his wife directly or indirectly; and, also, because the appellee did not file in the recorder's office, where she lived, the required "schedule." But we are of opinion that the constitution of 1868 made changes in the previous law that had a material bearing upon the rights of the parties. The declaration in that constitution that the property of any female in the State, acquired before or after marriage, whether by gift, grant, inheritance, devise "or otherwise," should, so long as she chose, be and remain her separate estate and property, and subject to be devised or bequeathed by her as if she were a *feme sole*, placed the property acquired by the appellee after that constitution went into effect, as between herself and her husband, under her exclusive control, (unless the deed or other instrument under which she held it otherwise directed,) with power to dispose of the proceeds as she pleased — a power inconsistent with any right in the husband to take the rents and profits. We limit this effect of the constitution of 1868 to property acquired after its adoption, because that instrument, upon this point, should receive the same construction as the Supreme Court of Arkansas has given to the constitution of 1874, namely, that it could not take from the husband any rights *vested* in him prior to its adoption. *Tiller &c.* v. *McCoy*, 38 Arkansas, 91, 96; *Ward* v. *The Estate of Ward*, 36 Arkansas, 586, 588; *Shryock, Trustee* v. *Cannon*, 38 Arkansas, 434, 437; *Erwin* v. *Puryear*, 50 Arkansas, 356, 358.

Did the constitution of 1868 take from the husband any rights previously vested, in virtue of his marriage, to the lands in dispute? Clearly not. Obviously the appellee had no interest in them at the time of marriage, or at the birth or death of her child, because they were not, at either date, owned by her husband. Nor had she any interest in them at the time of the adoption of that constitution, except that after the death of John F. Hanks, in 1864, she may, perhaps, have had a contingent right of dower in such real estate as might fall to her husband upon the termination of the life estate of Fleetwood Hanks, and after partition between her husband, James M. Hanks, and his sister, Mrs. Porter. When, in 1871,

the title to these lands was conveyed by Porter and wife to the appellee by direction of her husband, the conveyance was necessarily subject to the constitutional provision then in force, that the lands as between herself and husband should constitute her separate property, and as such, be free from his control. It is true that the lands so conveyed to her did not by the conveyance of 1871 become exempt from liability for the debts of her husband until they were "scheduled," as required by chapter 111 of the Revised Statutes of 1858, which chapter was not, in the matter of scheduling the property of married women, (other than property in slaves,) superseded by the constitution of 1868. *Berlin* v. *Cantrell*, 33 Arkansas, 611, 618; *Tiller &c.* v. *McCoy*, 38 Arkansas, 91, 95; *Humphries* v. *Hanson*, 30 Arkansas, 79, 88. But the provision in that constitution as to the registration of the wife's separate property had reference to its protection against the debts, engagements and obligations of her husband. As between herself and her husband, no registration was required or necessary. A law for registration, such as the constitution of 1868 directed to be passed, was not enacted until 1873, when the act of that year, already referred to, was passed, declaring, among other things, that any property then owned by a married woman, or which had been conveyed to her by any person in good faith and without prejudice to existing creditors, or which she might have acquired as her separate property, should be and remain her sole and separate property, and might be used, collected and invested in her own name, and should not be subject to the interference or control of her husband, or liable for his debts, except such debts as might have been contracted for the support of the wife or her children by her as his agent. That act, as we have seen, provided that before any married woman should be entitled to its privileges, in respect to property held by her separately as aforesaid, she should cause her said property to be recorded in her name in the county where she lived or had a residence. When it was passed, the appellee, by virtue of the deed of 1871 by Porter and wife, and of the constitution of 1868, certainly held the lands in dispute as her separate

property; and when the deed to her, under which she acquired title, was recorded in the county where she lived or had her residence, all was done that the act of 1873 required to be done in order to protect her estate against the creditors of her husband.

But it is said, that, as the conveyance to the appellee in 1871 did not, in express terms, create a separate estate in her favor, the placing it upon record did not meet the requirements of the statutes in force when the constitution of 1868 was adopted, or of the act of 1873; and that, in order to protect the property against the creditors of the husband, it was necessary that there be a record of the wife's property distinctly as her separate estate. Such, perhaps, may have been the state of the law in Arkansas prior to the act of 1873, although there is language in *Tiller* v. *McCoy*, 38 Ark. 91, 96, (which was a case between a married woman and the creditors of the husband,) indicating that there was some difference between the recording required by that act and the "scheduling" provided for in previous statutes. The court, in that case, said: "Appellee did not schedule her land as required by the act in Gould's Digest, (chapter 111, p. 765,) and she held it by inheritance, and not by any conveyance or bequest, etc., showing that it was to be exempt from liabilities for her husband. Nor did she cause the land to be recorded in her name as required by the act of April twenty-eighth, 1873." This language implies that some distinction was made between the recording required in the act of 1873 and the "scheduling" prescribed in previous statutes. Be this as it may, the constitution of 1868 was itself notice that property acquired by a married woman after its adoption, whether by gift, grant, inheritance, devise "or otherwise," should be and remain, so long as she chose, her separate estate; and when the deed of 1871 was recorded in 1875, all had notice of record that, if that deed be interpreted in the light of the constitution in force when it was executed, the property described in it was, by force of that instrument, the separate estate of Mrs. Hanks, until by conveyance or in some other mode she chose that it should not remain her separate prop-

erty. The effect of the constitution of 1868, and of the act of 1873, in respect to property acquired by a married woman after the adoption of the former and after the passage of the latter, was to make that property her separate estate as between herself and her husband, whether the deed conveying the title to her was recorded or not; and, as between her and the creditors of the husband, from the time the property, so held by her separately, was recorded in her name in the county where she lived or had a residence. It was so recorded in 1875. If, as between the appellee and her husband, the latter could not, of right, take the rents and profits of the wife's land, it is not perceived that he had any interest that could be seized by his creditors, at least after the deed of 1871 was recorded in the proper county.

When to these considerations is added the fact that the deed under which the appellee claims was recorded after the constitution of 1874 took effect, and long before the debt of Allen, West & Bush was contracted, there would seem to be no just ground for the claim that her property is liable to be sold for that debt. It may be also observed, that, while the constitution of 1874 is not to be so construed as to divest the husband of any right previously vested in him, we see no reason why the appellee, as between herself and the appellants, may not invoke the protection of the clause in that instrument exempting the wife's property, whenever and in whatever mode acquired, from the debts of her husband. The husband, as between himself and his wife, had no vested right in these lands when the constitution of 1874 was adopted, nor, indeed, any interest subsequent to the execution, by his direction, of the deed of 1871, the effect of which deed was, as we have seen, to create a separate estate for her in the property conveyed.

It is contended, however, that the constitution of 1868 could not divest the appellee's husband of his marital rights in respect to the property that he caused to be conveyed to his wife in 1871. This contention proceeds upon the ground that immediately upon marriage and birth of issue, an estate by the curtesy vested in the husband, not only in the real prop-

erty then owned by the wife, but in such as she might acquire at any time during coverture; and that no constitutional or statutory provision could affect his rights, in this respect, even as to property acquired by the wife after the change in the law. We do not concur in this view. It is not sustained by any decision of the Supreme Court of Arkansas to which our attention has been called, or of which we have any knowledge. On the contrary, the cases above cited, while holding that the constitution of 1874 could not affect any interest vested in the husband prior to its adoption, concede, by necessary implication, that, in all other respects, that constitution would control every acquisition of property by a married woman after its adoption. When the constitution of 1868 was adopted, the appellee's husband could have no estate by the curtesy in lands not then owned by her; for, as was said by the Supreme Court of Arkansas in *McDaniel* v. *Grace*, 15 Arkansas, 465, 483, except when from the nature and circumstances of the real property of the wife she may be regarded as constructively in possession, (as where it consists in wild lands, or it is impossible or impracticable to enter upon them,) marriage, actual seizin of the wife, issue and death of the wife, are all requisite to create an estate by the curtesy; and that the husband was not entitled to his curtesy, according to the common law, unless the wife was seized in fact and in deed. *Mercer's Lessee* v. *Selden*, 1 How. 37, 54; *Davis* v. *Mason*, 1 Pet. 503, 507; 4 Kent, 29, 30. There was, upon the part of the wife, no seizin of the lands in dispute until 1871, when the title came to her. That it is competent for the State, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman shall constitute her separate estate, not subject to the control, nor liable for the debts, of the husband, and that such regulations do not take away or impair any vested right of the husband, is, in our judgment, a proposition too clear to require argument or the citation of authorities to support it.

Upon the whole case, we are of opinion that the appellee's husband has no interest in the lands in dispute that may be taken under the execution of the appellants, Allen, West &

Bush. The decree in her favor was, therefore, right, unless, as contended, the appellee had a sufficient remedy at law for the protection of her rights. It is not sufficient that she has *a* remedy at law; "it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Watson* v. *Sutherland*, 5 Wall. 74. Now, what remedy at law is adequate to the relief she seeks, and to which she is entitled if these lands constitute her separate estate and may not be taken for her husband's debts? She is in possession, and, therefore, cannot bring ejectment. Must she remain inactive while the sale proceeds, and until the purchaser obtains and has recorded the marshal's deed to her lands, and then bring an action to have the deed cancelled and the sale set aside, as clouds upon her title? It needs no argument to show that the existing levy upon the appellee's land constitutes itself a cloud upon her title, which, if not removed and the proposed sale prevented, will injure the salable value of the lands, and otherwise injuriously affect her rights. In *Orton* v. *Smith*, 18 How. 263, 265, the right of those who have a clear, legal and equitable title to land, connected with possession, to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title, is recognized. And such is the established rule in Arkansas, where the general distinction between the functions of courts of law and equity have been maintained. In *Branch* v. *Mitchell*, 24 Arkansas, 431, 439, the court said: "When a party has the only or the better legal title to land, as against that which he wishes to put at rest, he may obtain or regain possession by an action of ejectment, if he is out of possession; and it is reasonable that equity should decline to interfere where he may obtain all the relief he needs at law. If he is *in* possession, then, as he can bring no action at law, it has been held that he may ask the court of equity to remove a cloud upon his title, which makes it less valuable, and may prevent his disposing of it to others." The same principle is recognized in *Miller* v. *Neiman*, 27 Arkansas, 233; *Chaplin* v. *Holmes*, 27 Arkansas, 414, 417; *Crane* v. *Randolph*, 30 Arkansas, 579,

585. In *Pettit* v. *Shepherd*, 5 Paige, 493, 501, the chancellor said: "If a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be given up and cancelled, as forming an improper cloud upon the complainant's title to his farm, it seems to follow, as a necessary consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale." "It is better," the court said in *Gerry* v. *Stimson*, 60 Maine, 186, 189, "to prevent the creation of a fictitious or fraudulent title, than to compel its cancellation or its release after it has been created." So in *Hinchley* v. *Greany*, 118 Mass. 595, 598: "The plaintiff is not required to wait until somebody obtains a title under a sale before he can seek his remedy. Even when this remedy [which in that case was a petition summoning the defendant to show cause why he should not bring an action to try his title] may be availed of under the statute, it is not necessarily so adequate and complete as to supersede the remedy in equity." *Irwin* v. *Lewis*, 50 Mississippi, 363, 368; *Christie* v. *Hale*, 46 Illinois, 117, 122; *Merriman* v. *Polk*, 5 Heiskell, 717, 718; *Jones* v. *De Graffenreid*, 60 Alabama, 145, 151.

For the reasons stated, we are of opinion that the relief asked was properly granted.

Decree affirmed.

MINNESOTA *v.* BARBER.

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

No. 1346. Argued January 14, 15, 1890. — Decided May 19, 1890.

The statute of Minnesota approved April 16, 1889, entitled "an act for the protection of the public health by providing for inspection, before slaughtering, of cattle, sheep and swine designed for slaughter for human food," is unconstitutional and void so far as it requires, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork, for human food, that the animals, from which such meats are taken, shall have been inspected in that State before being slaughtered.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States.

This statute of Minnesota, by its necessary operation, practically excludes from the Minnesota market all fresh beef, veal, mutton, lamb or pork, in whatever form, and although entirely sound, healthy and fit for human food, taken from animals slaughtered in other States; and as it thus directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State, it makes such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes with and burdens commerce among the several States.

A law providing for the inspection of animals, whose meats are designed for human food, cannot be regarded as a rightful exertion of the police power of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent the introduction into the State of sound meats, the product of animals slaughtered in other States.

A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it.

THIS was a petition for a writ of *habeas corpus*. The petitioner had been convicted of a violation of the statute of Minnesota respecting the inspection of fresh meats which will be found at length in the opinion of the court (*post* 318). The

State of Indiana having passed a similar statute, counsel intervened on behalf of that State and took part in the argument of this case. The Indiana statute will be found in the margin [1]. The petitioner was discharged from custody, the court below holding the act to be an unconstitutional interference with commerce among the States. The State took this appeal.

Mr. Gordon E. Cole for appellant. The closing passages in *Mr. Cole's* brief were as follows:

I sum up the argument thus:

1st. If inspection in life is necessary to detect disease, it may be required by state legislation, although it may incidentally affect commerce.

2d. If the legislature deem such inspection necessary, and manifest such an opinion by an enactment requiring it, the presumptions which surround a legislative enactment must

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[1] INDIANA STATUTE, ACTS 1889, c. 84.

An act for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before the slaughtering within this State, and to authorize cities to appoint inspectors. *Approved March 2, 1889.*

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be unlawful to sell, or offer, or expose for sale in any incorporated city within this State, beef, mutton, veal, lamb or pork for human food, except as hereinafter provided, which has not been inspected alive within the county by an inspector or his deputy duly appointed by the authorities of said county in which such beef, mutton, veal, lamb or pork is intended for consumption, and found by such inspector to be pure, healthy and merchantable, and for every such offence the accused, after conviction, shall be fined not more than two hundred dollars nor less than ten dollars.

SEC. 2. That the City Council is hereby empowered and required to appoint, in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks and decree the fees for such inspection: *Provided*, That where farmers slaughter cattle, sheep or swine of their own raising or feeding for human food, no other inspection shall be required, or penalty imposed, than such as are already provided by law to prevent the sale and consumption of diseased meat.

SEC. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, corned or canned beef, or smoked or salted pork, or other cured or salted meats.

sustain it, unless it manifestly on its face has no relation to its professed object.

3d. No evidence can be received in support of or opposition to the law, as was held in *Powell* v. *Pennsylvania;* but if such evidence was competent, the burden of proof is not on those seeking to sustain the law, to show the necessity of inspection in life to detect disease, but upon those who would overthrow it, to show the inadequacy of such inspection, or that the inspection of dressed meats would serve the same purpose.

The party who stands upon presumptions is not required in the first instance to support them by evidence.

A powerful combine has thrown its gauntlet at the sovereignty of the States and is engaged in a grand duello with both State and nation. Shall the right of self preservation, never yet denied to the States by the most rabid advocate of federal supremacy, yield to the selfish greed of a gigantic, moneyed interest, and their power to adopt such measures as are necessary to detect danger be swept away, because commerce in an article in a particular form may be affected thereby, is the question I herewith submit for decision.

Mr. James O. Broadhead filed a brief on behalf of the appellant.

Mr. W. C. Goudy and *Mr. Walter H. Sanborn* for appellee.

Mr. George W. McCrary and *Mr. Wallace Pratt* filed a brief on behalf of the appellee.

Mr. Alpheus H. Snow on behalf of the State of Indiana. *Mr. Louis T. Michener*, Attorney General of the State of Indiana, *Mr. Joseph E. McDonald* and *Mr. John M. Butler* were with him on the brief, which concluded as follows:

We conclude, therefore, that the statute in question is not an unlawful regulation of interstate commerce but an exercise of the police power proper, affecting interstate commerce, in

a lawful manner and to only a lawful extent, because dressed meat, the commodity which is the subject matter of the legislation, being an article of human food, and hence "usually passing by sale from hand to hand," and being capable of a quality, state or condition rendering it dangerous to life, health and property, viz.: to decay, disease and infection in ordinary commercial use without the voluntary coöperation of the citizen whose life, liberty or property is injuriously affected and without blame on his part and hence a proper subject of police regulation by way of inspection; and being incapable of a legal inspection except under the conditions imposed by the statute, is properly subjected to permanent prohibition upon failure to conform to the conditions of inspection; such right of prohibition being a necessary incident of the right of inspection, and being justifiable on the ground that dressed meat, when uninspected as required by the statute, is in a permanently and incurably dangerous condition to life, health and property in its ordinary commercial use, because its true state, condition or quality can never be determined by any rapid, cheap and "crucial test" — that is, by inspection, (by reason of the fact that dressed meat differs from meat in an inspectable condition — that is, in the living animal — only in the subtraction of those *indicia* which render the dangerous state, condition or quality determinable by inspection,) but only by a judicial examination requiring expense and delay, which judicial examination the State is not required or permitted to provide for, as respects property in its ordinary commercial use, because the expense and delay of such judicial examination to the applicant would equally operate as a prohibition to him upon such use of his property, and because of the expense of the necessary court machinery for making such a great number of judicial examinations as would be necessary would impose so great a burden of taxation upon the community as to violate the constitutional rights of all citizens to their property.

We submit, therefore, that the law under which the appellee was convicted is constitutional, and that the judgment of the Circuit Court of the United States, discharging the

appellee from custody, was erroneous and ought to be reversed.

Mr. Justice Harlan delivered the opinion of the court.

Henry E. Barber, the appellee, was convicted before a justice of the peace in Ramsey County, Minnesota, of the offence of having wrongfully and unlawfully offered and exposed for sale, and of having sold, for human food, one hundred pounds of fresh uncured beef, part of an animal slaughtered in the State of Illinois, but which had not been inspected in Minnesota, and "certified" before slaughter by an inspector appointed under the laws of the latter State. Having been committed to the common jail of the county pursuant to a judgment of imprisonment for the term of thirty days, he sued out a writ of *habeas corpus* from the Circuit Court of the United States for the District of Minnesota, and prayed to be discharged from such imprisonment, upon the ground that the statute of that State, approved April 16, 1889, and under which he was prosecuted, was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States, as well as to the provision declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 1, Sec. 8. Art. 4, Sec. 2. The court below, speaking by Judge Nelson, held the statute to be in violation of both of these provisions, and discharged the prisoner from custody. *In re Barber*, 39 Fed. Rep. 641. A similar conclusion in reference to the same statute had been previously reached by Judge Blodgett, holding the Circuit Court of the United States for the Northern District of Illinois. *Swift* v. *Sutphin*, 39 Fed. Rep. 630.

From the judgment discharging Barber the State has prosecuted the present appeal. Rev. Stat. § 764; 23 Stat. 437, c. 353.

Attorneys representing persons interested in maintaining the validity of a statute of Indiana, alleged to be similar to that of Minnesota, were allowed to participate in the argument in this court, and to file briefs.

The statute of Minnesota upon the validity of which the decision of the case depends is as follows: Laws of 1889, c. 8, p. 51.

"*An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep and swine designed for slaughter for human food.*

"SECTION 1. The sale of any fresh beef, veal, mutton, lamb or pork for human food in this State, except as hereinafter provided, is hereby prohibited.

"SEC. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State to appoint one or more inspectors of cattle, sheep and swine, for said city, village, borough or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially coëxtensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three of this act.

"SEC. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

"SEC. 4. Any person who shall sell, expose or offer for sale for human food in this State, any fresh beef, veal, mutton, lamb or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter, by the proper local inspector appointed hereunder, shall be deemed guilty of

a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months for each offence.

"SEC. 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food; a duplicate of which certificate shall be preserved in the office of the inspector.

"SEC. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each animal falsely certified to be fit for human food under the provisions of this act.

"SEC. 7. This act shall take effect and be in force from and after its passage."

The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In *Henderson &c.* v. *New York &c.*, 92 U. S. 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." In *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59, 63, where the question was as to the

validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title." So, in *Soon Hing* v. *Crowley*, 113 U. S. 703, 710: "The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." In *Mugler* v. *Kansas*, 123 U. S. 623, 661, the court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the Constitution rather than the law making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

Underlying the entire argument in behalf of the State is the proposition, that it is impossible to tell, by an inspection of

fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question.

The first section prohibits the sale of any fresh beef, veal, mutton, lamb or pork for human food, except as provided in that act. The second and third sections provide that all cattle, sheep and swine to be slaughtered for human food within the respective jurisdictions of the inspectors, shall be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals are slaughtered, and that a certificate shall be made by such inspector, showing (if such be the fact) that the animals, when slaughtered, were

found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for any one to sell, expose or offer for sale, for human food, in the State, any fresh beef, veal, mutton, lamb or pork, not taken from an animal inspected and "certified before slaughter, by the proper local inspector" appointed under that act. As the inspection must take place within the twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork — in whatever form, and although entirely sound, healthy, and fit for human food — taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent — the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value — will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say — certainly no judicial tribunal can, with propriety, assume — that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaugh-

tered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result.

The principles we have announced are fully supported by the decisions of this court. In *Woodruff* v. *Parham*, 8 Wall. 123, 140, which involved the validity of an ordinance of the city of Mobile, Alabama, relating to sales at auction, Mr. Justice Miller, speaking for this court, said: "There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void." So, in *Hinson* v. *Lott*, 8 Wall. 148, 151, decided at the same time, upon a writ of error from the Supreme Court of Alabama, it was said, in reference to the opinion of that court: "And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power, all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the

States until some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever."

In *Welton* v. *Missouri*, 91 U. S. 275, 281, the court, speaking by Mr. Justice Field, declared to be unconstitutional a statute of Missouri, imposing a license tax upon the sale by peddlers of certain kinds of personal property "not the growth, produce or manufacture" of that State, but which did not impose a like tax upon similar articles grown, produced, or manufactured in Missouri. After observing that if the tax there in question could be imposed at all, the power of the State could not be controlled, however unreasonable and oppressive its action, the court said: "Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State, and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

In *Railroad Co.* v. *Husen*, 95 U. S. 465, the court examined a statute of Missouri prohibiting, under penalties, any Texas, Mexican, or Indian cattle from being driven or otherwise conveyed into, or remaining in, any county of the State, between the first day of March and the first day of November in each year, by any person or persons whatsoever. While admitting, in the broadest terms, the power of a State to pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders, to prevent convicts, or persons and animals suffering under contagious or infectious diseases, from entering the State, and, for pur-

poses of protection, to establish quarantine and inspections, the court, Mr. Justice Strong delivering its opinion, said that a State may not, "under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." The general ground upon which it held the Missouri statute to be unconstitutional was, that its effect was "to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States."

In *Guy* v. *Baltimore*, 100 U. S. 434, 443, the court adjudged to be void an ordinance of the city of Baltimore, exacting from vessels using the public wharves of that city, and laden with the products of other States, higher rates of wharfage than from vessels using the same wharves and laden with the products of Maryland. "Such exactions," the court said, "in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations."

The latest case in this court upon the subject of interstate commerce, as affected by local enactments discriminating against the products and citizens of other States, is *Walling* v. *Michigan*, 116 U. S. 446, 455. We there held to be unconstitutional a statute of Michigan, imposing a license tax upon persons, not residing or having their principal place of business in that State, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without, a similar tax not being imposed in respect to the sale and soliciting for sale of liquors manufactured in Michigan. Mr. Justice Bradley, delivering the opinion of the court, said: "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

It is, however, contended, in behalf of the State, that there is, in fact, no interference, by this statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason — such is the argument — that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Case of the State Freight Tax*, 15 Wall. 232. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the animals from which it was taken.

The learned counsel for the State relies with confidence upon *Patterson* v. *Kentucky*, 97 U. S. 501, as supporting the principles for which he contends. In that case, we sustained the constitutionality of a statute of Kentucky, forbidding the sale within that Commonwealth of oils or fluids used for illuminating purposes, and the product of coal, petroleum, or other bituminous substances, that would ignite at less than a certain temperature. Having a patent from the United States for an improved burning oil, Patterson claimed the right, by virtue of his patent, to sell anywhere in the United States

the oil described in it, without regard to the inspection laws of any State, enacted to protect the public safety. It was held that the statute of Kentucky was a mere police regulation, embodying the deliberate judgment of that Commonwealth that burning fluids, the product of coal, petroleum or other bituminous substances, which would ignite or permanently burn at less than a prescribed temperature, are unsafe for illuminating purposes. We said that the patent was not a regulation of commerce, nor a license to sell the patented article, but a grant that no one else should manufacture or sell that article, and, therefore, a grant simply of an exclusive right in the discovery, which the national authority could protect against all interference; that it was not to be supposed "that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits;" also, that "the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." Now, the counsel of the State asks: If the State may, by the exercise of its police power, determine for itself what test shall be made of the safety of illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the Constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food, and prohibit the sale of all such food not submitted to and sustaining the test, although it may chance that articles otherwise subject to the Constitution and laws of the United States cannot sustain the test? The analogy, the learned counsel observes, seems close. But it is only seemingly close. There is no real analogy between that case and the one before us. The

Kentucky statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had prescribed a mode of inspection to which citizens of other States, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce. Looking at the nature of the property to which the Kentucky statute had reference, there was no difficulty in the way of the patentee of the particular oil there in question submitting to the required local inspection.

But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork — articles that are used in every part of this country to support human life — shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

One other suggestion by the counsel for the State deserves to be examined. It is, that so far as this statute is concerned, the people of Minnesota can purchase in other States fresh beef, veal, mutton, lamb and pork, and bring such meats into Minnesota for their own personal use. We do not perceive

that this view strengthens the case for the State, for it ignores the right which the people of other States have in commerce between those States and the State of Minnesota. And it ignores the right of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence. But there is a consideration arising out of the suggestion just alluded to which militates somewhat against the theory that the statute in question is a legitimate exertion of the police powers of the State for the protection of the public health. If every hotel-keeper, railroad or mining corporation, or contractor, in Minnesota, furnishing subsistence to large numbers of persons, and every private family in that State, that is so disposed, can, without violating this statute, bring into the State from other States and use for their own purposes, fresh beef, veal, mutton, lamb and pork, taken from animals slaughtered outside of Minnesota which may not have been inspected at all, or not within twenty-four hours before being slaughtered, what becomes of the argument, pressed with so much earnestness, that the health of the people of that State requires that they be protected against the use of meats from animals not inspected in Minnesota within the twenty-four hours before being slaughtered? If the statute, while permitting the sale of meats from animals slaughtered, inspected and "certified" in that State, had expressly forbidden the introduction from other States, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between those that were from animals inspected on the hoof and those that were not so inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota, for human food, of meats from animals slaughtered in other States.

In the opinion of this court the statute in question, so far as its provisions require, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork for human food, that the animals from which such meats are taken shall have been

inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void.

The judgment discharging the appellee from custody is affirmed.

IN RE LUIS OTEIZA y CORTES, Petitioner.[1]

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

No. 1631. Argued May 20, 1890. — Decided May 23, 1890.

A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error.

If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offence charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a Circuit Court or by this court, on *habeas corpus*, either originally or by appeal.

In § 5 of the act of August 3, 1882, c. 378, (22 Stat. 216,) the words "for similar purposes" mean "as evidence of criminality," and depositions, or other papers, or copies thereof, authenticated and certified in the manner prescribed in § 5, are not admissible in evidence, on the hearing before the commissioner, on the part of the accused.

PETITION for a writ of *habeas corpus*. The writ was denied, from which judgment the petitioner took this appeal. The case is stated in the opinion.

Mr. Louis S. Phillips for the petitioner.

Mr. Emmet R. Olcott, on behalf of the Spanish government, opposing.

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[1] The docket title of this case was: — *Luis de Oteiza y Cortez, Appellant*, v. *John W. Jacobus, Marshal, etc., et al.*

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

By section 12, of Article II, of the convention between the United States and the kingdom of Spain, for the extradition of criminals, concluded January 5, 1877, and proclaimed February 21, 1877, (19 Stat. 650,) it was provided, that persons should be delivered up according to the provisions of the convention, who should have been charged with, or convicted of, any of the following crimes: "12. The embezzlement of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

By a supplemental convention between the United States and the kingdom of Spain, concerning extradition, concluded August 7, 1882, and proclaimed April 19, 1883, (22 Stat. 991,) section 12, of Article II, of the convention of January 5, 1877, was amended to read as follows: "12. The embezzlement or criminal malversation of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

On the 2d of January, 1890, Miguel Suarez Guanes, the Consul General of Spain at the city of New York, duly recognized as such by the President of the United States, filed a complaint, on his own oath, before Samuel H. Lyman, a duly authorized United States commissioner for the Southern District of New York, charging that one Luis Oteiza y Cortes, the secretary or clerk of the Bureau of Public Debt of the island of Cuba, at Havana, and an officer in the employment of the kingdom of Spain, at Havana, had charge of the public funds and moneys belonging to the kingdom of Spain, namely, the Bureau of Public Debt of the island of Cuba, at Havana; that in December, 1889, the said Luis Oteiza y Cortes (who will hereinafter be called Oteiza) at Havana, and within the jurisdiction of the kingdom of Spain, in the course of his said employment, had in his possession, as such clerk or secretary, a large amount of public bonds or certificates of indebtedness of the kingdom of Spain, belonging to the public debt of the island of Cuba, and being a part of the public funds of the kingdom of Spain; and that Oteiza, at that time, at Havana,

wrongfully and feloniously embezzled bonds or certificates of indebtedness belonging to the said public debt of the island of Cuba, of the value of $190,000, and converted the same to his own use, and also the coupons of other government bonds, of the value of $500,000, and the stub-books thereof. The complainant, therefore, charged Oteiza with the crime of embezzlement of bonds or certificates of indebtedness of the said public debt of the island of Cuba, committed at Havana, and further stated that Oteiza had fled to the United States, and that criminal proceedings had been begun in Havana against him for such embezzlement, and asked for a warrant for his apprehension under the above-named two conventions, that evidence of his criminality might be heard by the commissioner, and that if, on the hearing, the evidence should be deemed sufficient to sustain the charge, a warrant might issue for his surrender. In the course of the proceedings before the commissioner, this complaint was amended by adding the words "or criminal malversation" after the word "embezzlement," wherever it appeared in the complaint.

On the 2d of January, 1890, a warrant was issued by the commissioner, reciting the complaint and stating that Oteiza was charged by it "with having committed the crime of embezzlement or criminal malversation of public funds within the jurisdiction of the kingdom of Spain," and that such crime was enumerated and provided for by the two conventions before mentioned. The warrant was directed to the marshal or any deputy, and commanded that Oteiza be apprehended and brought before the commissioner, in order that the evidence of his criminality might be heard. Oteiza was arrested, and evidence in the matter on both sides was heard by the commissioner. On the 13th of March, 1890, the commissioner certified that, on the examination and the hearings which had been had, he deemed the evidence sufficient to sustain the charge, and that he committed the accused to the custody of the marshal, to be held until a warrant for his surrender should issue according to the stipulations of the treaty, or he should be otherwise dealt with according to law.

On the 14th of March, 1890, a writ of *habeas corpus*, to

bring the body of Oteiza before the Circuit Court of the United States for the Southern District of New York, directed to John W. Jacobus, the marshal of the United States for the Southern District of New York, and to the warden of the jail, and a writ of *certiorari* to the commissioner, to transmit the proceedings to the said Circuit Court, were allowed by Judge Lacombe. These writs were returnable on the 28th of March, 1890. The case was heard by Judge Lacombe in the Circuit Court, and on the 18th of April, 1890, that court made an order discharging the writ of *habeas corpus*. Oteiza has appealed to this court.

In his opinion in the matter, which forms part of the record, Judge Lacombe arrives at the conclusion, that either the coupons alleged to have been abstracted by Oteiza were public funds, or that, by discharging the functions of his office falsely and with corrupt intent, he had got possession of certain moneys which were public funds, paid out by the Spanish Bank of the island of Cuba, which would not have passed from the possession of that bank to his own possession, except as a consequence of his official action; that he, therefore, obtained charge of such moneys by virtue of his office, and thereupon converted them to his own use; that his acts were, therefore, within the terms of article 401 of the Spanish penal code of Cuba, which is a part of Title VII, "Of the crimes of public employés in the discharge of their duties," and of chapter 10 therein, entitled "Malversation of public funds," and reads as follows: "Art. 401. A public officer, who, having charge of public effects or funds by virtue of his office, takes or allows others to take the same, shall be punished as follows," etc.; and that like acts are made punishable by section 5438 of the Revised Statutes of the United States, and by section 165 of the Penal Code of New York. The judge also refers to the warrant of arrest issued against Oteiza in Cuba, as specifically stating the offence which it was claimed he had committed. From that warrant it appears that the complaint against Oteiza in Cuba was for having committed the crime of "embezzlement of public funds" as a public officer.

We are of opinion that the order of the Circuit Court, refus-

ing to discharge Oteiza, must be affirmed. A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offence charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a Circuit Court or by this court, on *habeas corpus*, either originally or by appeal.

In the case of *Benson* v. *McMahon*, 127 U. S. 457, 461, 462, 463, which was an appeal to this court from an order of a Circuit Court of the United States, denying a discharge to a prisoner, on a writ of *habeas corpus* issued by that court to a United States marshal, in a case of extradition, where a United States commissioner had held the accused by a final commitment, this court, speaking by Mr. Justice Miller, said: "Several questions in regard to the introduction of evidence, which were raised before the commissioner, some of them concerning the sufficiency of the authentication of papers and depositions taken in Mexico, and as to the testimony of persons supposed to be expert in the law of that country regarding the subject, are found in the record, which we do not think require notice here. The writ of *habeas corpus*, directed to the marshal of the Southern District of New York, does not operate as a writ of error. . . . The main question to be considered upon such a writ of *habeas corpus* must be — had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul; and also, was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities? . . . We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial, by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day

in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed.' This describes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says, that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged." In the present case, article 1 of the convention of January 5, 1877, provides that the surrender of the accused "shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed." In the opinion in *Benson* v. *McMahon*, *supra*, the court proceeds: "We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him, or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody, to await the requisition of the Mexican government."

Without discussing the questions raised in the present case, it is sufficient to say that we concur in the views of Judge Lacombe.

The only point raised on behalf of Oteiza which we deem it important to notice is his offer to introduce in evidence before the commissioner, on his own part, certificates, made by public officers in Cuba, as to the existence of certain facts, and also certain copies of papers, and certain *ex parte* depositions in writing taken in Cuba before a notary public; all of which were sought to be made evidence under certificates made by the consul general of the United States at Havana, certifying that the papers were properly and legally authenticated so as to entitle them to be received "in the tribunals of Cuba as evidence in defence of a charge of embezzlement, and as evidence in defence of said charge upon a preliminary hearing before a committing magistrate, and as evidence in defence of said charge in an extradition proceeding upon a hearing before a competent magistrate, and especially as evidence in all the cases enumerated, where said charge of embezzlement is made against Don Luis de Oteiza y Cortes."

It is supposed that these documents were admissible in evidence by virtue of the provisions of section 5 of the act of August 3, 1882, c. 378, 22 Stat. 216, which reads as follows: "Sec. 5. That in all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant or other paper, or copies thereof, so offered are authenticated in the manner required by this act."

We are of opinion that section 5 of the act of August 3, 1882, applies only to papers or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended; and that it does not apply to doc-

uments or depositions offered on the part of the accused, any more than did the provisions of section 5271 of the Revised Statutes, either as originally enacted or as amended by the act of June 19, 1876, c. 133, 19 Stat. 59.

This view was held by Judge Brown, in the District Court for the Southern District of New York, in March, 1883, in *In re Wadge*, 15 Fed. Rep. 864. In that case, the commissioner had refused to adjourn the proceedings before him in order to enable the accused to procure depositions from England, to establish an *alibi*. Judge Brown considered the act of August 3, 1882, and held that while it was the duty of the commissioner, under section 3 of that act, to take such evidence of oral witnesses as should be offered by the accused, the statute did not apply to testimony obtained upon commission or by deposition, adding that, so far as he was aware, there was no warrant, according to the law or the practice before committing magistrates in the State of New York, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad, and that all the provisions of the law and the statutes contemplated the production of the defendant's witnesses in person before the magistrate for examination by him. The order dismissing the writ of *habeas corpus* in that case was affirmed by the Circuit Court, held by Judge Wallace, in *In re Wadge*, 21 Blatchford, 300. He said: "The depositions and proofs presented a sufficient case to the commissioner for the exercise of his judicial discretion, and his judgment cannot be reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this court cannot review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

In the case of *In re McPhun*, 24 Blatchford, 254, in the Circuit Court for the Southern District of New York, before Judge Brown, in March, 1887, on a *habeas corpus* in an extradition case, it was held that the words "for similar purposes" in the 5th section of the act of August 3, 1882, must receive the same construction they had received under the act of June 22, 1860, c. 184, 12 Stat. 84, which was that

they meant "as evidence of criminality;" and that the same construction had been given to similar words in prior statutes; citing *In re Henrich*, 5 Blatchford, 414, 424, and *In re Farez*, 7 Blatchford, 345, 353. We concur in this view.

Since the close of the oral argument we have been furnished with a printed brief on the part of the appellant, which we have examined, but we do not deem it necessary to make any further observations on the case.

The order of the Circuit Court is

Affirmed.

SALOY *v.* BLOCH.

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

No. 92. Argued December 18, 19, 1889. — Decided May 23, 1890.

Saloy, being the owner of a plantation in Louisiana, leased it to P. B. Dragon and Athanase Dragon. The Dragons arranged with Bloch to furnish them with goods, supplies and moneys necessary to carry on the plantation, for which he was to have a factor's lien or privilege on the crops, which were also to be consigned to him for sale. Saloy contracted before the same notary as follows: "And here appeared and intervened herein Bertrand Saloy, who, after having read and taken cognizance of what is hereinbefore written, declared that he consents and agrees that his claim and demands as lessor of the aforesaid 'Monsecours plantation' shall be subordinate and inferior in rank to the claims and privileges of said Bloch as the furnisher of supplies or for advances furnished under this contract; and that said Bloch shall be reimbursed from the crops of 1883 made on said place the full amount of his advances hereunder without regard and in preference to the demands of said Saloy for the rental of said plantation; provided, however, that three hundred and fifty sacks of seed rice shall remain or be left on said plantation out of the crop of this year for the purposes thereof for the year 1884;" *Held*,

(1) That under the laws of Louisiana the privilege or lien of the landlord over the crops of the tenant was superior to that of the factor;

(2) That the effect of Saloy's agreement was only the waiver of that priority, and that it did not commit him in any degree to the fulfilment by the Dragons of their agreements with Bloch;

(3) That if Saloy asserted his privilege by taking possession of the

crops, (which he did,) he thereby became liable to account to Bloch, and that this liability could be enforced by a suit in equity, to which the Dragons would be necessary parties;

(4) But that he was not liable therefor to Bloch in an action at law, to which the Dragons were not parties.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury and *Mr. E. Howard McCaleb* for plaintiff in error.

Mr. George A. King for defendant in error.

Mr. William S. Benedict and *Mr. Charles W. Hornor* filed a brief for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action on contract brought in the Circuit Court of the United States for the Eastern District of Louisiana, by Simon Bloch, a subject of the Emperor of Germany, against Bertrand Saloy, a citizen of Louisiana, to recover the sum of $6266.23, with interest and costs, alleged to be due from Saloy to the plaintiff.

In his petition the plaintiff avers that on the 26th of January, 1883, he entered into contract with P. B. Dragon and A. Dragon, by act before a notary, to furnish funds necessary for the cultivation and furnishing of necessary supplies to a plantation in the parish of Plaquemines, in said State, known as "Monsecours," for the year 1883, in consideration of the interest and commissions stipulated to be paid in said act;— that said plantation was leased by the Dragons from said Saloy, and that Saloy appeared in said act and made himself a party to said agreement, bound himself by said act and said agreement to carry out the terms and conditions thereof, and did waive and remit, in favor of petitioner, any and all superior rights and claims that he had or might have against said plantation, its buildings, etc., and the crop to be raised thereon during the year 1883, as the lessor or landlord thereof, to the

end that said land might be cultivated, the advances paid back to petitioner, and after payment of all legal claims, charges and expenses, the balance received should be paid over to said Saloy, the landlord.

The petition then stated that Saloy, in disregard of his contract, did, in December, 1883, proceed by action in the 24th District Court in and for the parish of Plaquemines, to a suit and seizure of the buildings, the growing crop, and the crop in process of manufacture on said plantation, and placed the sheriff in possession of the same, to the damage of petitioner exceeding the sum due him; that he, Saloy, afterwards obtained an order of the court to bond the property seized, and sold the same and converted it to his own use, without paying petitioner the balance due him for his advances under said contract; which balance was shown by a detailed account annexed to the petition, by which it appeared that Bloch had received only $23,336.10 net proceeds of the produce of the plantation, and had advanced in money and supplies (including his interest and commissions) the sum of $29,602.33; leaving a balance in his favor of $6266.23.

The petition further states than when Saloy so seized and converted the property, the Dragons were not indebted to him; and the said property was subject to the claim of the petitioner for the balance due him on his said advances; which has not been paid by said Dragons, (who are without means to pay the same,) or by Saloy; and that said acts of Saloy are illegal, unjust and malicious; and that by his taking possession of said crop, stopping the business, demoralizing the hands, and removing crop and machinery, he deprived the Dragons of all power to comply with their contract with the petitioner, and has injured and damaged the petitioner in a sum far exceeding the sum due him by them; and so the defendant, Saloy, is responsible for the said amount due petitioner.

To this petition the defendant, Saloy, filed exceptions:

1st. No cause of action.

2d. Plaintiff cannot maintain his action until he has first obtained judgment against the Dragons, who are necessary parties to the suit.

3d. That the judgment rendered for Saloy against the Dragons cannot be questioned collaterally, but only by appeal or action of nullity to set aside the proceedings, over which this court has no jurisdiction.

4th. The release bond given by defendant in said suit to the Dragons (to get possession of the property) cannot be litigated in this suit.

5th. Exceptor specially pleads the judgment rendered in said suit of *B. Saloy* v. *Pierre B. Dragon and A. Dragon*, No. 617 of the docket of 24th judicial district court for parish of Plaquemines, as *res judicata* of the necessity for, and validity of, the writ of provisional seizure therein issued, etc., (the record of that suit being filed with the exceptions.)

Upon argument, these exceptions were overruled, and thereupon Saloy filed an answer and plea in reconvention. In the answer he first made a general denial of the allegations of the petition, and then denied specifically that his suit against the Dragons, his tenants, (to wit, No. 617 of the docket of 24th judicial district court, etc.,) was in violation of any agreement made by him with the plaintiff, or that his acts therein were injurious to plaintiff, or illegal, unjust, or malicious, as charged; but he avers that the plaintiff appeared and ratified defendant's acts by furnishing the sheriff funds for cultivating the plantation and harvesting and manufacturing the crop, after the provisional seizure; and subsequently received from the sheriff the amount of such advances, which were paid by defendant.

In the plea of reconvention the defendant set up his title, as landlord, to Monsecours plantation, and the lease by which the Dragons held it from him, being at an annual rent of $4800, secured by notes of $4800 each. He then set out the contract made by the Dragons with the plaintiff, Bloch, annexing a copy of it to his plea. He further stated that the Dragons being heavily in debt, and unable to pay, in October, 1883, two of their creditors sued them, and sequestered and seized 100 barrels of rice and a threshing machine, subject to reconvenor's landlord privilege and that of said Bloch, and reconvenor intervened in that suit to protect his interest, and

afterwards, in November, 1883, brought the suit complained of by the plaintiff on two of the rent notes held by him, and obtained a provisional seizure of the property subject to his lien as lessor, and obtained judgment against the Dragons for the amount of the two notes, less certain payments made on one of them; and that from the sale of the property seized he only realized, after paying claims of laborers, and costs and charges, the sum of $1258.28, which, being deducted from his judgment, still leaves due to him the sum of $6017. This amount he claims from the plaintiff, Bloch, by way of reconvention, because, as he avers, Bloch received from the proceeds of the crop of the plantation a surplus of more than $7000, over and above all his advances, commissions and other lawful claims.

The cause was tried before a jury on these issues, and a verdict was found for the plaintiff of $3500. Several bills of exceptions were taken during the trial, but, from the view we have taken of the case, it is unnecessary to advert to them. A radical exception taken by the defendant at the beginning, and always insisted upon, is that the action is not maintainable; and that if the defendant is liable at all to the plaintiff, he cannot be made to respond in this form of proceeding, in which the Dragons are not parties, and no judgment is shown to have been recovered against them. We are of opinion that this exception is well taken; and, in order to explain our views, it is necessary to look a little more particularly at the laws relating to the respective rights of lessors in regard to the rents due to them, and of factors advancing moneys on supplies for the cultivation of a plantation, and at the alleged contract on which the suit is founded.

In treating of the subject of privileges, the Civil Code of Louisiana, by article 3217, declares as follows:

"The debts which are privileged on certain movables are the following:

"1. The appointments or salaries of the overseers for the current year, on the crops of the year and the proceeds thereof; debts due for necessary supplies furnished to any farm or plantation, and debts due for money actually ad-

vanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof.

* * * * *

"3. The rents of immovables and the wages of laborers employed in working the same, on the crops of the year, and on the furniture which is found in the house let, or on the farm, and on everything which serves to the working of the farm.

* * * * *

"The privileges granted by this article, on the growing crop in favor of the classes of persons mentioned, shall be concurrent, except the privilege in favor of the laborer, which shall be ranked as the first privilege on the crop."

"ARTICLE 3218. The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid."

Under the title "lease," in the same code, are the following provisions:

"ARTICLE 2705. The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased.

"In the case of predial estates, this right embraces everything that serves for the labors of the farm, the furniture of the lessee's house, and the fruits produced during the lease of the land.

* * * * *

"ARTICLE 2709. In the exercise of this right, the lessor may seize the objects which are subject to it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified."

By an act of the legislature of Louisiana, approved March 21, 1874, Laws of 1874, No. 66, p. 114, it was, amongst other things, provided as follows:

"SECTION 1. *Be it enacted, etc.* That in addition to the privilege now conferred by law, any planter or farmer may pledge or pawn his growing crop of cotton, sugar or other agricultural products for advances in money, goods and necessary supplies that he may require for the production of the same, by entering into a written agreement to pledge the same and having the agreement recorded in the office of the recorder of mortgages of the parish where said cotton, sugar or other agricultural product is produced, which recorded contract shall give and confer on the merchant or other person advancing money, goods and necessary supplies for the production of the said agricultural product, a right of pledge upon the said crop, the same as if the said crop had been in the possession of the pledgee: *Provided*, That the right of pledge thus conferred shall be subordinate to that of the claim of the laborers for wages and for the rent of the land on which the crop was produced."

From these laws it will be seen that the privilege or pledge of the landlord for his rent is superior to the privilege given by the Civil Code to the factor who advances money or necessary supplies to the planter; and, by the proviso of the act of 1874, it is still made superior to the pledge which that law authorizes the planter to make to the factor for his advances. It was in view of this superior right of the lessor that Saloy was asked to join in a contract between the Dragons as planters of Monsecours, and Simon Bloch, who agreed to make advances for the cultivation thereof. This contract was made by an act passed before a notary on the 26th of January, 1883, by which the two Dragons declared that, requiring to have goods and necessary supplies furnished and moneys actually advanced to be used for the purchase of necessary expenses and laborers to plant, cultivate, sow, gather and manufacture the crops of rice, sugar, molasses and other products to be made or raised during the present year on the Monsecours plantation, situated in the parish of Plaquemines,

etc., they had contracted a loan of the sum of $7500 of and from Simon Bloch, of this city [New Orleans], and as evidence of such loan the said Pierre B. Dragon had furnished three certain promissory notes for the sum of $2500 each, . . . which said notes were delivered unto said Simon Bloch. . . . And in order to more fully secure the punctual payment of all such advances and moneys advanced or to be advanced as aforesaid, costs, charges, expenses, commissions, and attorney's fees, a special lien and mortgage or privilege was thereby granted and recognized for the full sum of $15,000 on any and all crop or crops of rice, sugar, molasses, and other products that might be planted, grown, raised and gathered, or made and manufactured during the year 1883 on the said plantation. The act also contained an obligation to ship and consign the entire crop of rice, sugar, molasses and other products made on the said plantation during the year 1883 to the said mortgagee [Bloch] in the city of New Orleans, whenever required or notified so to do by him or his assigns, in default of which the mortgagee or assigns were authorized to sequester the crops or proceeds thereof, in whosesoever hands the same might be, regardless of any sale or transfer. After various other agreements and stipulations contained in the act between the Dragons and Bloch, a final clause was inserted containing an agreement or concession of Bertrand Saloy, the defendant below, which laid the foundation of the present action. It is here inserted *verbatim:*

"And here appeared and intervened herein Bertrand Saloy, who, after having read and taken cognizance of what is hereinbefore written, declared that he consents and agrees that his claim and demands as lessor of the aforesaid 'Monsecours plantation' shall be subordinate and inferior in rank to the claims and privileges of said Bloch as the furnisher of supplies or for advances furnished under this contract; and that said Bloch shall be reimbursed from the crops of 1883 made on said place the full amount of his advances hereunder without regard and in preference to the demands of said Saloy for the rental of said plantation; provided, however, that three hundred and fifty sacks of seed rice shall remain or be left on said planta-

tion out of the crop of this year for the purposes thereof for the year 1884."

We do not think that this clause contains any such contract as is averred in the petition of the plaintiff. It is there averred that Saloy appeared in said act and made himself a party to said agreement, and bound himself by said act and said agreement, to carry out the terms and conditions thereof, etc.

There is nothing, as it seems to us, in the agreement of Saloy, which engages him to any guarantee of the contract of the Dragons with Bloch; nothing to show that he committed himself in any degree to the fulfilment of said agreements on the part of the Dragons. It contains merely a waiver on his part of his priority in rank as lessor of the plantation. He simply consents and agrees that his claim shall be subordinate and inferior in rank to the claims and privileges of Bloch, and that Bloch shall be reimbursed for his advances without regard to any preference to the demands of said Saloy. That is all. This consent and waiver only placed Saloy in the position of a second incumbrancer, having himself a pledge on the crops of the plantation, but subject to a superior pledge or mortgage in favor of Bloch for his advances.

The question then arises whether Saloy was prevented by his said waiver from instituting suit, and seizure of the crop, for his own claim for rent. We know of no law or rule of practice in Louisiana which prevented him from instituting such suit. It is true that the net proceeds of the crop in his hands, resulting from his seizure and sale thereof, were liable to the claim of Bloch.

The Code of Practice provides for sales by the sheriff subject to the rights of those having prior liens or privileges, and the purchaser at such sales takes the property subject to those liens, and is credited for the amount thereof on the purchase money of the adjudication. Arts. 679, 683. And by article 709: "The hypothecary action lies against the purchaser of a property seized, which is subject to privileges or mortgages, in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property."

Opinion of the Court.

The crop and property sold by Saloy was undoubtedly subject to the plaintiff's pledge to the extent of the amount due to him from the Dragons, and he is entitled to an account from Saloy for that amount to the extent of the net proceeds of said sale. But his claim against Saloy is an equitable one, and in the United States court can only be pursued on the equity side on a bill for an account, in which all equitable deductions would be allowed for the claims of laborers and other preferred creditors; and in such suit an inquiry would be had as to the amount of Bloch's claim against the Dragons, and they would be necessary parties. The debt for which the plaintiff sues Saloy is their debt, and yet they are not cited and no judgment has been obtained against them. It seems to us altogether an irregular proceeding.

The present suit is an action for damages against Saloy for instituting proceedings and seizing the crops for the purpose of collecting his rent. Such an action cannot be maintained, for Saloy was not prevented by any law from instituting such proceedings for the recovery of his rent. He did nothing that he was not entitled to do, though he became liable to account to Bloch for the net proceeds of the crop, as before mentioned, so far as might be necessary for the satisfaction of Bloch's claim, when duly adjudicated. In our judgment, therefore, the exception taken by Saloy to the petition in this case was well founded, and the action was not maintainable. The judgment of the Circuit Court is

Reversed, and the cause remanded, with directions to enter judgment for the defendant.

REYNOLDS *v.* ADDEN.

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

No. 153. Submitted December 10, 1889. — Decided May 19, 1890.

J. H. A. resides in Reading in Massachusetts. J. A., his father, who had formerly resided there, removed to Lancaster in New Hampshire, of which he has since been a resident. The son becoming insolvent, the father became surety for one of his assignees, and for that purpose signed a bond in which he was described as of Reading; *Held*, that, no one being prejudiced thereby, this did not estop the father in a suit in Louisiana between him and the assignee, involving a claim to property of the insolvent there, from showing that he was not a citizen of Massachusetts, but a citizen of New Hampshire.

In Louisiana a transfer of the estate of an insolvent debtor by judicial operation is not binding upon the citizens and inhabitants of Louisiana, or of any other State except the State in which the insolvent proceedings have taken place — at least until the legal assignee has reduced the property to possession, or done what is equivalent thereto.

IN EQUITY. Decree dismissing the bill. Plaintiff appealed. The case is stated in the opinion.

Mr. Gus A. Breaux for appellant.

Mr. A. A. Ranney and *Mr. A. V. Lynde* for appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This suit was originally commenced in the Civil District Court for the parish of Orleans, Louisiana, by petition filed by John M. B. Reynolds against John Adden, to restrain him from further prosecuting two certain suits in the same court, or proceeding upon execution therein, and to have the same declared illegal and void. The suits referred to had been commenced by said John Adden by attachment against the goods of his son, John H. Adden, situated in a store in New Orleans, occupied by said John H. Adden for carrying on his business therein under the management (as alleged) of the father, John

Adden, the son being a resident of Reading, Massachusetts. The grounds of the relief sought as stated in the petition are that on the 10th of March, 1882, John H. Adden, a resident of Reading, in the county of Middlesex, and State of Massachusetts, presented a petition of insolvency to the proper court there, from which a warrant was issued for the seizure of all his property, real and personal, and other proceedings were had as usual in such cases; and at a meeting of the creditors on the 23d of March, one Stillman E. Parker and the petitioner, Reynolds, were appointed assignees, and accepted the said trust, and gave bonds as required by law, the said John Adden executing the bond of said Parker as his surety; that in the schedule of assets filed by the insolvent with his petition of insolvency there appeared to be in his store, No. 58 Custom-House Street, New Orleans, about 600 cases of shoes, valued at $18,341.47, and other property, accounts, notes, etc., amounting to about $28,000, notes and accounts due to the Boston store amounting to about $10,000, and other assets in Boston amounting to about $3000; that on the petitioner going to New Orleans to take possession of the assets there, he discovered that the said John Adden (the father) had instituted suit in that court against John H. Adden for $20,000 on the 16th of March, 1882, and had issued an attachment therein, and attached the property, and obtained judgment by default on the 3d of April, 1882, with lien and privilege on the property attached; and that on the 4th of April, 1882, he had obtained a second attachment in another suit upon notes of said John H. Adden amounting to over $6000; all which proceedings of John Adden the petitioner alleged to be illegal, null and void by reason of the insolvency proceedings in Massachusetts, he, the said John Adden, being a resident of Massachusetts, and bound thereby, as well as for irregularities in said proceedings themselves, referred to in the petition, and the complicity (as alleged) of the said John Adden with his said son, in the measures taken by the latter. The petitioner alleged that he had applied to his coassignee, Stillman E. Parker, to join him in the petition, but he had refused.

A rule to show cause why a writ of injunction should not

issue was granted and heard by the court, upon which hearing a certified copy of the insolvent proceedings in Massachusetts was presented and received in evidence; and on the 15th of May, 1882, a preliminary injunction was issued restraining the defendant, John Adden, from enforcing his judgment in the first suit, and from proceeding further in the second; also restraining the sheriff of the parish from selling the goods seized by him. A motion to dissolve the injunction was subsequently made, and after argument was refused. The principal grounds of refusal were, that John Adden was a resident of Massachusetts, and had become surety of one of the assignees of his son, and was therefore estopped and bound by the proceedings in insolvency.

On the 24th of May, 1883, the defendant, John Adden, filed a petition for the removal of the cause into the Circuit Court of the United States for the Eastern District of Louisiana. In this petition Adden contends, amongst other things, that the insolvent laws of Massachusetts, under which Reynolds claims the property in controversy, impair the obligation of the contract between the petitioner and John H. Adden, and deprive the petitioner of his property without due process of law, and are in violation of the Constitution of the United States; that he had already, in an answer filed in the case, claimed that the said insolvent laws deprived him, who was a citizen of the State of New Hampshire, of the privileges and immunities of citizens in the several States, and were in violation of the 4th article of the Constitution of the United States. And after setting up various other claims of privileges and immunities under the Constitution of the United States, alleged to be violated by said insolvent proceedings, the petitioner further stated that at the commencement of this suit, and continuously since, he had been and still was a citizen of the State of New Hampshire, and that said Reynolds and John H. Adden then were, and had continually been, citizens of Massachusetts, and that Duffy, the sheriff of the parish of Orleans, was, and is, a citizen of the State of Louisiana. He further represented that in said suit the real controversy was between said Reynolds and the petitioner,

and that John H. Adden, and Duffy, the sheriff, were not necessary, but merely formal defendants. The civil district court refused the application for the removal of the cause; but a certified copy of the proceedings being presented to the Circuit Court of the United States, that court took jurisdiction of the case, and ordered it to be docketed on the equity side of the court. A motion was made to remand the cause to the state court, which, after argument, was refused. Evidence was taken as to the residence and citizenship of the defendant, John Adden, and as to his connection with the business of his son, and the general character of the proceedings had in the insolvency case in Massachusetts, and in the suits instituted by John Adden in New Orleans at the final hearing. The court dismissed the petition or bill of complaint, and the petitioner, Reynolds, has appealed.

The first question which we shall consider is as to the jurisdiction of the Circuit Court of the United States. It is strenuously contended by the appellant that the case ought not to have been removed from the state court, and ought to have been remanded to that court upon the motion made for that purpose. The ground of this contention is that John Adden, the defendant, was a citizen of Massachusetts, and not a citizen of New Hampshire, as alleged by him in his petition for removal; or that if he was not in fact a citizen of Massachusetts he was estopped from denying that he was such by his acts and declarations in the proceedings, both in Massachusetts and in New Orleans. In the insolvency proceedings in Massachusetts he became, on the 23d day of March, 1882, the surety of Stillman E. Parker, one of the assignees of John H. Adden, and in the same bond he is described as "John Adden, of Reading, in the county of Middlesex." It was also testified by one Ambrose Eastman that John Adden, being examined on oath at the meeting of the creditors of his son in Cambridge, Massachusetts, on the 23d of March, 1882, testified that he resided in the town of Reading, county of Middlesex, in Massachusetts. It is also shown that in his petition for the attachments issued at his suit in New Orleans on the 16th of March, 1882, and the 4th of April the same year, he is described as

"John Adden, residing in the State of Massachusetts." But these petitions were not signed by him, but by his attorneys in New Orleans. On the other hand, the overwhelming evidence of a great number of witnesses puts the matter beyond all doubt, that whilst he had at a former period resided in Reading, Massachusetts, he had removed from thence to Lancaster, in the State of New Hampshire, in October, 1874, and had continued to reside in Lancaster ever since that time. His being described as residing in Reading at the time of the insolvency of his son was a natural inadvertence arising from the fact that in consequence of the intimate relations between him and his son, (who did reside at Reading,) he was often at that place on business or social visits. The only question, therefore, that arises on this branch of the subject is whether he is permitted to show the truth, or whether he is estopped by the papers before referred to, in which he is described as residing in Massachusetts. The evidence of Ambrose Eastman is contradicted by a number of witnesses equally in a position to hear what Adden did testify, and there is no question in our minds that Mr. Eastman was mistaken in his recollection. As to the papers relied on by the appellant, we are of opinion that Adden was not concluded by the descriptions of person contained in them. He was so often in Boston and Reading, about the business of his son and in intercourse with him, that the descriptive words "of Massachusetts," or "of Reading, Massachusetts," or "residing in Massachusetts" might easily have been overlooked; and the same words in the petitions for attachment in New Orleans were applied and used by his counsel there, and not by himself. They present no case upon which an estoppel as to the citizenship of Adden can be founded. He might even have been a temporary resident of Massachusetts, and yet a citizen of New Hampshire. So that if the descriptive words were to be taken as true they would not be decisive. But they were words of mere description, and as such they could not estop him from showing the truth and the fact. They induced no conduct on the part of the appellant, or of any of the creditors of John H. Adden, which operated to their prejudice. They contained no element of

estoppel. We are satisfied, therefore, that the cause was properly removed from the state court, and that the Circuit Court of the United States had jurisdiction thereof.

The next question to be considered is as to the legal right of the defendant, John Adden, to institute the suits and issue the attachments which were prosecuted by him at New Orleans. As a resident and citizen of New Hampshire, was he concluded by the insolvent proceedings in Massachusetts, and the incidental transfer of the property of John H. Adden therein? If he was, then he had no right to take the proceedings which he did take in Louisiana. Had he been a citizen and resident of Massachusetts, the question would have been a different one. We have recently decided, in the case of *Cole* v. *Cunningham*, 133 U. S. 107, that a creditor, who is a citizen and resident of the same State with his debtor, against whom insolvent proceedings have been instituted in said State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to attach or seize the personal property of the debtor situated in another State, and embraced in the assignment, he may be restrained by injunction by the courts of said State in which he and his debtor reside. That was a case, arising in Massachusetts, and the effect and operation of assignments made by debtors of personal property belonging to them in other States is elaborately discussed by the Chief Justice delivering the opinion of this court. It was held that where a debtor and his creditor were both citizens and residents of Massachusetts, and the former went into insolvency, and regular proceedings under the insolvent laws of the State were had, the creditor might be enjoined by the courts of Massachusetts from attaching goods and credits of the debtor in New York, although in the latter State such attachment would be legal and valid. But that is not the present case. Here it is proved beyond doubt that John Adden was not a citizen or resident of Massachusetts, but was a citizen and resident of New Hampshire; and the question is whether, as such citizen of New Hampshire, he had a right to prosecute his claims against John H. Adden, by attachment of the goods of the latter in the State of Louisiana by the laws of the latter

State. It is by the laws of Louisiana that the question must be decided. Every State exercises to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other States, except as it may be compelled to give them full effect by the Constitution of the United States. Where the transfer of the debtor's property is the result of a judicial proceeding, as in the present case, there is no provision of the Constitution which requires the courts of another State to carry it into effect; and, as a general rule, no state court will do this to the prejudice of the citizens of its own State.

But without discussing the rules adopted in different States on this subject, which are fully examined and commented upon in the treatises on private international law, our present inquiry is confined particularly to the doctrine of the courts of Louisiana. And here we are entirely free from embarrassment. By a succession of cases decided by the Supreme Court of Louisiana, it has become the established law of that State, that such transfers by judicial operation are not binding upon the citizens and inhabitants of Louisiana, or of any other State except the State in which the insolvent proceedings have taken place — at least until the legal assignee has reduced the property into possession or done what is equivalent thereto. *Olivier* v. *Townes*, 2 Martin, (N. S.,) 93; *Tyree* v. *Sands*, 24 La. Ann. 363; *Lichtenstein* v *Gillett*, 37 La. Ann. 522. In the case last cited, a receiver under a creditor's bill, appointed by a chancery court of Georgia, sought to recover possession of the property of the defendants adversely to the rights acquired by the plaintiffs under an attachment of that property in Louisiana. The plaintiffs' attachment was effected on the 26th of April, 1883. The intervention of the receiver was filed December 13, 1883. The Supreme Court of Louisiana, speaking through Mr. Justice Poché, after adverting to the distinction between a voluntary assignment and a compulsory one executed by order of a court, proceeds to say: "We do not propose to deny to him [the receiver], and we must not be understood as debarring him absolutely, of any right under his appointment to claim and obtain possession of the property

of Gillett Brothers, in case the exercise of such right does not militate with or destroy any existing rights acquired by creditors under proceedings instituted in our courts. In his brief, his counsel concedes that the claim which he now presses to our favorable consideration could not be enforced to the detriment of previously acquired rights of our own citizens. But he contends that the protection cannot be extended to plaintiffs for the reason that they are residents of the State of New York. . . . In our opinion, it is sufficient that the creditor who has acquired rights by legal process in our courts, be not a resident or a citizen of the State whose court has appointed a receiver who urges claims adverse to his acquired rights in our courts. The plaintiffs in this case, residents of New York, are not more amenable to the jurisdiction of the Georgia courts than would be a citizen of Louisiana, and they are legally entitled to the full protection of our courts against the claims of intervener."

Such, therefore, being the rule of comity applied by the courts of that State, we have no hesitation in saying that the defendant, John Adden, had a perfect right to prosecute his claims in the manner he did. No rule of law stood in his way, and nothing in the circumstances of the case, so far as we have been able to discover, prevented him from taking the course he did. It will be observed that his first suit in New Orleans was commenced on the 16th of March, 1882, a week prior to the meeting of the creditors in Cambridge and the appointment of the assignees in insolvency. He had not then done anything to interfere with his right to sue, and he did not afterwards do anything to take away that right. His going security on the bond of Parker as one of the assignees of his son is not shown to have any significancy in the matter in question. There was no reason why he should not approve of and acquiesce in the insolvent proceedings that were undertaken, nor why he should not, as an act of friendly accommodation, sign the bond of Parker, who seems to have been his brother-in-law. None of these things committed him to a position inconsistent with the prosecution of his claim in New Orleans.

Syllabus.

We have given due attention to the minor points raised by the appellant's counsel, but do not find anything therein which calls for a reversal of the decree. The decree of the Circuit Court is therefore

Affirmed.

NASHUA AND LOWELL RAILROAD CORPORATION *v.* BOSTON AND LOWELL RAILROAD CORPORATION.

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

No. 166. Argued December, 16, 17, 1889; March 31, 1890. — Decided May 19, 1890.

Railroad corporations, created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it was created, and the union of name, of officers, of business and of property does not change their distinctive character as separate corporations.

The Nashua and Lowell Railroad Corporation was incorporated by the State of New Hampshire June 23, 1835, "to locate construct and keep in repair a railroad from any point in the southern line of the State to some convenient place in or near Nashua," seven persons being named as incorporators. The Nashua and Lowell Railroad Corporation, (three out of the seven being named as incorporators,) was incorporated by the State of Massachusetts on the 16th of April, 1836, "to locate, construct and finally complete a railroad from Lowell" "to form a junction with the portion of said Nashua and Lowell Railroad lying within the State of New Hampshire." The legislature of Massachusetts, on the 10th of April, 1838, enacted that "the stockholders" of the New Hampshire Company "are hereby constituted stockholders" of the Massachusetts Company, "and the said two corporations are hereby united into one corporation," and further provided that the act should "not take effect until the legislature of . . . New Hampshire shall have passed an act similar to this uniting the said stockholders into one corporation, nor until the said acts have been accepted by the said stockholders." The legislature of New Hampshire, on the 26th of June, 1838, enacted "that the two corporations . . . are hereby authorized, from and after the

Statement of the Case.

time when this act shall take effect, to unite said corporations, and from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either shall be taken and accounted to be the joint property of the stockholders, for the time being, of the two corporations." A common stock was issued for the whole line, and for the forty-five years which intervened the two properties were under the management of one board of directors; but there was no other evidence that the stockholders had acted on these statutes; *Held*, that the New Hampshire Corporation, being a citizen of that State, was entitled to go into the Circuit Court of Massachusetts, and bring its bill there against a citizen of Massachusetts; and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts, as to defeat its right to go into that court.

While, as a general rule, the directors of a railroad company cannot, without the previous approval of their stockholders, authorize the construction of a passenger station in a city situated in a State foreign to that in which the company was created, and to which its own road does not extend, and cannot make the company responsible for any portion of the cost of such construction; yet, the fact that such increased facilities at Boston were necessary to enable the joint management under the contract between the Boston and Lowell and the Nashua and Lowell Companies to retain the extended business, common to both, justified the directors of the Nashua Company in incurring obligations on account of such expenditures, and brought them within the general scope of directors' powers.

A contract between two railroad companies, situated in different States, for the management of the business common to both by one of them, with an agreed division of receipts and expenses, does not warrant the managing company in purchasing at the common expense, the control of a rival line, without the assent of the stockholders of the other company.

In equity. Decree dismissing the bill. Plaintiff appealed. The cause being reached on the calendar, it was argued on the merits on the 16th and 17th of December, 1889. Subsequently, the court having expressed a desire to have the views of counsel, either orally or by brief, upon the jurisdiction of the Circuit Court, the counsel for the plaintiff moved, on the 17th March, 1890, for leave to argue that question; and, leave being granted, it was argued on the 31st March, 1890.

The questions at issue on the merits, as well as the question of jurisdiction will be found fully stated in the opinion of the court. For convenience in understanding the points made

by the counsel for the defendant in error on the point of jurisdiction a brief statement of that question is here made, referring to the opinion for more full details.

The State of New Hampshire on the 23d day of June, 1835, incorporated seven persons as the Nashua and Lowell Railroad Corporation, with power to construct a railroad from Nashua to the boundary line of the State of Massachusetts. The State of Massachusetts, on the 16th of April, 1836, incorporated three of those seven persons as the Nashua and Lowell Railroad Corporation with power to construct a railroad from Lowell to form a junction with the portion of the railroad of that company lying within the State of New Hampshire. The State of Massachusetts, on the 10th of April, 1838, enacted that the stockholders of the New Hampshire company were thereby constituted stockholders of the Massachusetts company, and that the two corporations were thereby united into one corporation of the same name; the act to take effect when the legislature of New Hampshire should have passed a similar act, and the stockholders should have accepted those acts. The legislature of New Hampshire, on the 26th day of June, 1838, enacted that the two corporations were empowered to unite; and that, after the union, the property should be the joint property of the stockholders of the two corporations. The material parts of these several statutes are printed in the margin.[1]

"[1] I. CHAPTER 37, NEW HAMPSHIRE LAWS, 1835.

"AN ACT TO INCORPORATE THE NASHUA AND LOWELL RAILROAD CORPORATION.

"SECTION 1. That Jesse Bowers, Ira Gay, Daniel Abbot, Benjamin F. French, John M. Hunt, Peter Clark and Charles J. Fox, their associates, successors and assigns, be and hereby are constituted and made a corporation by the name of the Nashua and Lowell Railroad corporation; . . .

"SECT. 2. That said corporation be and hereby is empowered to locate, construct and keep in repair a railroad from any point in the southern line of the State to some convenient place in or near Nashua village in Dunstable, in such manner as they shall deem most expedient, . . ."

"SECT. 12. That said corporation be and hereby is authorized to extend said railroad from its termination at the southern line of this State into and through the Commonwealth of Massachusetts, to meet the Boston and

Statement of the Case.

This suit was brought in the Circuit Court of the United States for the District of Massachusetts by the Nashua and

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Lowell Railroad, whenever said Commonwealth will empower said corporation so to do, with such powers, liabilities and restrictions as may be deemed expedient; and for this purpose said corporation may increase their capital stock and create new shares as said Commonwealth may authorize them to do."

"II. CHAPTER 249, MASSACHUSETTS LAWS, 1836.

"AN ACT TO ESTABLISH THE NASHUA AND LOWELL RAILROAD CORPORATION.

"SECTION 1. That Jesse Bowers, Ira Gay and Daniel Abbot, their associates and successors, are hereby made a corporation by the name of the Nashua and Lowell Railroad Corporation, with all the powers and privileges, and subject to all the duties, liabilities and provisions contained in that part of the thirty-ninth chapter of the Revised Statutes, passed November the fourth, in the year one thousand eight hundred and thirty-five, which relates to railroad corporations, and in the forty-fourth chapter of said Revised Statutes; and said corporation is hereby authorized and empowered to locate, construct and finally complete a railroad from Lowell, in the county of Middlesex, to form a junction with that portion of said Nashua and Lowell Railroad, lying within the State of New Hampshire;" . . .

"III. CHAPTER 96, MASSACHUSETTS LAWS, 1838.

"AN ACT TO UNITE THE NASHUA AND LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE.

"SECT. 1. The stockholders of the Nashua and Lowell Raiload Corporation, incorporated by the Legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the Nashua and Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges and property granted or to be granted, acquired or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations.

"SECT. 2. The said stockholders shall hold their meetings, make their by-laws, appoint their officers and transact all their business as one corporation; *provided*, that one or more of the officers of said corporation shall be a resident in this Commonwealth, and one or more of them in the State of New Hampshire, on whom process against said corporation may be legally served, in either State, and that said corporation shall be held to

Lowell Company as a corporation created by and a citizen of New Hampshire; and the jurisdictional question was, whether it was entitled to sue in that character.

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answer in the jurisdiction where the service shall be made and the process is returnable."

"SECT. 5. The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of the State to the same extent as the Nashua and Lowell Railroad Corporation, established by its Legislature in the year one thousand eight hundred and thirty-six, would be if this act had not been passed.

"SECT. 6. This act shall not take effect until the Legislature of the State of New Hampshire shall have passed an act similar to this, uniting the said stockholders into one corporation, nor until said acts have been accepted by the said stockholders at a meeting duly called for that purpose, at which meeting the said stockholders may ratify and confirm all or any of their former doings, and adopt them as the acts and proceedings of the said united corporation."

"IV. CHAPTER 21, NEW HAMPSHIRE LAWS, 1838.

"AN ACT TO UNITE THE NASHUA AND LOWELL RAILROAD CORPORATIONS OF MASSACHUSETTS AND NEW HAMPSHIRE AND FOR OTHER PURPOSES.

"SECTION 1. That the two corporations, under the name of the 'Nashua and Lowell Railroad Corporation,' one of which charters was granted by the Legislature of this State, the twenty-third day of June, one thousand eight hundred and thirty-five, and the other by the Legislature of the Commonwealth of Massachusetts, the sixteenth day of April, one thousand eight hundred and thirty-six, are hereby authorized, from and after the time when this act shall take effect, to unite said corporations; and all the tolls, franchises, rights, powers, privileges and property of the said two corporations shall be held and enjoyed by the stockholders in each and both, in proportion to their number of shares therein, and from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either of said corporations shall be taken and accounted to be the joint property of the stockholders, for the time being, of said two corporations.

"SECT. 2. That from and after the time said corporations shall be united, all the stockholders shall be entitled to the same notice, and shall enjoy the same right of voting; . . . *provided always*, that there shall be at least one officer in each State, who is an inhabitant thereof, on whom process against said corporation may be served, and that the books and registry of one corporation shall be taken to be the books and registry of the other corporation."

"SECT. 6. That the said corporation, so far as their road is situated in this State, when united by virtue of the provisions of this act, shall be subject to the general laws of this State, to the same extent as said corporation would have been if this act had not been passed.

Argument for Appellee.

Mr. E. J. Phelps and *Mr. Francis A. Brooks* for appellant in support of the jurisdiction, and on the merits.

Mr. J. H. Benton, Jr., on the merits, and in opposition to the jurisdiction. On the latter point he said:

I. Plaintiff is clearly a corporation of both Massachusetts and New Hampshire. It was the intention of the legislatures of Massachusetts and New Hampshire to create a new corporation which should owe its existence to the acts of union in each State. *Railroad Company* v. *Georgia*, 98 U. S. 359; *Memphis & Charleston Railroad* v. *Alabama*, 107 U. S. 581.

The New Hampshire act provides that the original corporations "shall be one corporation by the name of the Nashua and Lowell Railroad Corporation." The Massachusetts act provides that the "stockholders of the two corporations are hereby united into one corporation, by the name of the Nashua and Lowell Railroad Corporation."

Each act speaks of the united corporation as one corporation, and provides that there shall be in each State at least one officer, an inhabitant thereof, on whom process against "said corporation may be served;" that the shares of any stockholder "in said company" shall be subject to attachment and execution.

Each provides that stockholders of the united corporation "shall hold their meetings, make their by-laws, appoint their officers and transact all their business as one corporation;" and that "*said corporation* shall be subject to the general laws of each State, so far as their road is situated therein."

The larger part of the road to be built by the united corporation was in Massachusetts, and the legislation of that State cannot possibly be treated as giving a mere license to the New Hampshire corporation to exercise in Massachusetts corporate powers conferred upon it by New Hampshire, as was held to

"SECT. 7. That after said corporations shall be united, according to the provisions of this act, they shall be one corporation, by the name of the Nashua and Lowell Railroad Corporation; and all the acts of said corporations, which are valid in said corporations severally, shall be valid in the united corporation."

be the case in *Pennsylvania Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290, 296; and in *Goodlett* v. *Louisville Railroad*, 122 U. S. 391, 410.

Besides, unless the Nashua and Lowell Railroad Corporation is one corporation in both States, the decree in this cause will not bind it in Massachusetts, unless it is made a party plaintiff, in which case the Circuit Court would have no jurisdiction. If the cause of action set out in the bill does not belong to the plaintiff as a corporation in both States, but to two distinct corporations by the same name, then it belongs to those corporations jointly, and either is a necessary party plaintiff with the other to any suit upon it.

It was "in truth a single corporation, with the powers of two." *Covington &c. Bridge Co.* v. *Mayer*, 31 Ohio St. 317, 325; *Binney's Case*, 2 Bland, 99, 147; *State* v. *Northern Cent. Railroad*, 18 Maryland, 193, 213; *Quincy Bridge Co.* v. *Adams County*, 88 Illinois, 615; *Chicago &c. Railway* v. *Auditor General*, 53 Michigan, 79; *Mississippi Valley Co.* v. *Chicago &c. Railroad*, 58 Mississippi, 846; *State* v. *Metz*, 32 N. J. Law, 199; *Horne* v. *Boston & Maine Railroad*, 62 N. H. 454.

The question of jurisdiction in this case is, therefore, simply whether a corporation existing under the laws of Massachusetts and New Hampshire, and which is a corporation in Massachusetts, can be treated in Massachusetts, for the purpose of giving jurisdiction to the United States Circuit Court for the District of that State, as *not* being a corporation of that State.

Stated in another form, the question is, Whether the shareholders of a corporation existing under the laws of two States, and having but one set of shareholders, can, for the purpose of giving jurisdiction to the Circuit Court for one of the States, be assumed to be *all citizens of the other State?* To state this question, is to answer it in the negative, and it is thus answered by all the decisions of this court. *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286 (1861); *Railway Company* v. *Whitton*, 13 Wall. 270 (1874); *Muller* v. *Dows*, 94 U. S. 444 (1876); and *Memphis & Charleston Railroad* v. *Alabama*, 107 U. S. 581 (1882).

If a corporation existing under the laws of two States, and as much a citizen of one as of the other, is to be treated when sued either in the state court or in the Federal court of the State as a citizen of that State only on the ground that it cannot there be a corporation of any other State, then it necessarily follows that when such a corporation brings a suit, either in the state courts or in the Federal court of one of the States, it must in like manner be treated as a corporation of that State only, because it cannot *there* be a corporation of any other State. It is impossible to say that such a corporation cannot be sued in one of the States as a corporation of another State, and at the same time to say that it can sue in the State as a citizen of another State.

Under these decisions, it is clear that the Boston and Lowell Railroad Corporation, a citizen of Massachusetts, could not sue the Nashua and Lowell Railroad Corporation in the Circuit Court of the District of Massachusetts *as a citizen of New Hampshire;* and that if the Nashua and Lowell Railroad Corporation should sue the Boston and Lowell Railroad Corporation in the state court of Massachusetts, the suit could not be removed to the Circuit Court upon the ground that the Nashua and Lowell Company is a citizen of New Hampshire.

How, then, can the Nashua and Lowell Railroad Corporation maintain this suit as a citizen of New Hampshire, in the Circuit Court for the District of Massachusetts? If it is to be taken as a citizen of Massachusetts alone, in any suit which is brought against it in the State of Massachusetts, or in the Circuit Court for the District of Massachusetts, is it not equally to be taken as a citizen of Massachusetts alone, in any suit which it brings in either of those courts?

II. It cannot be assumed that the shareholders of the plaintiff are all citizens of New Hampshire. It has long been settled law that the jurisdiction of the Federal courts in suits by or against corporations, depended upon the citizenship of the shareholders of the corporation, who, in case of corporations, created by one State, are conclusively presumed to be all citizens of that State.

To say that a corporation is not a citizen, and therefore

cannot sue or be sued as such, and then to say that it is to be conclusively presumed that its members are citizens of the State by which it is created, and therefore it can be sued or sue as a citizen of that State, although its members are not in fact citizens of that State, is in effect to say that it may sue or be sued as a citizen of that State. As an original proposition it would seem that as the jurisdiction of the Federal courts in such cases depends upon the citizenship of the members of the corporation, that membership should be established as a matter of fact by the party invoking the jurisdiction of the court, and not by an absolute legal presumption, without reference to the fact.

But it is not necessary to discuss that question in this case, for, however proper it may be to absolutely presume that the members of a corporation created by one State are all citizens of that State, no such presumption can in the nature of things arise in the case of a corporation created by the concurrent legislation of two States, and having one franchise and one set of stockholders.

The fact that under the laws by which the plaintiff corporation was created its stockholders must be common stockholders in both States, necessarily prevents the presumption that they are citizens of one State only.

The Circuit Court could have jurisdiction of the cause of action in this suit only by reason of the citizenship of the parties; and, unless it is to be conclusively presumed that all the shareholders of the plaintiff are citizens of New Hampshire, the court had no jurisdiction. How can it be conclusively presumed that the shareholders of a corporation existing under the legislation of two States, and who are in fact identical, are citizens of one State rather than of the other. See *Railroad Co.* v. *Vance*, 96 U. S. 450, 458; *Attorney General* v. *Petersburg Railroad*, 6 Iredell, 456; *Philadelphia & Baltimore Railroad* v. *Maryland*, 10 How. 376; *Railroad Co.* v. *Harris*, 12 Wall. 65, 82; *Wilmer* v. *Atlanta &c. Railroad*, 2 Woods, 447; *Burger* v. *Grand Rapids &c. Railroad*, 22 Fed. Rep. 561; *Copeland* v. *Memphis & Charleston Railroad*, 3 Woods, 651; *Railroad Co.* v. *Georgia*, 98 U. S.

359; *St. Louis &c. Railway Co.* v. *Berry*, 113 U. S. 465; *Pullman Car Co.* v. *Missouri Pacific Railway*, 115 U. S. 587.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity to compel the defendant, the Boston and Lowell Railroad Corporation, to account for various sums of money alleged to have been received by it and used for its benefit, to which the complainant was entitled, and also to charge the defendant Hosford personally with the amount diverted by him to that corporation. The controversy relates to certain transactions growing out of a joint traffic contract between the plaintiff and the defendant corporations.

The plaintiff, the Nashua and Lowell Railroad Corporation, is alleged in the bill to have been duly established as a corporation under the laws of New Hampshire, and to be a citizen of that State. It will be convenient hereafter in this opinion to designate it as the Nashua Corporation. On the 1st of February, 1857, it owned and operated a railroad extending from Nashua, in New Hampshire, to Lowell, in Massachusetts, a distance of thirteen miles, of which five miles were in New Hampshire, and eight miles in Massachusetts. The suit was brought not only against the Boston and Lowell Railroad Corporation, alleged in the bill to be a corporation duly established by the laws of Massachusetts and a citizen of that State, but against Hocum Hosford, its treasurer, and Charles E. A. Bartlett, of the city of Lowell, also citizens of that State, but as to Bartlett it has been dismissed. On the 1st of February, 1857, this corporation, which for convenience we shall call the Lowell Corporation, owned and operated a railroad extending from Boston to Lowell, Massachusetts, a distance of twenty-six miles, with a branch to the town of Woburn a mile and a half in length.

On the 1st of February, 1857, the two corporations entered into a contract in writing with each other, "for the promotion of their mutual interest through a more efficient and economical joint operation and management of their roads and for the better security of their respective investments as well as for

the convenience and interest of the public," that their roads with their branches should "be worked and managed as one road," under certain conditions and stipulations which were stated at length. The contract recited that a large portion of the business of the two roads was joint business passing over the roads and through the branches of both parties, making desirable a common policy and unanimity of management, and that in the transaction of their business there was a mutual interest, both as to the mode of transaction and as to the tariff upon the same, as well as in all other matters relating thereto, and that the two corporations, by operating under a common management, would thereby be enabled to do business with greater facility, greater regularity, and at a greater saving of expense.

The Nashua Corporation had at this time leases of the Stony Brook Railroad, extending from its line at North Chelmsford to Groton Junction, about fourteen miles in Massachusetts, and of the Wilton Railroad extending from Nashua to Wilton, about thirteen miles in New Hampshire. The contract was originally for three years, but by a supplemental agreement of October 1, 1858, it was extended to twenty years. Among other things, it provided:

That the roads of the parties should be "operated and managed by one agent, to be chosen by the concurrent vote of a majority of the directors of each party, and who might be removed by a like vote or by the unanimous vote of either board;" and that the respective boards of directors should, "by such concurrent action, exercise the same control over the management as is usual with boards of railroad directors in ordinary cases."

That the corporations should each surrender to the joint management thus constituted "the entire control of their respective roads, shops, depots, furniture, machinery, tools, or other property necessary for the proper maintenance and working of the joint roads," reserving only certain specified property, necessary for the operation of the roads, consisting principally of real estate.

That the contracts of the Nashua Corporation with the

Wilton and Stony Brook roads should be assumed by the joint management and carried out; and that the contract with the Wilton road, which was to expire on the 1st of April, 1858, might be renewed during the continuance of the joint management.

That the Nashua Corporation should within the year 1857, at its own cost, erect a freight depot, with the necessary approaches and furniture, in the city of Lowell, upon its site at Western Avenue, which, during the continuance of the agreement, might be used for the accommodation of the joint business.

That the Lowell Corporation should complete within the year 1857, at its own separate cost, the new passenger depot at Causeway Street in Boston, then under construction, together with the tracks, bridges, and all necessary fixtures connected with the extension into that city, and at its separate expense make such alterations in the existing Boston passenger depot as had been designed by the Lowell Corporation for converting it into a freight depot; and also, without charge to the Nashua Corporation, complete at the earliest practicable time the crossing over the Fitchburg Railroad and the connection with the Grand Junction Railroad.

That the road-bed, bridges, superstructure, depots, buildings and fixtures of each road should be kept as near as might be in like relative repair from their then state and condition, and that all casualties and damages to the same, except fire risks on buildings, should be at the common risk, and charged in the current joint account, and in case of the destruction by fire of any buildings or injury to the same, that the owner should rebuild or replace them at his own cost.

That the income and expense accounts of the joint roads should be made up, as nearly as conveniently might be, by estimate to the close of each month, and the net balance should be divided and paid over, on account, to the respective treasurers of the two corporations, thirty-one per cent to the Nashua Corporation and sixty-nine per cent to the Lowell Corporation, subject to a final adjustment at the semi-annual closing of accounts; and that on the first days of April and

October in each year the said accounts should be accurately closed and balanced by settlement with each party covering and adjusting all previous payments on account, the Nashua Corporation receiving as its proportion thirty-one per cent of the said joint net income and the Lowell Corporation receiving as its proportion sixty-nine per cent thereof.

That each corporation might separately and on its own account declare such dividends upon its own stock, and payable from its own separate funds, as it might deem expedient, it being distinctly provided that "the interest upon the debts of either party must also be paid out of such separate share, and not from the common fund."

As thus seen, the contract provided that the two roads and their branches should be operated as a single road by a common agent to be appointed by the directors of both companies, and removable by them or by the unanimous action of either; that the roads and property of each party should be kept in a like relative condition and repair as they then were at their joint expense; that the Nashua Corporation should, in 1857, erect at its own expense a freight depot, with necessary approaches, in the city of Lowell, and the Lowell Corporation, in the same year, at its expense complete a passenger depot, with necessary approaches, in the city of Boston, and alter the existing passenger depot there, also, at its own expense into a freight depot; that the interest upon the debts contracted by either party should be paid out of its own share, and not from the common fund; and that the net income should be divided in the proportion of thirty-one per cent to the plaintiff, the Nashua Corporation, and of sixty-nine per cent to the defendant, the Lowell Corporation — payments on account of such division to be made upon monthly estimates, and final settlement and adjustment to be had semi-annually. The contract did not provide that the property of either corporation should be improved, or other property be acquired by either, at the joint expense of both.

Under this contract and during its continuance, the two corporations united their business and conducted it with marked success. By leases from other companies and the ac-

quisition of branch roads, a large mileage was added to their lines and a correspondingly increased business was transacted by them. In 1874, the Nashua Corporation reported to its stockholders that the two corporations then operated under their joint management one hundred and thirty-five miles, more than double the mileage at the time the contract was entered into. It is stated that thirty-three miles of this distance were added by the acquisition of the Salem and Lowell and the Lowell and Lawrence roads in 1858, and sixteen miles of it by the purchase of the Lexington and Arlington road in 1869. Contracts were made for business with connecting lines to such an extent that the two roads, during the late years of their joint operation, transported annually in the neighborhood of three hundred thousand tons of freight and two hundred thousand passengers. The net income resulting from this extended business was satisfactorily apportioned pursuant to the contract, thirty-one per cent going to the Nashua Corporation and sixty-nine per cent going to the Lowell Corporation, except as they were affected by two transactions of which the Nashua Corporation complains. One of these transactions was the alleged illegal appropriation by the Lowell Corporation of $181,962, for a passenger depot at Boston, erected by that corporation for its own benefit, and which complainant contends it was entitled to receive as its share of the net earnings of the joint management. The other transaction was the alleged illegal appropriation of $26,124, for interest on the amount expended by the Lowell Corporation in buying a controlling interest in the stock of two other railroad companies, the Lowell and Lawrence Company and the Salem and Lowell Company, which the complainant contends it was also entitled to receive as its share of the net earnings of the joint management. It is to compel an accounting for these sums and their payment to the complainant that the present suit is brought.

Before passing, however, upon the validity of these claims a question raised as to the jurisdiction of the Circuit Court must be considered. Its jurisdiction was assumed upon the diverse citizenship of the parties, and, upon the allegations of the bill, rightfully assumed. Although a corporation is not a

citizen of a State within the meaning of many provisions of the national Constitution, it is settled that where rights of property or of action are sought to be enforced, it will be treated as a citizen of the State where created, within the clause extending the judicial power of the United States to controversies between citizens of different States. The plaintiff was created a corporation by the legislature of New Hampshire in June, 1835. It is therefore to be treated as a citizen of that State. *Railway Co.* v. *Whitton*, 13 Wall. 270, 283.

But it also appears that in April, 1836, the legislature of Massachusetts constituted the same persons a corporation of that State, who had been thus incorporated in New Hampshire, giving to them the same name and authorizing the new corporation to build that portion of the railroad between Nashua in New Hampshire and Lowell in Massachusetts lying within the latter State.

It also appears that in April, 1838, the legislature of Massachusetts passed an act to unite the two corporations — the one created by New Hampshire and the one created by Massachusetts — the first section of which was as follows:

"The stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the Nashua and Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges and property granted, or to be granted, acquired or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations."

There were other provisions designed to enable the two corporations to conduct their business as one corporation. The act, however, declared that it should not take effect until the

legislature of New Hampshire had passed a similar act uniting the said stockholders into one corporation, nor until the acts had been accepted by the stockholders at a meeting called for that purpose.

In June of the same year, 1838, the legislature of New Hampshire passed an act authorizing the two corporations to unite, and providing in such case that "all the tolls, franchises, rights, powers, privileges and property" of the two corporations should be held and enjoyed by the stockholders in each and both in proportion to their number of shares therein, and that all property owned, acquired or enjoyed by either of the corporations should be taken and accounted to be the joint property of the stockholders of the two corporations, and that the two corporations should be one — the act to be in force when accepted by the stockholders of the corporations at a meeting called for that purpose.

It does not appear, so far as disclosed by the record, except in the allegations of the defendant, that there was any formal acceptance of this act by the stockholders of the two corporations; but it would seem that the corporations acted upon its supposed acceptance, for the defendants pleaded to the jurisdiction of the court on the ground that, by the legislation mentioned, the complainant was not a corporation of New Hampshire, and consequently a citizen of that State, but was a corporation of Massachusetts, and thus a citizen of that State.

In the bill as originally filed, the Nashua Corporation was the only complainant. By a subsequent amendment three persons, citizens of New Hampshire, stockholders of that corporation, were united as complainants. To the bill, as thus amended, the defendants pleaded as follows: "That this court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were, and still are all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not, and still are not all, each and every one citizens of another State, but that the said Nashua and Lowell Railroad Corporation, one of said

plaintiffs, at the time of filing said bill, was, and still is, a corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and, at the time of filing said bill, was not, and still is not, a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire. All of which matters and things these defendants do aver to be true, and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable court whether they should be compelled to make any other or further answer to said bill." This plea was argued upon an agreement as to the facts.

This plea was overruled, the court stating in its opinion that it seemed "that the defendant corporation might go into New Hampshire and there sue the plaintiff, as a New Hampshire corporation, in the Federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason," and adding that "if the defendant could sue the plaintiff in the Federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both States, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the Federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired." 8 Fed. Rep. 458.

A more satisfactory answer would, perhaps, have been, that whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that

State, for the enforcement of its rights of action in the national courts against citizens of other States. Indeed, no other State could by its legislation change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity.

But on this point we will hereafter speak more at large. At present it is sufficient to say that the decision of the court overruling the plea in abatement upon the facts agreed upon disposed of the question of jurisdiction in the court below. It is true the defendants, in their answers, subsequently filed, also made the same objection. Formerly the objection to the jurisdiction, from a denial of the complainant's averment of citizenship, could only be raised by a plea in abatement or by demurrer, and not by answer. *De Sobry* v. *Nicholson*, 3 Wall 420, 423; *Sheppard* v. *Graves*, 14 How. 504, 509; *Wickliffe* v. *Owings*, 17 How. 47. This rule is modified by the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States. 18 Stat. 472. That statute provides that if in any suit commenced in one of such courts "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may

require, and shall make such order as to costs as shall be just."

By this statute the time at which such objection may be raised is not thus restricted, but it may be taken at any time after suit brought in the cases mentioned. The principal object of the statute was to relieve the national courts from the necessity of passing upon cases where it was plain that no question was involved within their jurisdiction, and thus free them from a consideration of controversies of a frivolous and questionable character, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by colorable transfers of property or choses in action from a citizen of one State to a citizen of another, to enable the latter to go into those courts, the original owner still retaining an interest in the property or choses in action transferred, or taking a contract for a retransfer of the same to himself after the termination of the litigation. In such cases it is undoubtedly the duty of the court below, of its own motion, to deny its jurisdiction, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. *Morris* v. *Gilman*, 129 U. S. 315, 326; *Farmington* v. *Pillsbury*, 114 U. S. 138, 143.

If the question of jurisdiction could be raised in the answers of the defendants after the decision upon the issue on the plea in abatement, notwithstanding the decisions cited and the 39th Equity Rule of this court, the result in this case, though not perhaps in all cases, would be the same. Replications were duly filed to the answers, the effect of which was to deny the allegations respecting the acceptance of the acts having for their object the union of the two corporations, and those allegations were entirely unsupported by the evidence or by anything in the record; and neither in the final decree of the court, nor in its opinion, was any allusion made to the subject. The only evidence bearing upon the question is found in the legislation of the two States, New Hampshire and Massachusetts, and it is plain, as already stated, that no legislation of Massachusetts could possibly affect the existence of the complainant as a corporation of New Hampshire, or its character as a citi-

zen of that State. The act of New Hampshire of 1838, whilst in terms authorizing the two corporations to unite, did not confer any new franchise or right upon either of them. All that it did was to permit the funding or conversion of the separate interests of each stockholder in each corporation, into a common or joint or undivided interest in both; and to declare that after the two corporations were united all property owned by either should be considered the joint property of the stockholders of both. There is nothing in these provisions looking to any abandonment of its corporate character as a creation of New Hampshire or its citizenship of that State.

There are many decisions both of the Federal and state courts which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each, as a corporation of the State by which it was created, and as a citizen of that State, is not thereby lost.

In *Farnum* v. *Blackstone Canal Co.*, 1 Sumner, 46, we have an instance of this kind. It there appeared that in January, 1823, the legislature of Massachusetts created a corporation by the name of the Blackstone Canal Company, for the purpose of constructing a certain canal in that State. It also appeared that in June of that year the legislature of Rhode Island incorporated a company by the same name, the Blackstone Canal Company, and authorized it to construct a certain canal within the limits of that State. In May, 1827, the legislature of Rhode Island declared that the stockholders of the Massachusetts Company should be stockholders in the Rhode Island Company as if they had originally subscribed thereto, if both corporations should agree thereto, and that the books and proceedings of the original and associated stockholders should be deemed the books of both. And the court held that, though the two corporations were created in adjacent States by the same name, to construct a canal in each of the States, respectively, and afterwards by subsequent acts were permitted to unite their inter-

ests, their separate corporate existence was not merged, and that the legislature only created a unity of stock and interest. In giving its decision the court, by Mr. Justice Story, said: "Although in virtue of these several acts, the corporations," (one of Rhode Island and one of Massachusetts,) "acquired a unity of interests, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective acts of incorporation. Neither could exercise the rights, powers or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation."

In *Muller* v. *Dows*, 94 U. S. 444, 447, the bill averred that of the three complainants two were citizens and residents of the State of New York and one a citizen and resident of the State of Missouri. The two original defendants were corporations, namely, the Chicago and Southwestern Railway Company and the Chicago, Rock Island and Pacific Railroad Company, and they were alleged to be citizens of the State of Iowa. It was contended that the Chicago and Southwestern Railway Company could not claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence it was argued that the corporation was created by the laws of Iowa and of Missouri, and, as one of the plaintiffs was a citizen of Missouri, it was urged that the Circuit Court had no jurisdiction. But the court replied, speaking by Mr. Justice Strong: "We cannot assent to this inference. It is true the provisions of the stat-

utes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that any railroad company organized under the laws of the State, or that might thus be organized, should have power to intersect, join and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies, and such railroads were authorized 'to merge and consolidate the stock of the respective companies, making one joint stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern Railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa."

The case of *The St. Louis, Alton & Terre Haute Railroad Company* v. *The Indianapolis & St. Louis Railroad Company*, which was before the Circuit Court of the United States for the District of Indiana, and is reported in 9 Bissell, 144, and which came before this court under the title of *The Pennsylvania Railroad Company* v. *The St. Louis, Alton & Terre Haute Railroad Company*, and is reported in 118 U. S. 290, bears a strong resemblance to the one now before the court. In the bill the plaintiff was alleged to be a corporation created under the laws of Illinois and the defendants were alleged to be corporations created under the laws of Indiana and of Pennsylvania. To the bill a plea was interposed in which it was alleged that under various acts of the legislatures of Illinois and Indiana two corporations were created, one the plaintiff, *The St. Louis, Alton & Terre Haute Railroad Company*, and the other the same company in name in Indiana; that they had been consolidated by those States, and were so inseparably connected together that the plaintiff was really a corporation as well of Indiana as of Illinois; and that, as some of the defendants were corporations of the State of Indiana the court could not take jurisdiction of the case. But the court held that the fact that the two corporations created by

different States had been consolidated under the laws of those States, and that the railroad was operated by virtue of that consolidation as one entire line of road, did not prevent one of those corporations from bringing suit in the Federal court as a corporation of the State where it was created, against the corporation with which it was consolidated, which was created by the other State. Said the court, speaking by Judge Drummond: "If the defendant corporation, though consolidated with another of a different State, can be sued in the Federal court in the State of its creation, as a citizen thereof," (referring to the cases of *Railway Co.* v. *Whitton*, 13 Wall. 270, and *Muller* v. *Dows*, 94 U. S. 444,) "why can it not sue as a citizen of the State which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the Federal court, if a corporation of another State, it is clothed with all the attributes of citizenship which the laws of that State confer, and the shareholders of that corporation must be conclusively regarded as citizens of the State which creates the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the Circuit Court of the United States of Indiana against a corporation of that State."

The case turned upon the point whether the plaintiff corporation of Illinois had become also an Indiana corporation so as to lose its existence or identity and citizenship as an Illinois corporation. The court held in the negative, that it still remained an Illinois corporation, with all its rights of action as such in the United States courts.

When the case came to this court the decision of the court below was affirmed, but it would seem that when it was considered here the plea to the jurisdiction filed in the court below had been withdrawn. The question of jurisdiction was, however, examined by the court of its own motion. "It does not seem," said the court, "to admit of question that a corporation of one State owning property and doing business in another State by the permission of the latter, does not thereby become a citizen of this State also. And so a corporation of

Illinois, anthorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary may, by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred upon it by the State which created it, constitutes it a corporation of Indiana." pp. 295, 296. And again: "In a case where the corporation already exists, even if adopted by the law of another State and invested with full corporate powers, it does not thereby become such new corporation of another State, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it. We think what has occurred between the State of Indiana and this Illinois corporation falls short of this." p. 296.

Many cases might be cited from the state courts illustrative and confirmatory of the doctrine of this case. In *Racine & Mississippi Railroad Co.* v. *Farmers' Loan & Trust Co.*, 49 Illinois, 331, it appeared that in April, 1852, the legislature of Wisconsin incorporated the Racine, Janesville and Mississippi Railroad Company, and that the legislature of Illinois, in February, 1853, incorporated the Rockton and Freeport Railroad Company, both companies authorized to construct railways; that in February, 1854, these two companies entered into an agreement to fully merge and consolidate their capital stock, powers, privileges, immunities and franchises. In February, 1855, both the legislature of Illinois and the legislature of Wisconsin changed the name of these two companies to that of the Racine and Mississippi Railroad Company. It also appeared that in 1851 the Savannah Branch Railroad Company was organized under the general railroad law of Illinois, and that in January, 1856, this company entered into articles of agreement with the Racine and Mississippi Railroad Company, by

which its stock was consolidated with that of the latter company; that a majority in interest of the stockholders of the Savannah Company ratified the articles; and that in 1857 the legislature of Illinois changed the name of that company to the Racine and Mississippi Railroad Company. Thus the names of three railroad companies, created by three different States, were changed to the same name, and were allowed to be consolidated together and act as one company. The Supreme Court of Illinois held that this consolidation did not convert them into one company in fact. Said the court: "Our view of the effect of the consolidation between the Rockton Company (of Illinois) and the Wisconsin Company, which we hold to have been legally made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way and to the same degree that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and as is said by the court in *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, 297, a corporation 'can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers.'"

In *Quincy Railroad Bridge Co.* v. *Adams Co.*, 88 Illinois, 615, 619, the plaintiff was a consolidated corporation, so called, created by the laws of Illinois and Missouri for bridging the Mississippi River between those States. The plaintiff, a bridge company, to avoid taxation in Illinois, claimed to be a corporation of both States, and not of either alone. The court in its opinion said: "It is said by appellants, that this corporation, although it derived some of its powers, and in part its corporate existence, from this State, (Illinois,) derived an equal part from the sovereign State of Missouri, and, therefore, they are not a corporation created under the laws of either State. To this it is answered, and we think satisfactorily, that the legislatures of this State and of Missouri cannot act jointly, nor

can any legislation of the last-named State have the least effect in creating a corporation in this State. Hence the corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of the State which by its own vigor performs the act. The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two States without being a corporation of each State or of either State."

In *Chicago & Northwestern Railroad* v. *The Auditor General*, 53 Michigan, 91, it appeared that the general railroad law of Michigan made roads that lie partly within and partly without the State, taxable on so much of their gross receipts as corresponded to the ratio of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads and several leased lines besides, and in considering the effect of the consolidation the court said, speaking by Chief Justice Cooley: "It is familiar law that each corporation has its existence and domicil, so far as the term can be applicable to the artificial person, within the territory of the sovereign creating it; it comes into existence there by an exercise of sovereign will, and though it may be allowed to exercise corporate functions within another sovereignty, it is impossible to conceive of one joint act, performed simultaneously by two sovereign States which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

It would seem clear, from the decisions we have cited, as well as on general principles, that the plaintiff in this case must be considered simply in its character as a corporation

created by the laws of New Hampshire, and as such a citizen of that State, and so entitled to go into the Circuit Court of the United States and bring its bill against a citizen of any other State; and that its union or consolidation with another corporation of the same name organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into the Circuit Court of the United States in that district.

If the position taken by the defendants could be maintained then they could sue in the Federal court in New Hampshire the New Hampshire corporation, whilst that corporation could not enforce its claims in the Federal court in Massachusetts against the Massachusetts corporation. From the cases we have cited, it is evident that by the general law railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and that each one has its existence and its standing in the courts of the country, only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations.

We turn now to a consideration of the claims put forth by the plaintiff for a restoration to it of moneys appropriated to the use and for the benefit of the defendant corporation. As seen by the provisions of the joint traffic contract given above, the Lowell Corporation was to complete the construction of a passenger station, with all necessary approaches, in the city of Boston in 1857, at its own expense, and to alter the passenger depot then existing there into a freight depot also at its own expense; and the Nashua Corporation was, at its own expense, to erect a freight depot at the city of Lowell for the accommodation of the joint business; and in case of destruction of buildings belonging to either party, or damage to them by fire, they were to be rebuilt or replaced by the owner. As observed by counsel, it would appear that when

entered into it was not the intent of the contract that either party should be charged for improvements, additions or even restorations, in the real estate or terminal facilities of the other. But with the increase of business under the joint management, it became evident, if the business was to be retained, that larger terminal facilities at Boston were necessary; and the character and extent of the needed improvements were the subject of frequent consideration among the directors of the two companies. In the meantime the construction of another passenger station there was commenced by the Lowell Company. And at a meeting of the directors of the Nashua Corporation on the 23d of July, 1872, it was voted as follows: "That the expenditures made and to be made by the Boston and Lowell Railroad Corporation for land and building in Boston for a new station, and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad, and for the improvements in Winchester for a new station and land for railway purposes, to the amount of $20,000, are to be treated in the management of the business under the joint business contract existing between said corporation and the Nashua and Lowell Railroad Corporation as follows, viz.: The said Boston and Lowell Railroad Corporation are to be paid the interest upon such expenditures made and to be made, at the rate of seven per cent per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations and treasurer of the Boston and Lowell Railroad Corporation is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston and Lowell Railroad Corporation out of the joint receipts of said two corporations."

Under the authority of this vote there was deducted from the net earnings of the joint management the interest on the expenditures incurred in the construction of the passenger station in the city of Boston, at the rate of seven per cent,

the same being treated as operating expenses of the road. The amount of the net earnings thus diverted from the Nashua Company, being thirty-one per cent of the interest on the whole expenditure incurred, is alleged to have been $181,962, and the right to thus appropriate those earnings depends upon the sufficiency of that authority. The question thus presented is not free from difficulty. As a general rule, we should not hesitate to say that the directors of the Nashua Company could not authorize, without the previous approval of its stockholders, the construction of a passenger station at a city in a State foreign to that in which it was created, and to which its own road did not extend, or the payment of any portion of the cost of the construction. Such expenditures would not be considered as falling within the ordinary scope of their powers. See *Railway Co.* v. *Allerton*, 18 Wall. 233; *Davis* v. *Old Colony Railroad*, 131 Mass. 258, and cases there cited, particularly *Colman* v. *Eastern Counties Railway*, 10 Beavan, 1, and *Bagshaw* v. *Eastern Union Railway*, 7 Hare, 114. But the fact that the increased facilities provided at Boston were necessary to enable the joint management to retain its extended business, in which the Nashua Company was of course directly interested, changes the position of the directors of that company with reference to such expenditures, and brings them within the general scope of the directors' powers. Such is the conclusion of a majority of the court, and, therefore, the suit cannot be maintained for the restoration to the complainant of moneys thus expended, which otherwise would have gone to it as net earnings of the joint management.

But the purchase of the controlling interest in the stock of the Lowell and Lawrence and of the Salem and Lowell Railroad Companies stands upon a different footing. That was a matter solely for the Lowell Corporation. The purchase was never authorized by any vote of the directors of the Nashua Company. At the time those roads were under lease to the Lowell Corporation, and had been taken into the joint account and the net earnings divided between the two corporations in the same ratio as were the earnings of their own roads.

This gave to the Nashua Corporation all the benefits that could possibly arise from the ownership by the Lowell Corporation of a controlling interest in their capital stock. The additional burden of the purchase could in no way, therefore, be cast upon the Nashua Corporation without the consent of its stockholders, and no such consent was given either by them, nor, as already said, was any given by its directors. The pretence for the purchase was that the leases were invalid, and that other parties might otherwise obtain control of those roads, and thus injuriously affect the business of the joint management. The charter of the complainant did not extend to the purchase of controlling interests in the railroads of other States under the apprehension that such roads might become business competitors. The complainant is, therefore, entitled to an accounting by the Lowell Company for the net earnings of the joint management which were appropriated towards the interest on the sums expended in the purchase of the stock of those companies, and to the payment of the amount found due to it upon such accounting.

The decree of the court below will be reversed and the cause remanded for further proceedings in accordance with this opinion; and

It is so ordered.

Mr. Chief Justice Fuller, Mr. Justice Gray and Mr. Justice Lamar dissented on the question of jurisdiction.

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

NORRIS *v.* HAGGIN.

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

No. 333. Submitted May 2, 1890. — Decided May 19, 1890.

A plaintiff who delays for fifteen years after an alleged fraud comes to his knowledge before seeking relief in equity is guilty of laches, and his bill should be dismissed.

In equity. The defendants demurred to the bill and it was dismissed. The plaintiff appealed. The case is stated in the opinion.

Mr. J. H. McKune for appellant.

Mr. Louis T. Haggin and *Mr. S. C. Denson* 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 District of California. The plaintiff, Samuel Norris, who is appellant here, brought his suit in the Superior Court of the county of Sacramento, against James B. Haggin and Lloyd Tevis, by way of a bill in chancery. The bill gives a very lengthy account of what the plaintiff calls a "fraud and imposition" practised upon him by the defendants, who had been his agents and attorneys, and who, when he became so enfeebled in mind as to be incapable of understanding his rights or attending to business at all, procured from him conveyances and mortgages and other instruments in writing, by means of which they secured the title to over a million and a half dollars' worth of property, principally real estate.

This suit was commenced on the 21st day of August, 1884, and after a demurrer by defendants had been filed in the state

court, it was, on their motion, removed into the Circuit Court of the United States for the District of California. There the case was heard on the demurrer, which was sustained by the Circuit Court and the bill dismissed. 28 Fed. Rep. 275. From the decree dismissing the bill, the present appeal is brought.

The statements of the bill are very full and profuse in their recital of the advantages taken by the defendants of the plaintiff. He sets out in the amended bill, which was filed in the Circuit Court, that he was a citizen of the kingdom of Denmark, and a resident of the Sandwich Islands. That from the 1st day of December, 1849, until the 2d day of April, 1861, he was the owner in fee, in possession and entitled to the possession, of a certain piece or tract of land consisting of 45,000 acres, in the county of Sacramento, on the right bank of the American River, and known as the Rancho del Paso, and more particularly described in a patent from the government of the United States to him, which was duly recorded in the office of the recorder of Sacramento County. That also he was the owner of certain other parcels and lots of ground, the value of which in the aggregate amounted to $1,535,000. He then says that on or about the 1st day of January, 1855, said Haggin and Tevis became and, until a short time prior to the commencement of this suit were, the trusted agents, business managers and attorneys of plaintiff in and about the management of his business affairs connected with said property; that the defendants, for a valuable consideration, promised and undertook to act as his agents and confidential advisers, and that, having faith and confidence in their integrity and ability, he, from said first day of January, 1855, to the last of December, 1867, trusted them, and took and acted on their advice in all his business affairs, and counselled with them in all matters of importance, and confided to them all matters pertaining to his affairs. He then states that on the 4th day of March, 1859, he was injured by a severe blow on his head, whereby his senses and faculties were impaired, so that he then and thereby became deaf, and that for several months his hearing was wholly gone, and his left eye became and for several

years was sightless. That his nervous system was so far injured by said blow that for several years thereafter he was unable to take refreshing sleep, and for more than ten years thereafter he was unable, and mentally and physically incompetent, to attend in person to his business affairs or comprehend or understand what had been done in or about his said business, or to direct his agents how to act therein.

The specific acts of fraud charged to have been committed against him by the defendants are, mainly, that on the 29th day of April, in the year 1859, while in this unfortunate condition, they procured from him a note for $64,000, with a mortgage upon all his property to secure its payment; that this note was without consideration; that he did not understand it; that it was never read to him; and that, also, without his knowledge, they brought suit and foreclosed the mortgage by a decree of court, under which they purchased it at the sale, and now have the legal title; also, that they procured other judgments to be rendered against him in favor of other parties, on alleged contracts of which he had no knowledge or recollection, and in which, also, certain of this property was sold and purchased, and came ultimately to the hands of defendants Haggin and Tevis, all of which was through their contrivance. It is further alleged that, in order to make sure of their claim to this property, they procured from defendant on the 23d day of June, 1863, a conveyance, executed and delivered by him to said Tevis, of all the estate hereinbefore described, and also all other lands owned by him in California, which deed was recorded in the proper office on the 10th day of September, 1863.

The bill also alleges that these frauds did not come to his knowledge until a short time before the commencement of this suit, and then only through information derived from his counsel in the case.

There are many things about the bill which are peculiar and calculated to throw suspicion on the claims here asserted. The original bill filed in the state court was afterwards supplemented by two amended bills in the Circuit Court of the United States. The allegations of these bills are, in the main,

the same; but there are some differences in them which are calculated to attract attention. Among these are the fact that in the first amended bill filed in the Circuit Court of the United States, the execution of the note and mortgage for $64,000 is thus described: "That on the 29th day of April, 1859, your orator became indebted to said defendant Tevis in the sum of $64,000, and on that date gave said Tevis his note due on demand, for that sum, for the benefit of both defendants, and to secure said note, and on the same date, executed and delivered to said Tevis, for the benefit of both defendants, his certain indenture of mortgage securing the payment of said note by pledge of all the real estate hereinbefore mentioned; that on the 12th day of January, 1860, said Tevis commenced his suit to foreclose said mortgage in the District Court of the 6th Judicial District; that your orator, if he had at said time been able and competent to transact business and manage his affairs, might easily have arranged to pay and discharge said note without the sacrifice of his property."

In his second amended petition he declares that he knew nothing about the giving of this note; that he was ignorant of the proceedings to foreclose the mortgage; that the whole was a fraud from beginning to end; and that the note was entirely without consideration.

Another feature of the case is, that although there are three bills, including the original and amended bills, each of which purports to be complete in itself, none of them are sworn to either by complainant or by anybody for him; and this is true although the first and second amended bills purport to be bills of discovery, and some fifteen interrogatories are propounded to the defendants by the second amended bill, which they are required to answer under oath. There is also some ambiguity about the length of time during which the plaintiff was in this disabled condition, and there is no clear statement at all of what was the extent and character of that disability. It is not averred anywhere that he was insane.

As to the length of time of the existence of this disability, it is stated in one paragraph of the last amended bill, that it

existed from the time of his attack in 1859 for something more than ten years, and it is averred, and, apparently in accordance with this, as fixing the time of his recovery of capacity to attend to business: "That in the year 1869 he applied to H. O. Beatty, who had in some early cases been his attorney, for information concerning his affairs with defendants, and was advised by him that he could not act for him as he had been employed by the defendants," and he excuses himself for not seeking other advice or making other investigations, by saying that he was "ignorant of all the facts necessary to lay before an attorney, and could not communicate with a stranger so as to make himself intelligible, and felt himself compelled to accept the status of his affairs as he found them, and was incompetent to investigate and discover for himself the facts and matters hereinbefore recited."

It is to be observed that the facts which it was necessary for him to know in order to institute legal proceedings to recover his rights were those of which he could not well have been ignorant, and with reference to or on account of which he undoubtedly applied to Beatty for advice. These were the facts, that at that time all of his property was in the possession of Haggin and Tevis, who had been receiving the rents and profits, and in their actual use, for five or six years; that the mortgage he had given for $64,000 was on record in the proper office; that the foreclosure proceedings were of record in the court; that all the judgments under which his property was sold were open and notorious, and required only an attorney or person of ordinary capacity to examine them to know their existence; and that if his story, as now stated, of the imposition of the parties upon him were true, he must have known of that fraud, and could easily have ascertained about it, there being no difficulty in examining into the facts, and in obtaining his knowledge of whether he was bound by the proceedings.

We take it for granted, then, that in 1869 the plaintiff had so far recovered his mental faculties as to be aware of the fact that all of his property had passed from him, and was in the possession of the defendants. This, of course, brought

to his knowledge the fact that it was all done by fraudulent means, if the story told in his bill is true. It was, therefore, his duty to at once institute proceedings to correct the wrong done him, and the fact that one lawyer to whom he applied had already been retained by the defendants, instead of being a reason for not proceeding in the matter, was a clear intimation to him that the defendants expected to contest his right, instead of conceding it, and that it was time he should assert that right in a court of justice.

This principal note and mortgage were executed in 1859. The defendants foreclosed and got possession of the property in 1862. The present suit was brought in 1884, twenty-two years after the foreclosure proceedings, and after the possession by the defendants, everything about it being notorious and open to be known to anybody. And if we can suppose that the plaintiff's mental life was a blank up to 1869, there are still fifteen years of silence and inaction and laches unaccounted for. It is obvious that at that time he had sufficient knowledge to understand that his property had passed from him; that it was in the possession of the defendants; that it was claimed that the transfer was obtained under judicial proceedings; and that he must have known that these proceedings were open to investigation; and yet from that time up to 1884, a period of fifteen years, no movement was made to subject the parties to legal proceedings for relief against the frauds and impositions that had been practised upon him. No hindrance is suggested during all this time to any action by him. The sole reason given is, that because he could not get Mr. Beatty, he could not get any other lawyer whom he could rely upon, or who could put him in possession of the facts he needed; and this declaration is made in the face of the fact that every step on which the defendants had to rely were mortgages, duly recorded judgments rendered in open court, sales made in public, and actual possession for twenty-two years of the property in controversy.

We do not need to rely exclusively on the statute of limitations of the State of California, which makes five years the longest period allowed for bringing suit in cases of this kind.

It is sufficient to say, that as a court of equity is governed by the analogies of the statute of limitations of a court of law, and as the object of this suit is to do what generally could be done at law, namely, recover possession of real estate, and as the plaintiff is equally guilty of the laches which a court of equity regards in the same spirit it does the statute of limitation, this unexplained delay after the plaintiff had recovered whatever mental capacity he now has, must stand as a sufficient bar to the successful prosecution of this suit.

Even the principle of a court of equity, that time does not begin to run against a party on whom a fraud has been committed until that fraud has been discovered, can do the plaintiff no good in the present case. That he knew about the fraud, if there was one, in 1869, when he applied to Beatty, who refused to take his case; and that the facts out of which he was bound to know this fraud, if his bill be true, existed, were open, were patent, and could not fail to be discovered by any sort of inquiry or investigation, is so clear that there is no room for the doctrine of his having discovered these facts only a year or two before the suit was brought, or indeed after he had employed counsel.

It is a part of this general doctrine, that to avoid the lapse of time or statute of limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud as alleged in the bill were open and public acts. The note and the mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings which were open to everybody's examination, and which were probably well known in the entire community. The very circumstance that in 1869 the plaintiff consulted a lawyer upon this subject, shows that he was aware of the fact that defendants were contesting his right to the property, and that, if he had made any inquiry at all, he must have known of the proceedings on which they rested their title.

Syllabus.

Under all the circumstances of the case, we are satisfied that the two judges who held the Circuit Court were justified in sustaining the demurrer to the bill. The decree is therefore *Affirmed.*

TEXAS AND PACIFIC RAILWAY COMPANY *v.* MARSHALL.

MARSHALL *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Nos. 293, 1105. Argued April 23, 24, 1890. — Decided May 19, 1890.

The city of Marshall agreed to give to the Texas and Pacific Railway $300,000 in county bonds, and 66 acres of land within the city limits for shops and depots; and the company, "in consideration of the donation" agreed "to permanently establish its eastern terminus and Texas offices at the city of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed this bill in equity to enforce the agreement, both as to the terminus and as to the shops; *Held,*

(1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the contract to some other place;

(2) That the word "permanent" in the contract was to be construed with reference to the subject matter of the contract, and that, under the circumstances of this case it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them;

(3) That if the contract were to be interpreted as one to forever maintain the eastern terminus, and the shops and Texas offices at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity;
(4) That the remedy of the city for the breach, if there was a breach, was at law.

THE court stated the case as follows:

These are appeals from a decree of the Circuit Court of the United States for the Eastern District of Texas. The suit was originally brought by the city of Marshall in the court of the Fourth Judicial District of the State of Texas against the Texas and Pacific Railway Company, and was afterwards removed by that company into the Circuit Court of the United States for the Eastern District of Texas. The suit was a bill in chancery which sought relief for a violation by the railway company of its contract that it would establish the eastern terminus of its railroad at the city of Marshall, in the State of Texas, and would also establish its principal offices of the road at that place.

The bill sets out as the written evidence of this contract a letter from F. B. Sexton, E. D. Blanch and M. D. Ector on the part of the city of Marshall to Thomas A. Scott, president of the railway company, and the reply of Mr. Scott to this communication. These letters are set out as exhibits to the bill and are as follows:

"MARSHALL, TEXAS, *June 26th*, 1872.

"Col. Thomas A. Scott, President of the Texas & Pacific Railway Company, Philadelphia, Penna.

"Sir: Pursuant to your request we now present to you, to be laid before the board of directors for the Texas and Pacific Railway Company, a written statement of the agreement made at Mrs. King's Hotel, in this city, on the 22d inst., between yourself, on behalf of said railway company, and the undersigned, on behalf of the city of Marshall.

"The county of Harrison (of which the city of Marshall is the county seat) has determined, in the manner required by

an act of the legislature of the State of Texas, passed April 12, 1871, to donate to said Texas and Pacific Railway Company three hundred thousand dollars in the bonds of said county, payable in gold coin, having thirty years to run, and bearing seven per centum interest per annum, and to levy a tax in the manner required by said act, to provide for the payment of the principal and interest of said bonds, upon the condition that said company shall establish its eastern terminus and Texas office at the city of Marshall, and shall locate and construct at said city its main machine shops and car works, thereby securing at said city the connections with said terminus provided for by the act incorporating said Texas and Pacific Railway Company and an act supplemental thereto.

"We understand that a full transcript of the orders and decrees of the county court of Harrison County in regard to this matter has been furnished you.

"In addition to this, the city of Marshall will donate to said company sixty-six acres of land at the place and in the shape designated by you on the map of said city, whereon to locate the main machine shops, car works, and depot of said company at said city.

"The city of Marshall will procure said land by issuing its bonds in accordance with the provisions of the act of the legislature of Texas already referred to, which bonds will be used in the purchase of said land.

"The citizens of Marshall have already undertaken to cash said bonds to an extent sufficient to purchase all of said land which cannot be procured by donation directly from the owners thereof.

"The details of acquiring the title to said land by your company will be attended to by the city, and were explained in our conversation with you.

"In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city

the main machine shops and car works of said railway company.

"Awaiting your reply, we are,

"Respectfully, your ob't servants, F. B. Sexton,
"E. D. Blanch,
"M. D. Ector,
"*Committee on Part of City of Marshall.*"

"Texas and Pacific Railway Company, Office of the President.

"Philadelphia, *July* 16, 1872.

"F. B. Sexton, E. D. Blanch, M. D. Ector, committee on behalf of the city of Marshall, Texas.

"Gentlemen: I am in receipt of your favor of June 26, setting forth arrangement between your committee and myself, as president of the Texas and Pacific Railway Company. The statement, as you make it, is satisfactory, and I will have the matter ratified at the first meeting of our board of directors; but the absence of Judge Pierrepont and Mr. Stebbins in Europe for a few weeks to look after our financial matters may prevent me from getting a quorum of our directors together, but in due time it shall all be arranged.

"Very respectfully,
"Thomas A. Scott, *Pres.*"

The bill alleges that in pursuance of this contract the county of Harrison, of which the city of Marshall was the county seat, issued its $300,000 worth of bonds, which were sold and the proceeds paid over to the company, and that the city of Marshall purchased, at a cost of $60,000, the sixty-six acres of land mentioned in this contract and conveyed it to the railway company. This conveyance was by two separate deeds, and it is pertinent to note that in each one of these deeds it is recited that the ground was conveyed to the railroad company "whereon to locate the main machine shops, car works and depot of said company at said city," and that the Texas and Pacific Railway Company agreed to establish

its eastern terminus and Texas office at the city of Marshall, and also to establish and construct at said city the main machine shops and car works of said railway company.

Shortly after these contracts and conveyances, which were made and completed in the years 1872–3, the railway company did establish its principal offices at Marshall, constituting that city its eastern terminus; so that the court finds that "the contract was duly executed upon both sides, and that the eastern terminus of said railway company and the Texas office of said company and the main machine shops and car works of said railway company are and were established at the city of Marshall." The bill avers that although things remained in this condition until some time in December, 1881, the defendant has since that time moved various parts of its machine shops and its Texas office to other cities, and, in fact, has by various changes, not important to be recited here, caused the city of Marshall to cease to be the terminus of the road.

In the view that we shall take of this case it is not important to inquire what particular offices or what particular machinery, work shops, etc., of the railroad company have been removed from the city of Marshall, nor how far the railroad company has ceased to hold the city of Marshall as the eastern terminus of its road. It may be conceded that the allegations of the bill and the evidence in the case establish the fact that by the operations of said railway company the full and complete object of the city of Marshall in its contract with that company is not now accorded to it.

To the bill there was a demurrer, which being overruled, there was filed an answer by the company, and upon the final hearing the Circuit Court entered a decree forbidding the company from removing any more of its offices from the city of Marshall, and enjoining it to continue those which remained there, at that place, and otherwise to perform the contract. It did not, however, by any mandatory order decree that the corporation should restore to the city of Marshall the offices, the shops and the other things connected with its operations under the contract with that city, which it had removed. From

this decree both parties have appealed, the railway company denying that there was any ground of relief against it, and the city of Marshall on the ground that the complete relief which it sought had not been given to it.

Mr. W. Hallett Phillips for the city of Marshall.

I. The argument of the company is that the contract was fully performed by their establishing at Marshall the offices, machine shops and terminus, and that there was no obligation to retain them; that the county and city simply relied on the faith that, once established, the interest of the company would induce their retention.

The question then is, whether the donation by the county of $300,000 of bonds, and by the city of real estate costing $60,000, made upon the consideration that the company would make Marshall the eastern terminus, and permanently establish there its shops, car works and Texas offices, left it in the power of the company, at any time after receiving the benefits of the contract, to abandon Marshall, make another place its terminus, and remove its Texas office and shops?

Certainly such a construction of the bargain cannot be made unless imperatively called for by its terms.

The first inquiry must be as to the extent and meaning of the contract.

The petition of the freeholders of Harrison, upon which the election was ordered to determine whether the bonds should be issued to the railway, specifies "that the said donation, to be conditioned upon the fact that the eastern terminus of said railroad shall be permanently established at said city of Marshall, (the county seat,) with its Texas office and main shops."

This was the proposition submitted to the electors and contained in the contract with the county and city.

The general prosperity and growth of the city were the objects of the donation. The conditions of the contract to be performed by the company were commensurate in their importance with the large expenditure incurred by the county and city. The establishments of the company were to be fixed at

the city, and could not be removed by the company, unless acting in obedience to subsequent law applicable to the case.

Unless this is the true construction of the contract, no force can be attached to the provision as to permanency; for, under the opposing argument, that which was established one day could be removed the next. In fact the company in its answer contends for this right of immediate removal and to show their understanding of the contract, introduce a resolution of the board of directors of the company by which it was resolved "that the offices be located, *until otherwise ordered*, at Marshall." What sort of *permanency* is this, when it is shown that the establishments were *made* at Marshall until "*otherwise ordered?*" The case of *Mead* v. *Ballard*, 7 Wall. 290, relied on by opposing counsel is not applicable. There the whole question was whether the institute was obliged to rebuild on the land granted, or forfeit the same. The court held that inasmuch as the institute, by the terms of the grant, had to be permanently located within a year on penalty of reversion, such right of reversion ceased when the institute was established within the year, and the title was not subsequently divested by failure to rebuild, after the buildings had been destroyed by fire.

II. Assuming the contract to be legal, it is objected that equity is without jurisdiction. The argument seems to be that the company should be allowed to violate the contract and the city left to such redress as it may find in an action for damages.

But can it be the law that the city must give up all the public advantages secured to it by the contract and which constituted its sole consideration? Could any pecuniary compensation be the equivalent therefor?

It must be admitted to be very uncertain what damages could be recovered, unless, indeed, the amount is of the donation, a very inadequate recovery.

The remedy at law is not plain; it is not adequate nor complete.

The case seems to be peculiarly one in which the remedial and preventive jurisdiction of chancery can be invoked to

Counsel for Parties.

prevent by injunction the consummation of an injury, which cannot be estimated and sufficiently compensated by a pecuniary payment.

Another objection to the decree is that the court has no adequate means of enforcing it, because the court cannot compel the company to maintain and operate the shops at Marshall; that the decree is in effect one of specific performance.

But were it admitted that the court could not do complete justice to the city, that affords no sufficient reason why it should not repair, as far as lies in its power, the wrong inflicted and threatened, by an injunction, restraining the breach of the conditions of the contract, especially in a case like this where the defendant retains the full benefits resulting from the contract.

In order to sustain the decree, it is not necessary to decide whether the contract is one which, in the first instance, equity would specifically enforce. We deny that the agreement was such as is contended by appellant, or that obedience to the decree could only be enforced by undertaking the operation of the railroad. It is difficult to perceive why the court cannot prevent the removal of establishments acknowledged to have been made under the contract.

If the contract, as contended for the company, is one requiring the performance of continuous duties and supervision, that affords no reason why a court of equity should not by injunction prevent the violation of the contract. It is now settled by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. *Western Union Tel. Co.* v. *Union Pacific Railroad*, 3 Fed. Rep. 423, 429.

Mr. John F. Dillon (with whom was *Mr. Harry Hubbard* on the brief) for the Texas and Pacific Railway Company.

Mr. Augustus H. Garland for the city of Marshall.

Mr. James Turner and *Mr. C. B. Kilgore* filed a brief for the city.

Opinion of the Court.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

As regards the appeal of the railway company, two principal questions are presented. The first of these is, was there a valid contract that the corporation should not only establish its eastern terminus at Marshall City and put up there the depot buildings and machine shops, car works, etc., included in the contract, but should keep them there perpetually? Second, if this were so, is it a contract which a court of chancery should enforce?

If it were not for the word "permanent," as found in the communication of the committee of the city of Marshall to Mr. Scott, we should not think it easy to justify the inference that the obligation was to maintain forever at that place what the company engaged to establish there. The clause of the letter of this committee to Colonel Scott, which first mentions the conditions is, that the bonds of the county of Harrison were voted upon the condition, "that said company shall establish its eastern terminus and Texas office at the city of Marshall, and shall locate and construct at said city its main machine shops and car works, thereby securing at said city connections with said terminus provided for by the act incorporating said Texas and Pacific Railway Company and an act supplemental thereto." The same proposition is afterwards stated in the same letter in this form: "In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company."

The two conveyances by the city of the land which constituted the sixty-six acres in reciting the consideration for which the conveyance was made, speak of it, as we have already said, as an agreement to establish the eastern terminus at the city of Marshall, and also to construct at the city the main machine shops and car works of said railway company. This shows

that while the obligation of the company to establish its eastern terminus at the city of Marshall and construct its depot and machine shops and car works is spoken of at one time as an agreement to permanently establish these appurtenances to the railroad, yet at other times, when the same subject is mentioned as the consideration for what was done by the city and the same matters recited, the word "permanent" is omitted. The object of the city might very well be supposed to have been attained by the selection of the city as a terminus of the railroad, the construction and establishment there of its offices, its depot, its car manufactory and other machinery, since there was hardly any ground to suppose that the railroad company would ever have inducements enough to justify it in removing all these things to another place. And in point of fact it appears that for a period of about eight years they were permanently located at the city of Marshall. If, however, the city desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual. But it seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus, and should establish there its depot, its machine shops and its car works; and that this should be done in the ordinary course of its business, with the purpose that it should be permanent. But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine shops and car shops there and that whatever might be the changes of time

and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning.

It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean forever, or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject matter of the contract, and we think that these things were permanently established by the railway company at Marshall.

A case almost precisely like the one under consideration came before this court and is reported in 7 Wall. 290, *Mead* v. *Ballard*. In that case the ancestor of Mead, on the 7th day of September, 1847, conveyed to Amos Lawrence, of Boston, a certain tract of land in Wisconsin, in which conveyance was the following language: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin, chartered by the legislature of said Territory, shall be permanently located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money

without interest, the said land shall revert to and become the property of said grantors." The board of trustees of the institute, on the 9th of August, 1848, passed a resolution locating the institution on the land described in the deed. The necessary buildings were made, and the institution was in full operation by November, 1849. The buildings cost about $8000, but were burned down in the year 1857 and were never rebuilt. But in 1853 a larger building, called the university, was erected on an adjoining tract of land. Under these circumstances, Mead, the heir of the grantor, tendered the purchase money, demanded a reconveyance of the land, and on its refusal brought suit. In that case, the condition was for the permanent location of the university. In the present case, the condition is for the permanent establishment of the eastern terminus of the road, with its machine shops, car works, etc. In that case the court held that the contract was complied with when the trustees of the institution located, by a resolution of its board, the university on the ground conveyed, and built what was then the necessary houses for its use. It also held that the word "permanent" did not require of them to reconstruct these buildings when they were burned down, and that the title to the land was not forfeited because of this failure to rebuild, although they built other houses on an adjoining tract of land; and though part of the reasoning of the court is based upon the fact that the contract in that case required the location of the institute to be made within a year from the date of the deed, and that it necessarily meant something which could be done within that year, we do not see that the principle of the present case varies much from that. The court said in that case that "counsel for the plaintiff attach to the word 'permanent' in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the in-

tention of the parties." So we think of the present case. It cannot be supposed that the parties intended a covenant to build and rebuild, a covenant never to change any of its offices, or the place of manufacturing cars and other machinery necessary for the use of the company, nor that it would forever keep up, for the benefit of the town of Marshall, this establishment, when once organized.

But we are further of opinion, that if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the city of Marshall, to keep its main machine shops there, and its car works there, and its other principal offices there, although the exigencies of railroad business in the State of Texas may imperatively demand that these establishments, or some of them, should be removed to places other than the city of Marshall, and that this would be also required by the convenience of the public, in which case both the public convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual, that all of its business offices and business shall forever remain at Marshall.

It appears to us that if the city of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. Nor do we see any substantial difficulty in ascertaining this compensation. Though there may not be any rule by which these damages can be estimated with precision, this is not a conclusive objection against a resort to a court of law, for it is very well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done, but, with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect.

There would be, in this instance, the sums of money advanced by the city, and possibly the bonds furnished by the county, as a means of ascertaining the compensation due to the city of Marshall. Other considerations, such as the length of time that the contract has been complied with, the value of this compliance to the city, the probable loss of taxable property resulting from the violation of the contract, and other elements not necessary to be enumerated now, might enter into the question of damages, if the contract has really been violated. On the other hand, the enforcement of the contract by a decree of the court requiring the company to restore in all its fulness the offices, the workshops, and whatever has been removed from the city of Marshall, and the continued and perpetual compliance with all those conditions by the company, to be enforced in the future under the eye of a court of chancery, against the public interest, and, perhaps, manifestly to the prejudice and injury of the railroad company, exercising to some extent the public function authorized by the acts of Congress or of the legislature of Texas, present difficulties far more formidable than the action at law.

If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance.

The cases cited on this subject in the brief of counsel we think are conclusive. In *Marble Company* v. *Ripley*, 10 Wall.

339, 358, it was said: "Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor and cultivated judgment. It is in effect a personal contract to deliver marble of certain kinds, in blocks of a kind that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was *sound*, and whether it was of *suitable size* or *shape* or *proportion*."

This question was very fully considered, in reference to a contract for building a railroad, in the case of *Ross* v. *Union Pacific Railway Company*, 1 Wool. C. C. 26, in which nearly all the authorities up to that time are fully considered. It was decided that the court could not enter upon the duty of compelling one party to build a railroad, and the other party to pay for it according to contract. See also *Port Clinton Railroad Company* v. *Cleveland & Toledo Railroad Company*, 13 Ohio St. 544; *South Wales Railway Co.* v. *Wythes*, 5 DeG. M. & G. 880; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Company*, L. R. 9 Ch. 331.

Without more minute examination of the authorities on this subject, we are of opinion that the plaintiff is not entitled to any relief in a court of equity. The decree of the court granting such relief is therefore

Reversed, and the case remanded to the Circuit Court with directions to dismiss the bill. As the appeal of the plaintiff therefore fails, it is to pay the costs of this court on both appeals.

Mr. Justice Brewer dissented from both the grounds set forth in the opinion.

RICHELIEU AND ONTARIO NAVIGATION COMPANY *v.* BOSTON MARINE INSURANCE COMPANY.

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

No. 296. Argued April 25, 1890. — Decided May 19, 1890.

Where a policy of marine insurance excepts losses and perils occasioned by want of ordinary care and skill in navigation, or by want of seaworthiness, and a statute of the country to which the insured vessel belongs requires all vessels to go at a moderate speed in a fog, and the insured vessel, having a defective compass, is stranded while going at full speed in a fog, and a loss ensues, the burden of proof is on the insured to show that neither the speed at which the vessel was running nor the defect in the compass could have caused, or contributed to cause, the stranding.

The exception in a marine policy of losses occasioned by unseaworthiness is, in effect, a warranty that a loss shall not be so occasioned, and it is therefore immaterial whether a defect in the compass of the vessel which amounts to unseaworthiness was or was not known before the loss.

When in a policy of marine insurance it is provided that acts of the insurers or their agents in recovering, saving and preserving the property insured, in case of disaster, shall not be considered as an acceptance of an abandonment, such acts in sending a wrecking party on notice of a stranding of a vessel, in taking possession of it and in repairing it, if done in ignorance of facts which vitiated the policy, do not amount to acceptance of abandonment; but it is a question for the jury to determine whether such acts, taken in connection with all the facts, and with the provisions in the policy, amounted to such an acceptance.

Although a protest by a master of a vessel after loss is ordinarily not admissible in evidence during his lifetime, yet in this case it was rightfully admitted, because it was made part of the proof of the loss.

A stranded insured vessel, having been recovered and repaired, was libelled and sold for the repairs, neither the owners nor the insurers being willing to pay for them. In an action between the owners and the insurer to recover the insurance; *Held*, that the record in that suit was not admissible against the insurer to establish acceptance of an abandonment.

This was an action upon a policy of insurance, bearing date May 1, 1883, insuring the steamer Spartan, a Canadian vessel of six hundred and seventy-eight tons burden, from April 1 to November 30, 1883. The plaintiff in error, a Canadian cor-

poration, chartered the Spartan in the spring of 1883 to the Owen Sound Steamship Company, also a Canadian corporation or association, and she was being run by that company on the route between Owen Sound on Georgian Bay, Ontario, to Fort William, Ontario, on the north shore of Lake Superior, when the loss occurred. The perils insured against were thus stated in the policy:

"Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz.: Damage that may be done by the vessel hereby insured to any other vessel or property, incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading, stowing and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness ; theft, barratry or robbery."

The steamer was valued at $50,000 and was insured in all to the amount of $40,000. Her crew consisted of the master, two mates, two engineers, two wheelsmen, four firemen, a full complement in the cabin, and four or five deck hands. She had made three trips from the opening of the season of navigation; and on the 18th of June, 1883, left Fort William, on her return trip to Owen Sound, and stopped en route at Silver Island on the north shore of Lake Superior, leaving that port at 12.45 P.M., and was stranded on the southwest point of Caribou Island, in Lake Superior, at about two o'clock in the morning of June 19. The evidence tended to show that on this occasion, "for the first time," she laid her course from Silver Island for Passage Island, thence direct for White Fish Point on the south shore of Lake Superior. Between Silver Island and Passage Island a thick fog arose, which continued until after the stranding. She passed Passage Island at 2.30 P.M., thence the chart course lay S. E. by E. $\frac{1}{2}$ E. to White Fish Point, passing about eight miles to the southward of Car-

ibou Island, one hundred and thirty-two miles from Passage Island. About eight o'clock in the evening of June 18, the master retired to his stateroom, leaving the second mate on watch, and gave him the following written instructions:

"Monday Evening.

"Mr. Harbottle: If it continues thick at 10 o'clock P.M. keep her S. E. by E. until 3 A.M.; then keep her S. E. by E. ½ E. small. If it clears continue on your course S. E. by E. ¼ E."

The fog continued dense during Harbottle's watch, and he made the course prescribed until he came off watch about 1 o'clock A.M. on the 19th, running the steamer at full speed, which was twelve or twelve and a half miles per hour, the master testifying that his instructions "were based on the steamer's running on time." At twenty minutes past one in the morning, Wagner, the first mate, relieved Harbottle and took charge, navigating the vessel under the same orders, the fog being so dense, he says, "that you could not see anything." There was no lookout forward; no one else on deck during either watch, beside the mate and the wheelsman; no soundings were taken; and the steamer was kept running at her full rate of speed, carrying her regular steam of forty-five pounds, her maximum pressure being forty-seven pounds. She struck on the southwest point of Caribou Island, in Canadian waters, though she should have passed seventeen miles to the southward of that island. Upon the ordinary course from Passage Island to White Fish Point, she would have passed about eight miles south, but the testimony tended to show that she took a course somewhat southerly of the most direct course between the two points, which should have carried her some seventeen miles south.

Notice of the disaster and request for assistance were sent by the master to the insurers' agents, who received it, June 22, and sent to the aid of the Spartan a tug and wrecking expedition, under command of Captain Swain, which left Detroit June 23, and arrived at Caribou Island June 25. June 26, plaintiff sent a telegram to the insurance agent at Toronto, who was the broker who negotiated this insurance, through defend-

Statement of the Case.

ant's agents at Buffalo, as follows: "Spartan ashore on Caribou Island, and this company beg to inform you that they abandon the boat and claim a total loss. Please inform the underwriters."

The steamer was brought to Detroit, as alleged on the one side, by the order of her master, and there docked and repaired under his instructions, which is denied on the other. The cost of rescuing the steamer and towing her to Detroit was $7455.13, which was paid by the underwriters. It is in dispute as to who ordered the repairs, or claimed or exercised control over them or the steamer, or directed where she should be brought, but it is not shown that either plaintiff or defendant did. The repairs were made by the Detroit Dry Dock Company, and completed in September, at a cost of from $23,000 to $24,000. In November, plaintiff served on the insurers proofs of loss, verified November 3, 1883, in which it is stated: "That the said vessel, in the prosecution of a voyage from Fort William, on the north shore of Lake Superior, in the Province of Ontario, to Owen Sound, on Georgian Bay, in said Province of Ontario, at about two o'clock on the morning of the 19th of June last, in a fog, ran ashore on the southwest shore of Caribou Island, and became a wreck and total loss, and was duly abandoned by her owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you; in consequence of which the said Richelieu and Ontario Navigation Company suffered damage, sustained loss or damage, within the perils insured against under the said policy No. 1965, to the amount of ten thousand dollars, as will further appear by particular statement herewith."

The agents of the insurers knew nothing of the facts attending the stranding, except what the protest showed, until after March, 1884. Up to that time plaintiff and the underwriters had been negotiating for a settlement of the loss, but could not agree upon the liability for duties upon the repairs, but after discovery of the facts the defendant and the other insurers refused to pay. Upon the trial the jury found a verdict for the defendant, on which judgment was entered.

The opinion of Judge Brown, the district judge, on the motion for a new trial, will be found in 26 Fed. Rep. 596.

The cause was brought to this court by writ of error, and errors were assigned as follows: That the Circuit Court erred

1. In ruling that no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made upon the steamer Spartan.

2. In striking out all the testimony respecting the acts and statements of Gibson.

3. In excluding this question put by plaintiff's counsel to the witness Patterson: "Q. What is the custom of Canadian vessels about carrying a lookout forward?"

In refusing to instruct the jury according to the requests made by plaintiff's counsel, as follows:

4. *First.* "If the jury find that the Spartan, while navigating Lake Superior on June 19th, 1883, and while a dense fog prevailed, was stranded on Caribou Island, and that the insurers were promptly notified of the disaster, and that proper proofs of loss were furnished to the insurers, then the plaintiff has made a case which *prima facie* entitles it to a verdict in this case."

5. *Second.* "The stranding of the Spartan on Caribou Island while a dense fog was prevailing was an accident which is *prima facie* covered by the policy and for which the insurers are *prima facie* liable."

6. *Third.* "If the jury find that the fog contributed proximately to the stranding of the Spartan, then the insurers are liable for the loss caused by such stranding."

7. *Fourth.* "There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass had not varied more than vessels' compasses ordinarily do, that the steamer had been navigated by the same compass without trouble from the time she left La Chene, on the St. Lawrence River, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for so believing, then the insurers

would not be relieved from liability on account of any supposed defect in the compass."

8. *Fifth.* "If the jury find that the insurers received the notice of abandonment which has been offered in evidence, and that without notice to the owners of the steamer they sent Captain Swain with a wrecking expedition to her rescue, and that Captain Swain brought her to Detroit for repairs, and was paid for so doing by the insurers; that the steamer was subsequently surveyed for repairs by the insurers and repaired, and that the owners never interfered with the making of the repairs, then the jury may consider these facts as evidence of an acceptance of the abandonment."

9. *Sixth.* "If the jury find that the insurers, upon receiving notice of the abandonment from the owners, sent a rescuing expedition for the purpose of rescuing the Spartan and taking her to a place of repair, and that the Spartan was gotten off by the wreckers and brought to Detroit for repairs and was there repaired without any notice whatever to the plaintiff, and that the plaintiff never interfered with or exercised any control over or made any claim to said steamer after their abandonment, then the jury may consider these facts as evidence tending to prove an acceptance of the abandonment on the part of the insurers."

10. *Seventh.* "If the jury find that the insurers sent the wrecking expedition to the Spartan with the intention of rescuing and repairing her without consulting the plaintiff, then it was the duty of the insurers to repair her within a reasonable time and tender her back to the owners free from all liens for such repairs. Their failure to do so is evidence of an acceptance of abandonment and their liability to pay as for a total loss."

11. *Eighth.* "If the jury find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff; that the insurers failed to pay for said repairs, but allowed the steamer to be libelled and sold by the court of admiralty to satisfy the lien for such repairs without notice to the plaintiff, then this would amount to an acceptance of abandonment."

12. *Ninth.* "If the jury find that there was an actual or constructive acceptance of the abandonment, then the plaintiff is entitled absolutely to recover as for a total loss."

And in instructing the jury as follows:

13. "The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in regard to this fact — that is, the rate of speed — but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel, or by her want of a lookout, or by the defects of the compass, the defendant is not liable."

14. "With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective compass, and while that statement is not binding upon the plaintiff, and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it undoubtedly is entitled to considerable weight."

15. "In case you shall find, as I have said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred through peril of the sea and from no want of skill in navigation and no want of competency in the master or insufficiency of the crew and from no fault on the part of the vessel, then your verdict should be for the plaintiff."

16. "I charge you, as requested by the defendant, that under the policy of insurance in this case the expense of bringing her to Detroit must be shown by the plaintiff to have been occasioned by the risk against which the defendant had insured the steamer; and if the stranding of said steamer and the expense incurred in effecting her relief resulted from any incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, or from any unseaworthiness of said vessel, then the plaintiff cannot recover."

17. "I charge you, as requested by the defendant in his seventh request, that under the evidence in this case the

burden of proof is upon the plaintiff to show that the stranding of said steamer could not have been guarded against or prevented by the ordinary exertions of human skill and prudence."

18. "As the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, the plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or have contributed to cause the stranding of the steamer. The burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was occasioned by the peril insured against by the defendant."

19. "If there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by, consequent upon, or arose from such defect in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover."

Mr. F. H. Canfield for plaintiff in error.

The rulings of the court below which are now presented for review, may be considered under two distinct heads:

1st. Those which relate to the cause of the loss.

2d. Those which relate to an acceptance of the abandonment.

I. In behalf of the plaintiff we submit that the stranding of the steamer at night in a fog, with a heavy sea, was *prima facie* a loss by a peril insured against, and we therefore insist that the court erred in not charging the jury in accordance with plaintiff's first, second and third requests, which were to the effect that the stranding of the Spartan on Caribou Island, while a dense fog was prevailing, was an accident which was *prima facie* covered by the policy, and for which the insurers were *prima facie* liable; and that if the fog contributed proximately to the stranding, the insurers would be liable.

It is clear from the charge given and also from the opinion of the court upon the motion for a new trial, that the court

departed from the rule applicable in cases of marine insurance, which regards only the proximate cause of the loss, and according to which, if the proximate cause of the loss was a peril insured against, the underwriters would be liable, although such proximate cause may have been brought into operation by a peril not insured against; or, to state the rule in another form, if the proximate cause of the loss be a peril insured against, the underwriters will be liable, although other perils not covered by the policy may have contributed to bring about the loss. *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507; *Waters* v. *Merchants' Ins. Co.*, 11 Pet. 213; *Peters* v. *Warren Ins. Co.*, 14 Pet. 99; *Orient Ins. Co.* v. *Adams*, 123 U. S. 67; *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351; *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581; *S. C.* 2 App. Cas. H. L. 284; *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *Ionides* v. *Universal Ins. Co.*, 14 C. B. (N. S.) 259.

We submit, that by the true interpretation of this policy the insurers take upon themselves *all* the perils of the lakes, rivers, etc., that may come to the damage of the vessel, and that they are responsible for all losses except those "consequent upon" "arising from" or "caused by" the excepted perils; and if the underwriters seek to defend upon the ground that there was "a want of ordinary care and skill" in the navigation, the burden of proof is with them to show that such want of ordinary care and skill was the proximate cause of the loss.

In *Union Ins. Co.* v. *Smith*, 124 U. S. 405, the policy was identical with the one at bar, and it was there held that the defendant, having set up in its answer that the loss was occasioned by want of ordinary care in managing the vessel, it was not error to charge the jury that such want of ordinary care must be shown by a fair preponderance of proof on the part of the insurers.

Again, these exceptions are to be construed most strongly against the underwriters, they being the party by whom, and for whose benefit, the exceptions were introduced into the policy. *Palmer* v. *Ins. Co.*, 1 Story, 360; *Ins. Co.* v. *Wright*, 1 Wall. 456, 468; *Tudor* v. *New Eng. Ins. Co.*, 12 Cush. 554.

Argument for Plaintiff in Error.

Even in actions of tort the negligence of the plaintiff will not defeat his recovery, unless it contributed proximately to his injury. Beach on Contributory Negligence, pp. 7, 9, 27, and cases there cited: *Railroad Co.* v. *Stout*, 17 Wall. 657.

Nor is the rule applicable to common carriers who have negligently exposed the goods intrusted to their care to a peril excepted in their bill of lading, to be applied to cases of marine insurance. A carrier becomes an insurer of the safe delivery of goods, unless prevented by the act of God or the public enemy, or unless the loss results from a cause excepted in the bill of lading. But if the carrier's negligence has exposed the goods to loss from such excepted cause, he is not to be held liable, unless such negligence contributed proximately to the loss. *Railroad Co.* v. *Reeves*, 10 Wall. 176; *Morrison* v. *Davis*, 20 Penn. St. 171; *Denny* v. *New York Cent. Railroad*, 13 Gray, 481; *Daniels* v. *Ballantine*, 23 Ohio St. 532.

Why should the assured in a case like this be held to a stricter rule than the one applicable to carriers under the decision in 10 Wallace above cited?

The decisions of the Admiralty courts cited by the District Judge in his opinion, holding that a violation or a departure from the statutory rules intended to apply in cases of collision, is to be presumed to have contributed to the disaster, have no bearing upon the present case, for the reason that neither those rules nor the doctrine of contributory negligence has any application to the case at bar. *Hoffman* v. *Union Ferry Co.*, 68 N. Y. 385.

The instruction of the court is not to be sustained by reason of the Canadian statute referred to by the District Judge, being chapter 29, 43 Vict. See *Grill* v. *Iron Screw Collier Co.*, L. R. 1 C. P. 600; *The Pennsylvania*, 19 Wall. 125.

If it was intended that these statutory rules should be incorporated into this policy, why is it not so stipulated?

What is ordinary care in a case like this is a question of fact for the jury, to be determined by the evidence as to the manner in which such steamers are ordinarily navigated. And whether there was a want of ordinary care in navigating the

Spartan at her usual speed upon the broad lake — with no other vessel in the vicinity, simply because a fog prevailed, was a question for the jury.

II. The court erred in charging the jury that "under the evidence in this case the burden of proof is upon the plaintiff to show that the stranding of the steamer could not have been guarded against or prevented by the ordinary exertions of human skill and prudence."

We claim this to be erroneous for two reasons:

(1) Because it puts the burden of proof upon the wrong party. As already shown, but for the exceptions in the policy, negligence on the part of the officers and crew would be no defence. And under the decision of this court in *Union Ins. Co.* v. *Smith*, 124 U. S. 405, already cited, the burden is with the *defendant*, if it seeks to bring itself within the exception of a want of ordinary care in the navigation of the vessel, "to establish negligence by a fair preponderance of proof."

(2) There is nothing in the law of marine insurance even under such a policy as this, which relieves the insurer from liability, although the insured may have failed to use all ordinary skill and prudence to prevent disaster. Unless the want of such skill and prudence was the *proximate* cause of the loss, it would be no defence.

III. The defence of unseaworthiness relates wholly to the compass.

It should not be forgotten that the policy of insurance in this case was a *time* policy, and that there is no warranty of seaworthiness in a time policy. If the vessel was seaworthy at the time the policy was issued, no subsequent unseaworthiness would affect the liability of the insurers. *Thompson* v. *Hopper*, 6 El. & Bl. 171; *Merchants Ins. Co.* v. *Morrison*, 62 Illinois, 242; *Gibson* v. *Small*, 4 H. L. Cas. 353; *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581.

The record shows, beyond all question, that the steamer was seaworthy when the policy was issued. She had been navigated by the same compass during the entire season up to the time of the loss. From Lachine, on the St. Lawrence River, she had been navigated to Owen Sound. From Owen

Sound she had made three trips on her regular route to Port Arthur, running as well by night as by day, encountering much fog, but experiencing no difficulty whatever from the compass. The owner of an appliance or a vessel, which has been known to operate safely and satisfactorily in a variety of circumstances, may continue to use it without subjecting himself to the charge of negligence simply because an accident occurs subsequently, he being in ignorance of its actually having become defective. This is a proposition sustained by good sense and judgment, and is recognized by the authorities. *Burke* v. *Witherbee*, 98 N. Y. 562; *Loftus* v. *Union Ferry Co.*, 84 N. Y. 455; *Cleveland* v. *New Jersey Steamboat Co.*, 68 N. Y. 306; *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1.

IV. The court erred in admitting the protest in evidence.

2 Arnould on Ins. 1353, says: "The protest of the captain, so long as he is living, is in no case evidence on the one side or the other; the only use that can be made of it is to contradict his testimony if he vary from it; it cannot be adduced to disprove the grounds of the condemnation of a foreign prize court; nor will the brokers, having shown it to the underwriters with other papers relating to the loss, on demand of payment, make it evidence as against the assured." See also *Senat* v. *Porter*, 7 T. R. 158.

That the admissions of the master, not made as part of the *res gestæ*, are not admissible in evidence, is well established by the authorities. *Packet Co.* v. *Clough*, 20 Wall. 528; *Am. Steamship Co.* v. *Landreth*, 102 Penn. St. 131; *Ins. Co.* v. *Mahone*, 21 Wall, 152, 157; *Adams* v. *Hannibal &c. Railroad*, 74 Missouri, 553, 557, 559; *Lane* v. *Bryant*, 9 Gray, 245; *Bacon* v. *Charlton*, 7 Cush. 581; *Luby* v. *Hudson River Railroad*, 17 N. Y. 131; *Randall* v. *N. W. Tel. Co.*, 54 Wisconsin, 140; *Bellefontaine Railroad* v. *Hunter*, 33 Indiana, 335.

V. As to the acceptance of the abandonment: We claim that the evidence shows, or at least tends to show, a constructive acceptance by the underwriters. That the taking possession of a vessel, or proceeding to repair her by the underwriters after notice of abandonment, without protest or notice

of their intentions, is evidence of an acceptance, is recognized by all the authorities. *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Mon. 541, 557; *Provincial Ins. Co.* v. *Le Duc*, L. R. 6 P. C. App. 224; *Northwest Transportation Co.* v. *Continental Ins. Co.*, 21 Fed. Rep. 171; *Northwest Transportation Co.* v. *Thames and Mersey Ins. Co.*, 59 Michigan, 214; *Richelieu and Ontario Navigation Co.* v. *Thames and Mersey Ins. Co.*, 40 Northwestern Rep. 758; *Copeland* v. *Phœnix Ins. Co.*, 1 Wool. C. C. 278; *S. C.* 9 Wall. 461, *sub nom. Copelin* v. *Ins. Co.*; *Norton* v. *Lexington &c. Ins. Co.*, 16 Illinois, 235; *Shepherd* v. *Henderson*, 7 App. Cas. 49; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. 191; *S. C.* 1 Met. 160.

Defendant's counsel may argue that the underwriters were ignorant of the circumstances surrounding the loss, and therefore their taking possession of the steamer after notice of abandonment and getting her off, would not amount to acceptance of abandonment.

If the insurers were in fact ignorant of the circumstances surrounding the loss, (which is not conceded,) they could not go on indefinitely under the notice of abandonment. It was their duty to make inquiry. Mere ignorance on their part of the circumstances surrounding the loss would not prevent an acceptance of the abandonment, which their actions would otherwise indicate. They are to be judged by their acts.

Mr. Henry H. Swan for defendant in error

Mr. Joseph H. Choate for plaintiff in error.

It is impossible to sustain the general verdict which the jury found upon the several alternative propositions of law contained in the charge, which were duly excepted to. Where several distinct grounds of liability on the part of the defendant are submitted to the consideration of the jury, if either was improperly submitted, and the verdict is a general one, the judgment will be reversed, unless it appear that some one of the others was so clearly established by uncontroverted evidence as to have rendered it the duty of the court to direct

a verdict for plaintiff, and this for the obvious reason that it is impossible to determine upon which of the several alternative grounds which were left to them, the jury based the general verdict. *Baldwin* v. *Burrows*, 47 N. Y. 199; *Maryland* v. *Baldwin*, 112 U. S. 490, at p. 493.

The following distinct grounds of liability on the part of the defendant were submitted to the consideration of the jury:

First. If they found that there were any defects in the compass, known or *unknown*, rendering it unsafe for use on Lake Superior, and the stranding was caused by such defects.

Second. If they found that the stranding occurred by the vessel's being navigated with excessive speed.

Third. If they found that the loss was occasioned by the want of a lookout.

Fourth. If it resulted from the incompetency of the master.

Fifth. If it resulted from insufficiency of the crew.

Sixth. Or if it resulted from want of ordinary care and skill in navigating the vessel.

Forasmuch, therefore, as this general verdict rests upon these six alternative propositions, and some of them certainly were improperly submitted, and it is impossible to say that the verdict was not found upon those so improperly submitted, the judgment must be reversed, and a new trial ordered.

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

In *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438, it is said: "Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them." But in the case at bar, there

is an express exception of all perils and losses occasioned by the want of ordinary care and skill in navigation and of seaworthiness.

The Spartan was a Canadian vessel and was navigating Canadian waters between two Canadian ports, and was bound to comply with the laws of Canada. The Canadian statute put in evidence (Vol. I, Stats. Canada, 1880, p. 236) is entitled "An act to make better provisions respecting the navigation of Canadian waters," and prescribes certain rules, among them that every ship, whether a sailing ship or steamship, shall go at a moderate speed in a fog, mist or falling snow, and shall not be exonerated by anything in the rules from the consequences of any neglect to keep a proper lookout, or of the neglect of any ordinary precaution, or precaution required by the special circumstances of the case. These statutory rules correspond with those revised by an order of Council in England in August, 1879, (see 4 P. D. 241,) and prescribed by Congress, Rev. Stat. sec. 4233; Act March 3, 1885, 23 Stat. 438; and recognized as international rules, *The Belgenland*, 114 U. S. 355, 370; *The Scotia*, 14 Wall. 170. Section seven of the Canadian statute provides that "In case any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved, or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary, and the owner of the vessel or raft, in all civil proceedings, and the master or person in charge, as aforesaid, or the owner, if it appears that he was in fault, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default."

In *The Pennsylvania*, 19 Wall. 125, it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. And this was but the statement of the settled rule in collision cases.

In this case, in view of the seventh section of the Canadian statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. If it appeared that the misconduct or unseaworthiness was *causa sine qua non*, it was an excepted peril, and that, as stated by Judge Brown, "ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track." We think there was no error in giving the eleventh instruction asked by the defendant, and forming the subject of the eighteenth assignment of error. And this disposes also of the sixteenth and seventeenth errors assigned, as the burden was upon the plaintiff to show that the stranding and its consequent losses, misfortunes and expenses were caused by perils insured against, and as to the perils consequent upon and arising from or caused by the want of ordinary care and skill in navigating the vessel, plaintiff was its own insurer.

And the same result must attend the fourth, fifth and sixth errors assigned, which question the refusal of the court to instruct the jury, as requested in the first, second and third of the plaintiff's instructions, that the stranding of the Spartan, while a dense fog was prevailing, was an accident which was *prima facie* covered by the policy, and for which the insurers were *prima facie* liable, and that if the fog contributed proximately to the stranding, the insurers would be liable.

The jury were entitled to draw their conclusions, not from a part, but from the whole, of the facts in the case, and the difficulty in these instructions is that they are based upon a partial view of the testimony. It was necessary to the plaintiff's case that it should appear from the whole proof that the loss was not occasioned by the want of ordinary care by the master, or on account of unseaworthiness, and was not within

exceptions contained in the policy, against which plaintiff was not insured. *Union Insurance Company* v. *Smith*, 124 U. S. 405. The jury were the judges of all the facts proved; and the court charged that if they found that the vessel "was carried ashore by the current or by any mysterious cause which you are unable to explain, then the loss will be within the policy and the plaintiff would be entitled to recover;" and again, "if you find that this vessel was stranded by reason of want of ordinary care and skill in her navigation or by reason of a defective compass, the plaintiff is not entitled to recover; on the other hand, if you find that she was stranded by circumstances, by reason of the current or by perils of the sea — any other peril of the sea — then the plaintiff would be entitled to your verdict;" and also: "Stranding is one of the perils insured against in the policy, and if the jury find that the stranding was the proximate result of the fog or currents of the lake prevailing, then the owners of the steamer have made a case which entitles them to your verdict in this case."

It appears to us that this branch of the case was left to the jury in a manner in respect to which the plaintiff has no ground of complaint. Certainly the state of facts disclosed by the record precludes the claim that instructions more favorable to the plaintiff could reasonably have been given, and this is illustrated by cases cited.

Bazin v. *The Steamship Company*, 3 Wall. Jr. C. C. 229, 239, was a suit for loss of merchandise under a bill of lading, which absolved the carrier from "accidents from machinery, boilers, steam, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever." The steamer was wrecked on Cape Race in a snow-storm, under the following circumstances: "She struck the point of Cape Race — up to that time she continued perfectly seaworthy. If she had not struck, at the average rate of our passage, we would have been in Philadelphia in five days more. The steamer was wrecked. We backed off the point of Cape Race, and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest; she struck in a dense fog — and the sinking of the vessel, and the dam-

age done, resulted from her striking the cape." "Here, then," said Mr. Justice Grier, "we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness *both seem* to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an '*accident* of the sea,' within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass — and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape or a continent, has neither the skill nor the prudence to be entrusted with such a command — and for want of such an officer the vessel is not seaworthy. . . . That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier."

In *The Kestrel*, 6 P. D. 182, the master was suspended by the Wreck Commissioner, with the concurrence of two captains sitting as assessors, because of the stranding of the steamship Kestrel, by reason of negligent navigation, and this decision was affirmed by the Court of Appeal, Mr. Justice Hannen and Sir Robert Phillimore, assisted on the hearing by two of the Elder Brethren of the Trinity House.

The Wreck Commissioner, among other reasons for his report, said: "It appears to us that the master is in this dilemma: either the weather was so foggy that it was not possible to see the island until they were within a ship's length of it, and in that case he would not have been justified in going at full speed, which we are told was ten knots an hour; or it was not very foggy, and in that case it is difficult to account for the island not having been seen until they were

within a ship's length of it, unless indeed there was a very bad lookout being kept on board. In either case the master would seem to have been guilty of a neglect of the ordinary precautions required from seamen for the safe navigation of their vessels."

The Court of Appeal held that the master was guilty of a wrongful act in running the vessel at such a rate of speed as he did in the state of the weather which existed, and also in that he continued to steer the course he did in a fog.

The exceptions in this policy protect the insurer against the excepted perils, as a shipper is protected under a bill of lading from loss to which the negligence of the carrier has contributed. And, as already remarked, if the peril was caused by negligence or unseaworthiness, notwithstanding it was the fog which prevented the mate from seeing the island, the predominating and efficient cause was the negligence or unseaworthiness, and must be regarded as the proximate cause, under the circumstances. *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, 199.

The unseaworthiness especially relied on was the alleged defect of the compass.

The plaintiff in error complains of the refusal to give the fourth instruction asked by his counsel, as follows:

"There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass did not vary more than vessels' compasses ordinarily do, that the steamer had been navigated by the same compass without trouble from the time that she left La Chene, on the St. Lawrence River, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for so believing, then the insurers would not be relieved from liability on account of any supposed defect in the compass."

Exceptions were also taken to the parts of the charge italicized in the following:

"Upon the question of speed I will have a word to say, although it is covered, so far as the law of the case is concerned, by my general charge, that if you find the loss occurred by her being navigated at an excessive speed, there can be no recovery; still it is for you to judge whether, under all the circumstances of the case, she was navigating at too great a speed. *The law of Canada provides: 'That all vessels shall run in a fog at a moderate rate of speed.'* Now, it strikes me — but the question is one for your determination — that a vessel is not under an obligation while navigating the open lake to slacken her speed because of a fog unless there is some reason to apprehend collision with another vessel, or unless the vessel is so near the shore or known to be so near the shore that she might run upon it, unless she was navigated at a less rate of speed, and if this compass had been a proper compass, and there was no reason to think it was otherwise, I should feel loth myself to charge the vessel with fault on account of excessive speed. On the other hand, if this compass were known to the captain, or he had good reason to believe it was defective, then it would strike me that in passing in the neighborhood of Caribou Island he should have directed the speed of the steamer to be slowed. But, as I said before, gentlemen, that is a question for your consideration, *and I do not undertake to direct you one way or the other in regard to this fact, but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by the defects of the compass, the defendant is not liable. With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective compass, and while that statement is not binding upon the plaintiff here and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it undoubtedly is entitled to considerable weight.* On the other hand, it is shown that the vessel had navigated from Owen Sound up to Sault Ste. Marie and from the Sault up to Port Arthur with this compass, and that no unusual deviation had been detected, except that the captain thought the compass was a little slow, as he said. Now, then, gentle-

men, *in case you shall find, as I have said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred through peril of the sea and from no want of skill in navigation and no want of competency in the master or sufficiency of the crew and from no fault on the part of the vessel, then your verdict should be for the plaintiff.*"

The court also instructed the jury:

"The stranding of said steamer at a point 17 miles out of the course on which said steamer was running in navigating the distance of about 130 miles is *prima facie* evidence that the compass was defective, and throws the burden of proving that the compass was correct upon the plaintiff.

"I charge you, as requested by the plaintiff in his eighth request, that the jury are entitled to consider the fact that the Spartan had been successfully navigated by this compass during the season up to the time of her stranding, and that on her final trip she had made a good course from Fort William to Silver Island and from Silver Island to Passage Island, and that she was upon her usual course when she passed the Quebec, as evidence tending to show that the officers had reason for believing that the compass was a proper one, and to rebut the charge that they were negligent in using that compass.

"The steamer is presumed to have been seaworthy, and that her officers were competent to navigate and manage her, and the insurers are not entitled to a verdict on account of unseaworthiness unless they prove by a preponderance of evidence that she was unseaworthy.

"But that is to be construed in connection with the charge I gave you that the fact that she ran ashore, on a still night, upon Caribou Island, 17 miles out of her course, raises the presumption of unseaworthiness, which it devolves upon plaintiff to explain."

The court charged that there was but one defect in connection with the defence of unseaworthiness to which attention need be called, and that was "the want of a proper compass," and, among other things, said: "It was the duty of the plaintiff to keep the Spartan in a seaworthy condition for the safe

navigation of the waters in which she might be run under the policy. In order to be seaworthy the steamer must have been supplied with a good and reliable compass or compasses, which must have been kept in proper repair and condition for the safe navigation of all waters described in the policy. *If there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by, consequent upon, or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover.*" To the italicized portion of this the plaintiff excepted.

The declaration before the notary by the captain, two mates and wheelsman, states that "from the course taken the steamer should have passed seventeen miles to the southward of Caribou Island." The master had the words "fogs and defective compass" inserted among the causes protested against. There was no lookout, and both that and the rate of speed were contrary to the Canadian statute. The exception of losses occasioned by unseaworthiness was in effect a warranty that a loss should not be so occasioned, and whether the fact of unseaworthiness were known or unknown would be immaterial. This is so stated by the learned District Judge in his opinion on the motion for a new trial, and the decisions referred to fully sustain the position. *Work* v. *Leathers*, 97 U. S. 379; *The Glenfruin*, 10 P. D. 103; *Union Insurance Company* v. *Smith*, 124 U. S. 405. But the testimony of the captain and his mates leaves but little, if any, room for doubt that the compass was known to be defective on former trips. The captain testified that he thought the loss was occasioned by a defective compass, but qualified that as merely given as a supposition; that the compass was defective more or less; "it was running in opposite courses;" that when the protest was signed he had the words "fogs and defective compass" inserted; that the loss was occasioned by a defective compass or fogs or the current; that he had experienced on previous trips no more variation than was general on iron vessels; that "another compass on that vessel

might be just the same and different on wooden vessels;" that the stranding must be attributed to the compass or some other cause aboard the vessel; that all compasses on Lake Superior vary more or less at different points; that he could not tell the extent of the variation; that he discovered a little difference from some other vessels in the compass on former trips; that he found the compass out in the other channel; and that every vessel he was on varied there in the same place. The first mate testified that the captain spoke to him about the defect, and said the compass was "a little out; it was not like the compass he had on the Smith;" that the captain laid the stranding solely to the compass; and further, that the compasses "all vary up there; those that have not been adjusted, they vary more at certain points than others; a compass that is adjusted should not vary at all;" that he did not know how much the variation of the compass was; that he steered the small boat by the spirit compass after the stranding, on a S. E. by E. course, and brought up 40 miles from the point for which he steered; "the course actually run must have been ½ south, or something like that, judging from where she fetched up." The second mate, when asked what took them on Caribou Island, answered, "It must have been the fault of the compass." Patterson, the charterer's manager, said that there was more attraction on an iron than on a wooden vessel; that to meet and obviate this, it is usual to adjust compasses; that this compass had never been adjusted; that the Spartan had been fitted out by the plaintiff; that the compass was a little slow in its movements; that he did not know that compasses are specially adjusted to run on Lake Superior. The evidence taken together did not fairly leave the inquiry open as to whether the compass did not vary more than vessels' compasses ordinarily did, or whether the officers, at the time the Spartan started on the voyage, believed the compasses to be reliable or had reason for such belief, any further than was covered by what the court said on that subject. And the slight inaccuracy in the reference to the protest is of no moment.

The eighth, ninth, tenth, eleventh and twelfth assignments of error relate to the question of abandonment. It is not contended that there was any evidence establishing an actual acceptance of abandonment, but it is argued that the evidence tended to show a constructive acceptance. If the loss was the result of a peril not insured against, there was no right to abandon, but it is insisted that if the abandonment is accepted, it is too late to recede, and that an acceptance in ignorance that the loss was occasioned by perils not insured against would be equally binding. And this was so held by the Supreme Court of Michigan, *Richelieu & Ontario Navigation Co.* v. *Thames & Mersey Insurance Co.*, 72 Michigan, 571, which was an action by the present plaintiff against another of the insurers of the Spartan. But the testimony in that case in regard to the repairs was not the same as in the case in hand, as is conceded by plaintiff's counsel, and it is upon that very point of the repairs that the plaintiff chiefly relies to make out the alleged constructive acceptance.

The "sue and labor clause" of the policy was as follows: "It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party." The bill of exceptions shows that the officers and crew of the steamer were unable to get her off, and notice was sent to the owners and charterers, and notice of the loss was also communicated to the underwriters, with a request for assistance, and the underwriters sent a wrecking expedition, under the command of Captain Swain, to rescue the steamer. The request for assistance was received June 22, and the wrecking expedition left Detroit June 23, and reached the Spartan June 25. The telegraphic notice of abandonment was sent to the underwriters on June 26. The policy provided that in case of loss or misfortune it should be lawful and necessary for the assured "to make all reasonable exertions in and about the defence, safeguard and

recovery of the said vessel or any part thereof, without prejudice to this insurance;" and in case of neglect or refusal on the part of the insured to adopt such measures, "then the said insurers may and are hereby authorized to interpose and recover the said vessel." Captain Swain, who had command of the wrecking expedition, testified that he had no orders where to take the steamer when she was got off, and he and the first mate agreed in testimony that she was towed to Detroit under the orders of her master. The captain denied that he gave such orders. The survey was held by Gibson, acting for the underwriters, and Kirby, for the charterer. The superintendent of the dry dock testified that the dock was engaged by the captain, "who had something to do with ordering the repairs," and it appeared that by direction of officers of the charterer work was done not made necessary by the stranding. The captain testified that he directed the repairs, because Gibson told him both need not be there, and that after that Crosby, the agent of the underwriters, told him to keep a strict supervision over the work; that he received no instructions from any person representing the plaintiff or the charterer.

Crosby's evidence was that he gave no orders or instructions to any person or persons as to the repairs on the steamer, nor did he assume any responsibility therefor. He did tell the captain to be careful "to keep what is in the survey separate from what is outside." There was a dispute between the plaintiff's manager, the charterer's treasurer, the captain and Crosby about the payment of duties charged by the Canadian government on the repairs. And as late as March 24, 1884, these duties, and the fact that the repairs included work not specified in the survey, still divided the parties; nor from June 26 to the date of the proofs of loss, November 3, was there any claim of total loss made, nor did such seem to be the attitude of the parties until defendant refused to pay.

In *Rich. & Ont. Nav. Co.* v. *Thames & M. Insurance Co.*, *supra*, the Supreme Court of Michigan, in a careful opinion, held that the company could not defend on the ground that the peril and loss were not insured against, because, as found by the

jury in that case, the abandonment had been accepted. The plaintiff there rested its case entirely upon the acceptance of the abandonment of the vessel, and the evidence upon that question was, for some reason, largely different from the evidence on this trial.

The court in this case left the question of abandonment to the jury, and the finding was against the plaintiff. No reference is made, in the opinion, on the motion for a new trial, to this question, though it is stated that the opinion "covers all the points made in the briefs of counsel." But certain rulings of the court in relation to this subject are questioned by the alleged errors under consideration.

"Whether the insurer accepts or not is a matter of construction of his words and conduct. Any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus seeks the common interest." 2 Phillips on Ins. §§ 1692, 1693. Any act of the underwriter in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance. *Peele* v. *Merchants' Ins. Co.*, 3 Mason, 27; *Gloucester Ins. Co.* v. *Younger*, 2 Curtis, 322. The question for the jury was whether upon the evidence, taken in connection with the provisions of the policy, there were any such acts.

As it is not contended that there was any evidence of actual acceptance, and as it clearly appeared that the rescuing expedition was sent before the telegraphic notice of abandonment was given, and as the evidence did not tend to show that that expedition was sent with the intention of rescuing "and repairing" the Spartan, or that the insurers brought the Spartan to Detroit, (if they did bring her,) with the intention of "repairing her," each one of the requested instructions was objectionable.

Assuming that an offered abandonment may be accepted even when the assured has no right to abandon, and that taking possession to make partial repairs, not amounting to indemnity, may not be authorized by the policy, and that taking possession of and holding a vessel for an unreasonable time, or taking

possession after a peremptory abandonment, without qualification or reservation, are such acts as imply and constitute an acceptance of the abandonment and liability for total loss, and that by the abandonment and acceptance the whole interest is transferred to the underwriters; *Copelin* v. *Ins. Co.*, 9 Wall. 461; *Shepherd* v. *Henderson*, 7 App. Cas. 49; *Northwestern Transp. Co.* v. *Thames &c. Ins. Co.*, 59 Michigan, 214; *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Mon. 541; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. 191; the question still remains what the facts really are in respect to the conduct of the underwriters. The plaintiff insists that although the captain moved the Spartan to Detroit and placed her in the dry dock, and to some extent, if not wholly, superintended the repairs, the plaintiff was not bound by his action, because he was not employed by it, but by the charterers, and that the master, after abandonment, becomes the agent of the insurers.

But it is only after a valid abandonment and the passage of the title that the captain thus becomes the insurer's agent, and to concede that here begs the very question which was at issue. Phillips on Insurance, § 1732.

The first and second errors were that the court ruled that no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made upon the Spartan, and in striking out the testimony respecting Gibson's acts and statements. Crosby, who was the agent of the insurance company at Buffalo, testified that he "gave no orders or instructions to any person or persons whatsoever as to the repairs on the steamer, nor did he assume any responsibility therefor; that he sent Gibson to Detroit to act on the survey on the Spartan, and afterwards sent him to see that no more repairs were put on the steamer than were called for by the survey, as the Spartan had been damaged on previous occasions and not properly repaired;" and further, that "Mr. Gibson was sent by the insurers from Buffalo to hold a survey on the steamer before she was repaired." This is all the evidence bearing on Gibson's authority, and the court was justified in its action. Why Gibson was not called as a witness does not appear.

It is urged, thirdly, that the court erred in excluding the question put to the witness Patterson: "What is the custom of Canadian vessels about carrying a lookout forward?" The Canadian statute provided that every steamer should, in a fog, mist, or falling snow, go at a moderate speed, and that nothing in the rules prescribed should exonerate any ship, or the owner, or master, or crew thereof from the consequences of any neglect to keep a proper lookout, etc.

In *The Farragut*, 10 Wall. 334, 338, it was held that the rule laid down by Congress to the same effect intimated that the lookout was one of the ordinary precautions which a careful navigation involved; and Mr. Justice Bradley, delivering the opinion of the court, said: "A lookout is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service." Evidence of a custom to run at full speed in a dense fog, without a lookout, and contrary to the statute, would be clearly inadmissible, and would be of no avail if established.

It is also objected that the protest was admitted in evidence. That protest consists of the statement signed by the master, mates and wheelman, and the declaration of the notary that he protests at the request of the master, as well on his own behalf as on the behalf of the owners, freighters, officers and crew, against all and singular the cause and causes operating as aforesaid, etc., and more especially "against the storm and heavy winds and gales, high and dangerous seas, fogs and defective compass, experienced on her late voyage;" all of which is certified by the notary public as being a true copy filed in his office. Undoubtedly the protest of the captain, so long as he was living, would not be evidence on one side or the other, unless to contradict him if he varied from it; and it is said in Arnould on Insurance, (2d ed. by Perkins,) Vol. II, p. 1353, that it would not be made evidence as against the assured, if the brokers showed it to the underwriters with other papers relating to the loss on demand of payment. But it was admissible in this case, not on the ground of agency, but because it was made part of the proofs of loss, being directly referred to

in the proofs in the statement that the vessel ran ashore, "and became a wreck and total loss, and was duly abandoned by the owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you." Hence the admission of the proofs of loss involved the admission of the explanatory writing. *Ins. Co.* v. *Newton*, 22 Wall. 32.

Finally it is said the court erred in excluding the record in a suit instituted by the Dry Dock Company against the Spartan to enforce a lien for the repairs, because the record was admissible to show the amount due to the Dry Dock Company, and also to show that the steamer was sold to satisfy the decree in that suit, and thereby to establish a constructive acceptance of abandonment by the insurers; but we do not think that it was admissible on either ground. The insurers were not parties to that suit, and the cost of the repairs and the amount of the loss were properly shown by other and competent evidence, while the sale of the vessel had no tendency to prove the acceptance of the abandonment, but rather that the underwriters did not consider themselves bound in the premises. The result is that the judgment of the Circuit Court must be *Affirmed.*

IN RE KEMMLER, Petitioner.

ORIGINAL.

No. 13. Original. Argued May 20, 1890. — Decided May 23, 1890.

Ex parte Mirzan, 119 U. S. 584, affirmed and applied.

A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when this court, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment.

Chapter 489 of the Laws of New York of 1888, which provides that "the punishment of death must in every case be inflicted by causing to pass through the body of a convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead," is not repugnant to the Constitution of the United States, when applied to a convict who committed the crime for which he was convicted after the act took effect.

Statement of the Case.

On the 5th May, 1890, *Mr. Roger M. Sherman* filed a petition for an original writ of *habeas corpus* on behalf of Kemmler, accompanied by a statement in which he said:

"This is a motion for an original writ of *habeas corpus.*

"The petitioner is under sentence of death in the Northern District of New York, under a statute of New York, which imposes the punishment of death by the passing through his body of a current of electricity sufficient, in the opinion of the warden of the State Prison, to cause his death, which current is to be continued until it kills him; the statute also leaves it to the warden to fix the day and hour of his death, and contains other features which he here asserts are in violation of the Fourteenth Amendment. These features abridge his privileges and immunities as a citizen of the United States and deprive him of his life without due process of law.

"Judge Wallace has granted a writ, in the emergency, to afford an opportunity to make this application. The case having been passed upon under the state constitution by the Court of Appeals, it is suggested that an original writ here is proper.

"The petition, an affidavit showing the emergency, the opinion of the Court of Appeals of New York, and the state statute are herewith submitted."

The court at once gave him a hearing, and when he had concluded it announced its judgment.

Per Curiam. This case is governed by the rule laid down in *Ex parte Mirzan*, 119 U. S. 584; and inasmuch as the writ of *habeas corpus* has been granted by the Judge of the United States Circuit Court, and the case is proceeding to a hearing there, we must

Deny the application.

It was then suggested by Mr. Justice Blatchford, to whom an application had been made for a writ of error to the Court of Appeals of the State of New York to bring up Kemmler's case, that the application should be made to the full court, to be heard on the 19th of May, and notice thereof be given to the Attorney General of New York, and a corresponding order was made.

The 19th of May passed without hearing this motion. On the 20th it came up and and was heard.

Mr. Roger M. Sherman for the petitioner.

Mr. Charles F. Tabor, Attorney General of the State of New York, opposing.

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

This is an application for a writ of error to bring up for review a judgment of the Supreme Court of the State of New York, affirming an order of the county judge of Cayuga County, remanding the relator to the custody of the warden of the State Prison at Auburn, upon a hearing upon *habeas corpus*. The judgment of the Supreme Court was entered upon a judgment of the Court of Appeals of the State of New York, affirming a previous order of the Supreme Court. The application was originally presented to Mr. Justice Blatchford, and, upon his suggestion, was permitted to be made in open court, and has been heard upon full argument.

A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment. *Spies* v. *Illinois*, 123 U. S. 131.

The writ of *habeas corpus* was allowed on the 11th day of June, 1889, and made returnable before the county judge of Cayuga County. The petition was filed by one Hatch, and stated "that William Kemmler, otherwise called John Hort, is imprisoned or restrained in his liberty, at Auburn State Prison, in the city of Auburn, county of Cayuga, State of New York, by Charles F. Durston, agent and warden of Auburn State Prison, having charge thereof. That he has not been committed and is not detained by virtue of any judgment,

decree, final order or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order. That the cause or pretence of the imprisonment or restraint of said William Kemmler, otherwise called John Hort, according to the best knowledge and belief of your petitioner, is that he was indicted by a grand jury of Erie County, for murder in the first degree; that he was tried therefor at a Court of Oyer and Terminer of Erie County, and found guilty thereof by the verdict of a jury on the 10th day of May, 1889; that thereafter and on the 14th day of May, 1889, he was arraigned in said Court of Oyer and Terminer for sentence; that, contrary to the constitution of the State of New York and of the United States, and contrary to his objection and exception, duly and timely taken in due form of law, he was sentenced to undergo a cruel and unusual punishment, as appears by a copy of the pretended judgment, warrant or mandate hereto annexed and made a part of this petition and marked Exhibit 'A' by virtue of which such imprisonment or restraint is claimed to be made; that he is deprived of liberty and threatened with deprivation of life without due process of law, contrary to the constitutions of the State of New York and of the United States, and contrary to his objection and exception thereto, duly and timely taken. The imprisonment is stated to be illegal because it is contrary to the provisions of each of said constitutions."

The warden of the Auburn State Prison made the following return:

"*First.* That I am the duly appointed and acting Warden and Agent of the Auburn State Prison, and on the said 11th day of June, 1889, and before the said writ of *habeas corpus*

was served upon and came to me, the said William Kemmler, otherwise called John Hort, was and now is in my custody and detained by me in the State Prison at Auburn, in the State of New York, under and by virtue of a judgment of the Court of Oyer and Terminer of the State of New York, held in and for the county of Erie, on the 14th day of May, 1889, duly convicting the said William Kemmler, otherwise called John Hort, of murder in the first degree. A true copy of the judgment roll of the aforesaid conviction is hereto attached as a part hereof, and marked Exhibit 'A.'

"And said William Kemmler, otherwise called John Hort, is also detained in my custody as such Warden and Agent under and by virtue of a warrant signed by the Hon. Henry A. Childs, the Justice of the Supreme Court before whom the said William Kemmler, otherwise called John Hort, was, as aforesaid, duly tried and convicted, and which said warrant was duly issued in pursuance of the aforesaid conviction, and in compliance with the provisions of the Code of Criminal Procedure, relating thereto, a copy of which said warrant is hereto annexed as a part hereof, and marked Exhibit 'B.'

"*Second.* And I, the said Charles F. Durston, Agent and Warden of Auburn State Prison, do make a further return and allege as I am advised and verily believe to be true, that the said William Kemmler, otherwise called John Hort, was not sentenced as hereinbefore set forth, to undergo a cruel and unusual punishment, contrary to the provisions of the constitution of the State of New York and the Constitution of the United States.

"And I do further allege that the said imprisonment and restraint of the said William Kemmler, otherwise called John Hort, and the deprivation of his liberty and the threatened deprivation of life, are not without due process of law and are not contrary to the provisions of the constitution of the State of New York or the Constitution of the United States, as alleged in the petition upon which said writ of *habeas corpus* was granted.

"I do further allege, as I am advised, that the said judgment of conviction hereinbefore set forth, and the aforesaid

warrant and the punishment and deprivation of liberty and the threatened deprivation of life of the said William Kemmler, otherwise called John Hort, thereunder, are fully warranted by the provisions of chapter 489 of the Laws of 1888, which is a valid enactment of the legislature of the State of New York, and it is not in conflict with or in violation of the provisions of the constitution of the State of New York or the Constitution of the United States.

"And I hold the said William Kemmler, otherwise called John Hort, under and by virtue of no other authority than as hereinbefore set forth."

Copies of the indictment of Kemmler, otherwise called Hort, for the murder of Matilda Zeigler, otherwise called Matilda Hort; the judgment and sentence of the court; and the warrant to the warden to execute the sentence, were attached to the petition and return. The conclusion of the warrant, pursuing the sentence, was in these words: "Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

Upon the return of the writ before the county judge, counsel for the petitioner offered to prove that the infliction of death by the application of electricity as directed "is a cruel and unusual punishment, within the meaning of the Constitution, and that it cannot, therefore, be lawfully inflicted, and to establish the facts upon which the court can pass, as to the character of the penalty. The Attorney General objected to the taking of testimony as to the constitutionality of this law, on the ground that the court has no authority to take such

proof. The objection was thereupon overruled, and the Attorney General excepted." A voluminous mass of evidence was then taken as to the effect of electricity as an agent of death. And upon that evidence it was argued that the punishment in that form was cruel and unusual within the inhibition of the constitutions of the United States and of the State of New York, and that therefore the act in question was unconstitutional.

The county judge observed that the "Constitution of the United States and that of the State of New York, in language almost identical, provide against cruel and inhuman punishment, but it may be remarked, in passing, that with the former we have no present concern, as the prohibition therein contained has no reference to punishments inflicted in state courts for crimes against the State, but is addressed solely to the national government and operates as a restriction on its power." He held that the presumption of constitutionality had not been overcome by the prisoner, because he had not "made it appear by proofs or otherwise, beyond doubt, that the statute of 1888 in regard to the infliction of the death penalty provides a cruel and unusual, and therefore unconstitutional, punishment, and that a force of electricity to kill any human subject with celerity and certainty, when scientifically applied, cannot be generated." He, therefore, made an order dismissing the writ of *habeas corpus*, and remanding the relator to the custody of the respondent. From this order an appeal was taken to the Supreme Court, which affirmed the judgment of the county judge. The Supreme Court was of opinion, *People &c.* v. *Durston, Warden, &c.*, 55 Hun, 64, that it was not competent to support the contention of the relator by proofs *aliunde* the statute; that there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of a court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the

court; and that the presumption that the legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment, was conclusive upon the court. And Dwight, J., delivering the opinion, also said: "We have read with much interest the evidence returned to the county judge, and we agree with him that the burden of the proof is not successfully borne by the relator. On the contrary, we think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless, death."

From this judgment of the Supreme Court an appeal was prosecuted to the Court of Appeals, and the order appealed from was affirmed. It was said for the court by O'Brien, J.: "The only question involved in this appeal is whether this enactment is in conflict with the provision of the state constitution which forbids the infliction of cruel and unusual punishment. . . . If it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated." The determination of the legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was held conclusive. The opinion concludes as follows: "We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in

painless, death." At the same term of the Court of Appeals the appeal of the relator from the judgment on the indictment against him was heard, and that judgment affirmed. Among other points made upon that appeal was this, that the sentence imposed was illegal and unconstitutional, as being a cruel and unusual punishment, but the court decided, as in the case of the appeal from the order under consideration here, that the position was untenable, and that the act was not unconstitutional because of the new mode adopted to bring about death.

We find, then, the law held constitutional by the court of Oyer and Terminer in rendering the original judgment; by the Supreme Court and the Court of Appeals in affirming it; by the county judge in the proceedings upon the writ of *habeas corpus;* by the Supreme Court in affirming the order of the county judge; and by the Court of Appeals in affirming that judgment of the Supreme Court.

It appears that the first step which led to the enactment of the law was a statement contained in the annual message of the governor of the State of New York, transmitted to the legislature January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature." The legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the Laws of 1888. Laws of New York, 1888, 778. Among other changes, section 505 of the Code of Criminal Procedure of New York was amended so as to read as follows: "§ 505. The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued

until such convict is dead." Various other amendments were made, not necessary to be considered here.

Sections 10, 11 and 12 of the act are as follows:

"§ 10. Nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. Such crime must be punished according to the provisions of law existing when it is committed, in the same manner as if this act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this act, are continued in existence and applicable to all crimes punishable by death, which have been or may be committed before the time when this act takes effect. A crime punishable by death committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act, and not otherwise.

"§ 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"§ 12. This act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death, committed on or after that date."

Kemmler was indicted for and convicted of a murder committed on the 29th day of March, 1889, and therefore came within the statute. The inhibition of the Federal Constitution upon the passage of *ex post facto* laws has no application.

Section 5 of article 1, of the constitution of the State of New York, provides that "excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." The Eighth Amendment to the Federal Constitution reads thus: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." By the Fourteenth Amendment it is provided that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is not contended, as it could not be, that the Eighth Amendment was intended to apply to the States, but it is urged that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term "due process of law."

The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," in which, after rehearsing various grounds of grievance, and among others, that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted," it is declared that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [1] Stat. 1 W. & M. c. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think

[1] *Note by the Court.* In the "Body of the Liberties of the Massachusetts Colony in New England," of 1641, this language is used: "For bodilie punishments we allow amongst us none that are inhumane, Barbarous or cruel." Colonial Laws of Massachusetts (1889), p. 43.

this equally true of the Eighth Amendment, in its application to Congress.

In *Wilkerson* v. *Utah*, 99 U. S. 130, 135, Mr. Justice Clifford, in delivering the opinion of the court, referring to Blackstone, said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision, which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the statute that presumption could not be overthrown. They went further, and expressed the opinion that upon the evidence the legislature had attained by the act the object had in view in its passage.

The decision of the state courts sustaining the validity of the act under the state constitution is not reëxaminable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioner under the Constitution of the United States.

Treating it as involving an adjudication that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allow-

ing the writ upon the ground that error might have supervened therein.

The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *Slaughterhouse Cases*, 16 Wall. 36.

In *Hurtado* v. *California*, 110 U. S. 516, 534, it is pointed out by Mr. Justice Matthews, speaking for the court, that the words "due process of law," as used in the Fifth Amendment, cannot be regarded as superfluous, and held to include the matters specifically enumerated in that article, and that when the same phrase was employed in the Fourteenth Amendment it was used in the same sense and with no greater extent.

As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or

property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we cannot do upon the record before us.

The application for a writ of error is *Denied.*

DISTRICT OF COLUMBIA *v.* WOODBURY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 234. Argued March 27, 28, 1890. — Decided May 19, 1890.

The municipal corporation called the District of Columbia, created by the act of June 11, 1878, 18 Stat. 116, c. 337, is subject to the same liability for injuries to individuals, arising from the negligence of its officers in maintaining in safe condition, for the use of the public, the streets, avenues, alleys and sidewalks of the city of Washington, as was the District under the laws in force when the cause of action in *Barnes* v. *District of Columbia*, 91 U. S. 540, arose.

Barnes v. *District of Columbia*, 91 U. S. 540, has never been questioned, and is again affirmed.

Evidence that a medical man, who had been in the habit of contributing articles to scientific journals was unable to do so by reason of injuries caused by a defect in a public street is admissible in an action to recover damages from the municipality, without showing that he received compensation for the articles.

The admission of incompetent evidence at the trial below is no cause for reversal if it could not possibly have prejudiced the other party.

General objections at the trial below, to the admission of testimony, without indicating with distinctness the precise grounds on which they are intended to rest, are without weight before the appellate court.

The stenographic report of an oral opinion of the court below, as reported by the reporter of that court, cannot be referred to to control the record certified to this court.

The charge of the court below correctly stated the rules of law applicable to this case; and they are reduced to seven propositions, by this Court in its opinion, and approved.

THE case is stated in the opinion.

Mr. Henry E. Davis for plaintiff in error.

Mr. James Coleman and *Mr. J. M. Wilson* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Early in the evening of December 6, 1881, the defendant in error, while passing on the sidewalk near the north entrance

of the Riggs House on G Street in the city of Washington, fell into a hole, whereby he sustained personal injuries of a serious character. Claiming that the sidewalk was not in a safe condition for use by the public, and that the District authorities had been grossly negligent in not keeping it in proper repair, he brought this action to recover damages for such injuries. The plea was not guilty. A verdict for fifteen thousand dollars was returned against the District, and a judgment in conformity therewith was entered. That judgment having been affirmed by the general term the case has been brought here for reëxamination.

The question to be first considered is whether the District of Columbia is, under any circumstances, liable in damages for personal injuries resulting from the unsafe condition of the avenues, streets and sidewalks in the city of Washington. The charge of the court below proceeded upon the ground that such liability existed. The District contends here, as it did at the trial, for the opposite view. And it insists that the question is not concluded by the decision in *Barnes* v. *District of Columbia*, 91 U. S. 540. The argument in support of this proposition assumes that the relations between the government of the District and the public have been so materially changed by legislation enacted since the *Barnes Case*, that the principles therein announced have no application to the present case. This suggestion renders it necessary to ascertain precisely what was decided in the former case.

It arose under the act approved February 21, 1871, 16 Stat. 419, c. 62, creating the "District of Columbia" a body corporate for municipal purposes, with power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to have a seal and to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States, or with that act. Provision was made for the appointment by the President, with the consent of the Senate, of a Governor, Secretary, Board of Health, Board of Public Works and a Legislative Assembly composed of two bodies, whose power of legislation extended to all rightful subjects of legislation within the District, con-

sistent with the Constitution of the United States and that act. The streets, avenues, alleys and sewers of Washington, together with all other works entrusted to their charge by the Legislative Assembly or by Congress, were placed under the entire control of the Board of Public Works with authority to make all regulations they deemed necessary for keeping them in repair. It was also required to disburse "upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders in pursuance of law, for the improvements of streets, avenues, alleys and sewers, and roads and bridges," and to "assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected."

It was contended in the *Barnes Case* that the Board of Public Works was not a department or subordinate agency of the District of Columbia, but a Federal Commission, having exclusive power to make such regulations as it deemed necessary for keeping in repair the streets, avenues, alleys, sewers, roads and bridges committed to their control. This view was rejected by the court. Although that Board was dependent upon both Congress and the Legislative Assembly of the District, and was the hand and agent both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the act of 1871, and that its proceedings and acts in repairing and improving public streets were the proceedings and acts of that corporation. The District was held liable for the injury there complained of upon the principle, which the court declared to be sound and supported by numerous and well-considered adjudications in this country and in England, that a municipal corporation, as distinguished from a corporation organized for private gain, is liable for injuries to individuals arising from negligence upon its part in the construction of works which it was authorized to construct and maintain. And it was ex-

pressly declared that it was not of the slightest consequence, in principle, by what means the officers of the District were "placed in 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." 91 U. S. 545.

Has there been any such change in the government established for this District as will take the present case out of the rule announced in the *Barnes Case?* In the revision of the statutes relating to the District, the clause of the act of 1871, declaring the District of Columbia (Rev. Stat. Dist. Col. 2, § 2) to be a body corporate for municipal purposes with power to contract, etc., was retained. By the act of June 20, 1874, for the government of the District and for other purposes, 18 Stat. 116, c. 337, previous statutes providing for the District a Governor, Secretary, Legislative Assembly, Board of Public Works and a Delegate in Congress were repealed, and all the power and authority then vested in the Governor and Board of Public Works, except as limited by that act, were vested in a commission, composed of three persons, to be appointed by the President with the consent of the Senate. But by the act of June 11, 1878, 20 Stat. 102, c. 180, a permanent form of government for the District was established. It provided that "the District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District," and that the Commissioners therein provided for should "be deemed and taken as officers of such corporation." Those Commissioners, consisting of two persons, to be appointed by the President, with the consent of the Senate, and an officer of the Engineer Corps, detailed for that purpose, were vested with all the powers, rights, duties and privileges, and all the property, estate and effects then lawfully exercised by and vested in the Commissioners of the District, including the power, among others, to apply the taxes or other revenues of the District to the payment of its current expenses, the support of the public schools, the fire

department and the police, but making no contract nor incurring any obligation other than such as were provided in that act, and should be approved by Congress; to collect taxes theretofore lawfully assessed and due, or to become due, but without anticipating taxes by selling or hypothecating them; to abolish offices, consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office under them authorized by law; and to erect, light and maintain lamp-posts, with lamps, beyond the city limits. §§ 1, 2, 3.

It was made their duty to submit annually to the Secretary of the Treasury, for his examination and approval, a detailed statement "of the work proposed to be undertaken by them" during the then ensuing fiscal year, and the estimated cost thereof, as well as the cost of constructing, repairing and maintaining all bridges authorized by law across the Potomac and other streams within the District, the cost of maintaining all public institutions of charity, reformatories and prisons, then belonging to or supported in whole or in part by the District, and the expenses of the Washington Aqueduct and its appurtenances, together with an itemized statement and estimate of the amount necessary to defray the expenses of the District for the then ensuing fiscal year. These estimates it became the duty of the Secretary of the Treasury to examine and approve or disapprove, or suggest such change in them as the public interest demanded, the result to be certified to the Commissioners, who were required to transmit the same, with the original estimates, to Congress. The act provided that "to the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia." § 3.

It also provides that when any repairs of streets, avenues, alleys or sewers within the District are to be made, or when new pavements are to be substituted in place of those worn

out, new ones laid, new streets opened, sewers built, or any work the total cost of which shall exceed $1000, the work shall be given out upon advertisement, the lowest responsible bid to be accepted by the Commissioners, though they have the right, in their discretion, to reject all proposals made. It further provides that the "United States shall pay one-half of the cost of all work done under the provisions of this (5th) section, except that done by railway companies, which payment shall be credited as part of the fifty per centum which the United States shall contribute towards the expenses of the District of Columbia for that year; and all payments shall be made by the Secretary of the Treasury on the warrant or order of the Commissioners of the District of Columbia or a majority thereof, in such amounts and at such times as they may deem safe and proper in view of the progress of the work." The act places the police, schools, Board of Health and sanitary inspectors of the District all under the charge and control of the Commissioners.

We have made this extended analysis of the provisions of the act of 1878, because of the earnest contention of the counsel for the defendant, that while the District of Columbia is still a municipal corporation, under its present form of government it has not, "as a municipal corporation, the features involving it in the liability under consideration." The reasons assigned by counsel for this contention have been carefully considered, with the result that, in our judgment, the municipal corporation created by the act of 1878 is subject to precisely the same liability for injuries to individuals, arising from the negligence of the Commissioners or of the officers under them in maintaining in safe condition, for the use of the public, the streets, avenues, alleys and sidewalks of the city of Washington, as was the District under the laws in force when the cause of action in the *Barnes Case* arose. It is said that the present corporation, as a corporation, has nothing to do with the streets. That could have been said with equal propriety in reference to the old corporation, when the streets were under the control and supervision of the Board of Public Works. Yet, that board was held to be a part of the munic-

ipal corporation. Its acts, within the scope of its powers, were deemed the acts of the corporation. Its negligence, in the care of streets, was held to be the negligence of the municipal corporation of which it was a part. So, in this case, the Commissioners, having full control of the streets, are under a duty to keep the public ways of the city in such condition that they can be used with reasonable safety. Their neglect in that matter is the neglect of the municipal corporation of which they are the responsible representatives, although subject to the paramount authority of Congress.

It is suggested that the District is without the means to perform the supposed neglected duty; that none of its officers can pay a judgment against it, and that no process against it could enforce payment; that even a mandamus against it to levy a tax would be futile because neither the District nor the Commissioners can levy a tax for any purpose; and that no judgment against it can be paid except by warrant upon the Treasury, pursuant to an appropriation by Congress. We do not perceive that these considerations materially affect the principle upon which the decision in the *Barnes Case* rests. That streets, avenues, pavements, sidewalks and sewers in Washington are established, repaired and maintained, in part, by appropriations made by Congress, and, in part, by taxation upon private property, does not change the fact that, by an express declaration of Congress, the District is created a body corporate for municipal purposes. Because it was a municipal corporation proper, as distinguished from a corporation established as an agency of the government creating it, this court held in the *Barnes Case* that it was responsible for such negligence of its officers having the care of streets, avenues and sidewalks, as resulted in personal injuries to individuals. The source from which the District obtains the means for maintaining public highways in the city is of no consequence, so long as Congress has made it, and permits it to remain, a mere municipal corporation, with such functions as pertain to municipal corporations proper. This municipal feature was emphasized in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 7, where it was said that the corporate capacity

and the corporate liabilities of the District remained as they were before the act of 1878, and that its character as a mere municipal corporation had not been changed. Having that character, we held, in that case, that the District was subject to the ordinary rules governing the law of procedure between private persons, and was, therefore, embraced by the Maryland statute of limitations of 1715.

It is further said that the fee-simple of the streets in the city of Washington is in the United States, and that that fact is entitled to great weight. This point was made in the *Barnes Case* and distinctly overruled. The court there said: "We do not perceive that the circumstance that the fee of the streets is in the United States, and not in the municipal corporation, is material to the case. In most of the cities of this country, the fee of the land belongs to the adjacent owner; and upon the discontinuance of the street, the possession would revert to him. The streets and avenues in Washington have been laid out by competent authority. The power and the duty to repair them are undoubted and would not be different were the streets the absolute property of the corporation. The only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends."

Without further discussion, we adjudge, upon the authority of *Barnes* v. *District of Columbia*, that the District is liable for such negligence upon the part of its officers as is charged in the plaintiff's declaration. That case was determined in 1875, and has never been questioned by any subsequent decision in this court. On the contrary, its authority was recognized in *Metropolitan Railroad* v. *District of Columbia*, and in *Brown* v. *District of Columbia*, 127 U. S. 579, 586, and the principles announced in it were applied in *District of Columbia* v. *McElligott*, 117 U. S. 621. If the rule announced in the *Barnes Case* is not satisfactory to Congress, it can be abrogated by statute.

We proceed to examine the objections urged by the District to the admission of evidence. The first one relates to the plaintiff's testimony in reference to his contributions to medi-

cal journals upon various medical subjects. At the trial below he gave evidence tending to show that at the time of the accident he was, and had been since 1864, a resident practicing physician of Washington; that between eight and nine o'clock of the evening of December 6, 1881, while walking with his sister on the south side of G Street, between Fourteenth and Fifteenth Streets northwest, he stepped on a board covering a hole in the sidewalk adjoining the Riggs House, and the board breaking or bending, he fell into the hole underneath it, was severely and permanently injured, and his ability to prosecute his studies and to pursue his profession greatly impaired. While under examination-in-chief, his counsel propounded to him this question: "State, Doctor, if you please, whether or not you had at that time or prior to the time of this accident been a contributor to any medical journal of this country or abroad — the old country — of any articles or essays on diseases known to the profession." To this question the plaintiff answered: "I have been for years a regular contributor in the Philadelphia Medical Times; also to the Virginia Journal, a medical monthly published in Richmond, and other journals." The defendant at the time objected to the question and answer, but the objections being overruled, it excepted to the ruling of the court. At a subsequent stage of the trial the plaintiff, being recalled as a witness in his own behalf, offered to prove that he had in his possession certain written articles for medical journals and medical works on obstetrics and gynecology, and that he had been quoted as an authority upon certain subjects; to which the defendant objected, but the court overruled the defendant's objection and permitted said testimony to be given as follows: "Atkinson's Therapeutics of Gynecology and Obstetrics and Wood's Library Minor Surgical Gynecology, by Paul F. Munde, (which books were produced and examined by the witness before the jury,) are text-books in the medical profession, and that, on pages 73 and 140 of said first-named book, were articles written by himself, or reference made to him, and also at page 217 of the last book referred to; also that in the Virginia Medical Monthly for August, 1876, there

is an article by the plaintiff on the therapeutic use of certain remedies, and also in the American Journal of Obstetrics there is an article by plaintiff on the 'Application of Nitric Acid in Endocervicitis and Endometritis' and also a translation of one of plaintiff's articles in a French journal, entitled 'Annales de Gynécologie,' in April, 1875, and also in a French journal, 'The Review of Medical and Surgical Therapeutics,' of May, 1875." To the action of the court in overruling the defendant's objection and permitting this testimony to be given and to the testimony itself, the defendant excepted.

This evidence was competent upon the issue as to damages. It indicated the nature of the plaintiff's pursuits, and, in connection with other evidence showing the serious and permanent character of the injuries received by him, that his capacity to prosecute his studies, and to follow his ordinary pursuits, was impaired. The defendant insists that the evidence should have been rejected because it did not appear that the plaintiff had derived any income from his contributions to medical journals. This is not a sound view of the question. Even if those contributions were made without compensation, his inability to continue them by reason of the injuries in question was a proper element in the inquiry as to damages. That fact tended to show the extent of both his mental and physical suffering, resulting from the injuries received. All evidence, tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, was pertinent to the issue. *Wade* v. *Leroy*, 20 How. 34; *Nebraska City* v. *Campbell*, 2 Black, 590; *Vicksburg &c. Railroad Co.* v. *Putnam*, 118 U. S. 545, 554; *City of Ripon* v. *Bittel*, 30 Wisconsin, 614; *Ballou* v. *Farnum*, 11 Allen, 73; *Caldwell* v. *Murphy*, 1 Duer, 233; *S. C.* 1 Kernan, (5 N. Y.,) 416. The authorities all agree that in cases of this character much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering, resulting from such injuries, is necessarily attended by mental suffering in a greater or less degree. And as said in *Kennon* v. *Gilmer*, 131 U. S. 22, 26, 27: "The action is for an injury to the per-

son of an intelligent being; and when the injury, whether caused by wilfulness or negligence, produces mental as well as bodily anguish and suffering, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded." *Railroad Co.* v. *Barron*, 5 Wall. 90, 105; *Penn. & Ohio Canal Co.* v. *Graham*, 63 Penn. St. 290; *Smith* v. *Holcomb*, 99 Mass. 552; *Holyoke* v. *Grand Trunk Railway*, 48 N. H. 541; *Stockton* v. *Frey*, 4 Gill, 406; *Smith* v. *Overby*, 30 Georgia, 241; *Cox* v. *Vanderkleed*, 21 Indiana, 164; *Lynch* v. *Knight*, 9 H. L. Cas. 577.

The next objection to the admission of evidence relates to a certain entry in the books of the Adams Express Company in reference to the dead-light placed at the hole into which plaintiff fell. It should be stated in this connection that there was evidence before the jury, on behalf of the plaintiff, tending to show that the sidewalk, where the accident happened, was torn up for the purpose of putting in a new boiler for the Riggs House; that after the boiler had been set, and the wall around it bricked up, a hole was left for the purpose of putting in a dead-light; that before the dead-light (in the procuring of which there was some delay) was put in place, the hole was covered by a board, that was kept there for fifteen or eighteen days before the dead-light was put in, which was not done until after the accident in question; that on the top of the boiler was a safety valve that required the attention of the engineer; that before the hole was covered, or the boiler set, the engineer, in order to reach the safety valve, would take off the board cover and go down; and that there was no attachment to the boards from below to prevent them from sliding, but they were nailed together by two cleats. There was also evidence tending to show that the boards constituted a reasonably sufficient covering for the hole. C. E. Luckett, a witness for the plaintiff, testified that he was a clerk in the Adams Express Company in Washington, and its agent at Georgetown in November and December, 1881; that he had the company's book of delivery for those months; that the entries in it under date of November 29, 1881, are in his

handwriting, were made by him in the regular course of business for which the book was kept, and that on that date there is an entry in the book of a delivery to Beckham & Middleton; that he did not in person deliver the article mentioned to that firm; his duty being to write up the driver's book, check off the way-bills that came in, and do all the clerical work of the office; and that the company's driver delivered the article referred to, taking the book with him, the book produced by witness being the one that the driver had. At this point of the witness' testimony-in-chief he was asked: "Whether the book shows that this thing was received on the 29th of November." The question was objected to, and the objection overruled. The witness answered: "It was." To this ruling of the court as to the question and answer the defendant excepted. It was also in proof, in behalf of the plaintiff, by Middleton, of the firm of Beckham & Middleton, that on the book of the Adams Express Company, referred to by Lucket, (and shown to the witness,) appeared his signature under this entry, of date November 29, 1881: "1 casting, Beckham & Middleton; amount of charges, $1.60; Beckham & Middleton;" that the casting referred to was ordered from New York for Hutchins, who put in the boiler, and that no other casting was delivered to him by witness or his firm during November or December, 1881. To this evidence when offered the defendant objected, but the objection was overruled, and it excepted.

The principal object of this evidence in reference to the dead-light was to show when it was placed at the hole. We will not stop to consider whether a proper foundation was laid for the use of the above entry as evidence in itself; for it was otherwise in proof and not questioned, that the dead-light was not placed in position until after the plaintiff had fallen into the hole, and that the hole was unguarded by such a light for some time prior to the accident. The point which concerned the District was the length of time during which the hole was left unguarded by a dead-light, or other sufficient signal, and not whether Beckham & Middleton, as between themselves and Hutchins, were negligent in not procuring the

dead-light sooner, or in not delivering it more promptly than was done after it reached their hands. If the entry in the books of the Express Company was incompetent as evidence, in itself, of the facts stated in it, its use before the jury could not possibly have prejudiced the defendant.

We will add, that the objections made by the District to the evidence in relation to the plaintiff's contributions to medical journals, as well as to the entry upon the books of the Express Company, lose much of their force because they did not indicate with distinctness the precise grounds upon which they were intended to rest. Such general objections were well calculated to embarrass the court, and put it at disadvantage in its conduct of the trial. It was entitled to know the grounds of the objection, so that the jury could be put in possession of the real case to be tried. In *Camden* v. *Doremus*, 3 How. 515, 530, this court declined to consider objections made to the admission of evidence which did not state the grounds upon which they were made, and did not obviously cover the competency of such evidence nor point to some definite and specific defect in its character. "We must," the court said, "consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court." To the same effect are *Burton* v. *Driggs*, 20 Wall. 125, 133; *Patrick* v. *Graham*, 132 U. S. 627, 629. This rule is especially applicable in actions like the present one, in which no fixed rule can be prescribed for measuring the amount of damages, and in which the result must, of necessity, depend upon the good sense and sound discretion of the jury, as controlled by the special circumstances of the case.

At the close of the testimony on behalf of the plaintiff the defendant asked the court to instruct the jury that the evidence did not show a case entitling the plaintiff to recover. The court refused to so instruct the jury. The defendant having closed its evidence made numerous requests for instructions, each one of which was refused, and it excepted.

The charge of Mr. Justice Cox to the jury covered every possible view of the case as made by the evidence. While it is too lengthy to be here inserted, it will be proper to state

the general principles of law which the jury were instructed to observe in their determination of the case. Those principles — preserving as far as possible the language of the charge — were as follows:

1. The District government, as a municipal corporation, is charged with the duty of supervising the streets of Washington, and keeping them in a condition fit for convenient use and safe against accident to travellers using them. But it is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practise due care and diligence in the exercise of its powers and in the application of its resources towards the objects named. If due care is once exercised, and, notwithstanding, an accident occurs and somebody is injured, it is the misfortune of the victim and not the fault of the authorities. If its duty has been fully performed in regard to any particular street and that street has been put in good condition, safe against all accidents that could be foreseen and provided for, and afterwards, by some casualty, it falls into dilapidation and becomes dangerous, as, for instance, by the caving in of a sewer, and then an accident happens, the rule is that the District government is not responsible for the injury that results, unless it had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger obviated. This notice is either actual or constructive; the latter meaning that the District authorities, within the scope of their opportunities and money, being under an obligation to exercise a general supervision of the streets, and to keep themselves informed about their condition, if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper vigilance, then the law imputes notice to them; in other words, they have notice in contemplation of law, and that is constructive notice.

2. No certain duration of a dangerous condition of a public highway operates of itself as a notice. The law does not require impossibilities of any person, natural or artificial, and

it is impossible that all parts of all the streets should be under constant inspection. Consequently, it could not be maintained that at the instant an accident happens to a highway the authorities are charged with notice and held liable therefor if they do not put it instantly in repair. Every such case must be determined by its peculiar circumstances. The District would not be responsible for damages arising from the bad condition of a street unless actual notice was brought to them of the condition of the street, or unless the street remained in an unsafe condition so long that they ought to have known of it if they exercised ordinary care.

3. People must build houses, and, in order to do that, it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water-mains, gas-pipes and sewers. Nobody has a right to do this without a permit from the authorities, and if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the District would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted.

4. These works are necessarily dangerous to life and limb, and it is the duty of a person doing the work to protect it against accident to travellers on the street, and the duty of a private person is very much the same as that of the District itself when it is prosecuting an improvement. If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the District authorities to see that it is protected, and they are held responsible that he shall do it, for they were notified that he was going on with the work when he obtained his permit. If the individual himself supplies the protection against danger, then the duty will have been discharged on his part, and that of the District also will have been discharged just the same as in the case of the works being constructed by itself. If, then, by any unforeseen accident or the act of somebody that could not be anticipated, the protection has been removed and new danger supervenes, of course the law about notice applies.

5. The first question for the jury was a delicate and difficult one, namely, whether in the first instance a sufficient protection was provided to guard the public against accident. A mortar-board was placed over the hole and extended several inches beyond the edges, and was the protection relied upon. If there never was an adequate protection provided in the first instance, then the duty of the builder never was fulfilled, and it would not make the slightest difference whether it became a little more dangerous by the displacement of the cover afterward or not, and the question of the notice about this displacement would not arise at all. If it was an adequate protection in the first instance, then comes the question of notice of subsequent change.

6. It was for the jury to decide whether the boards placed over the hole be sufficient to sustain the weight of an ordinary man travelling over them. It is not only necessary that the protection should be sufficient to sustain the weight of persons passing along, but another element is the security of the covering in its place over the hole to sustain the weight of a heavy man walking over it. If it would be liable to be kicked out of place by persons passing along it might not be deemed an adequate protection. But that was for the jury to decide. They must decide whether it was sufficient to sustain the weight of a person passing over it, and whether it was sufficiently secured, either by artificial appliances or by its own inherent weight, to hold it in its proper place. It was not necessary that the board placed over the hole should have been made absolutely safe against all interference, for no barrier or other safeguard could be put there which could not be removed by some force, but only that it should be safe against the consequences of the ordinary use of the street — such contingencies as might fairly have been anticipated and foreseen. If it was such a precaution as proper care, diligence and foresight ought to have provided for, and the accident was not occasioned by any defect in the original appliance provided there, but that it was subsequently, by some unforeseen occurrence or agency, or the exertion of some individual, moved from its place and thereby

made dangerous, then the above rules as to notice will apply. The burden is on the plaintiff to prove either that the thing was originally dangerous or had become so long enough before the accident for the authorities to have known it, so as to impose upon them the obligation to put it in proper condition.

In regard to the amount of damages, the court said: "The rule laid down in the instructions asked on the part of the plaintiff is to the effect that the plaintiff is entitled to recover, if he is entitled to recover at all, for his loss of time, the expenditure of money made necessary by his injury, and compensation for his suffering in body and mind, and his whole condition and prospects are to be considered in case you find a verdict in his favor. It is impossible for me to say what the compensation should be, as there is no mathematical rule by which his losses can be estimated, and it is a matter for sound judgment in this as in all cases."

As to so much of the charge as instructed the jury that it was to be presumed that a permit had been given by the defendant for doing the work in the sidewalk of the street, and to so much as related to the liability of the defendant incident to and consequent upon such permit, the defendant excepted.

In reference to the entire charge to the jury, it is unnecessary to say more than that it correctly stated the rules of law applicable to the case. It omitted nothing that ought to have been said, and contained nothing that was inconsistent with the principles announced in *Barnes* v. *District of Columbia*, or that was not in harmony with the established rules of evidence. We will not extend this opinion by comments upon the instructions asked by the defendant; for the charge to the jury covered all the issues, and gave, in clear language, the whole law applicable to the case.

It is, also, assigned for error that the court below, in general term, refused to consider that one of the grounds for a new trial which stated that the verdict was against the weight of the evidence; thereby, it is contended, disregarding the rule announced in *Metropolitan Railroad* v. *Moore*, 121 U. S. 561. It is attempted to support this assignment by referring to the

stenographic report of the oral opinion of Mr. Justice Hagner, speaking for the general term. It is to be found in 5 Mackey, 127, 143. This report cannot control the record of the case as certified to us. It does not appear from the record that the general term declined to pass upon any question which it was its duty to consider. This objection is, therefore, without any basis upon which to rest.

Upon the whole case we are of opinion that no error of law was committed by the court below, and the judgment must be

Affirmed.

STEVENS *v.* FULLER.

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

No. 1617. Submitted May 5, 1890. — Decided May 19, 1890.

On a body execution issued against a debtor on a judgment in the Circuit Court of the United States for the District of Massachusetts, his arrest was authorized on the ground that he had property not exempt which he did not intend to apply to pay the judgment claim. Notice having been given to the creditor that the debtor desired to take the oath for the relief of poor debtors, his examination was begun before a United States commissioner. Pending this, charges of fraud were filed against him, in having fraudulently disposed of property, with a design to secure the same to his own use and to defraud his creditors. His examination as a poor debtor was suspended, and a hearing was had on the charges of fraud. After the testimony thereon was closed, the commissioner refused to resume the poor debtor examination, and then sustained the charges of fraud and sentenced the debtor to be imprisoned for six months. His examination as a poor debtor was not read to him and corrected, and he did not sign or swear to it, and the commissioner refused to administer to him the oath for the relief of poor debtors. He was then taken into custody under the execution and lodged in jail. On a hearing on a writ of *habeas corpus* the Circuit Court discharged such writ and remanded him to the custody of the marshal. On an appeal to this court; *Held*, that the order must be affirmed.

As the commissioner had jurisdiction of the subject matter and of the person of the debtor, any errors or irregularities in the proceedings could not be reviewed by the Circuit Court on *habeas corpus*, or by this court, on the appeal.

HABEAS CORPUS. The case is stated in the opinion.

Mr. William E. Jewell for the petitioner, appellant.

Mr. Edward W. Hutchins and *Mr. Henry Wheeler* for the opposing judgment creditor, appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by William J. Stevens from an order of the Circuit Court of the United States for the District of

Massachusetts, refusing to discharge him from custody on a writ of *habeas corpus*. The following are the material facts: William G. Fuller having recovered a judgment against Stevens, in the Circuit Court of the United States for the District of Massachusetts, for $18,000, an execution was issued thereon to the marshal, which commanded him, if he could find no property belonging to Stevens, to take his body and commit him to jail. Accompanying that execution was an affidavit made by Fuller, that the judgment in question amounted to $20, exclusive of costs, and that $20 remained uncollected, and that he believed, and had good reason to believe, that Stevens had property not exempt from execution, which he did not intend to apply to the payment of the judgment claim, and that he intended to leave the State and District of Massachusetts. Thereupon, a commissioner of the Circuit Court certified that, after due hearing, he was satisfied that there was reasonable cause to believe that the charge made in the affidavit was true, and that, satisfactory cause having been shown, he thereby authorized the arrest of Stevens, if his arrest was authorized by law, to be made after sunset. Stevens was arrested and brought before Henry L. Hallett, a United States commissioner for the District of Massachusetts, who interrogated him, and he declared that he did not desire to take any oath, or to recognize, or to give bail for his appearance at any time, and he failed to recognize or give bail. Thereafter, the commissioner gave notice to Fuller that Stevens desired to take the oath for the relief of poor debtors, at a time specified and appointed, at the office of the commissioner. Stevens then gave a recognizance for his appearance, at such time and place, to be examined. He duly appeared and submitted to be examined, protesting that the commissioner was not authorized by law to order him to be examined touching his property, and stating that he did not waive any informalities in his arrest or in any of the other proceedings. His examination was begun and continued for some time. In the course of it, he offered evidence from the court of insolvency for the county of Suffolk, in the district, that proceedings in insolvency had been begun by him and were then pending. There-

upon, Fuller filed with the commissioner charges of fraud against Stevens, alleging that Stevens, since he had contracted the debt for which the judgment was rendered, had fraudulently conveyed, concealed or otherwise disposed of some part of his estate, with a design to secure the same to his own use and to defraud his creditors, and specifying the particulars of seven different conveyances of land, and a mortgage of land, and three payments of money, by him with such design. The examination of Stevens as a poor debtor was suspended by the commissioner, and a hearing was had before him on such charges of fraud.[1] Stevens put in a plea of want of jurisdic-

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[1] These proceedings were had pursuant to provisions in Pub. Stats. Mass. c. 162, set forth as follows in appellee's brief.

"SECT. 17. Except as provided in sections five to sixteen inclusive, and except in actions of tort, no person shall be arrested on an execution in a civil action, unless the judgment creditor or some person in his behalf, after execution is issued amounting to twenty dollars exclusive of all costs which make part of said judgment, whether the same have accrued in the last action or in any former action on the same original cause of action, and while so much as that amount remains uncollected, makes affidavit and proves to the satisfaction of some magistrate named in section one, that he believes and has good reason to believe:

"First. That the debtor has property not exempt from being taken on execution, which he does not intend to apply to the payment of the plaintiff's claim; or,

"Second. That since the debt was contracted or the cause of action accrued, the debtor has fradulently conveyed, concealed or otherwise disposed of some part of his estate, with a design to secure the same to his own use or defraud his creditors; or,

"Third. That since the debt was contracted or the cause of action accrued, the debtor has hazarded and paid money or other property to the value of one hundred dollars or more in some kind of gaming prohibited by the laws of this Commonwealth; or,

"Fourth. That since the debt was contracted the debtor has wilfully expended and misused his goods or estate, or some part thereof, for the purpose of enabling himself to swear that he has not any estate to the amount of twenty dollars, except such as is exempt from being taken on execution; or,

"Fifth. If the action was founded on contract, that the debtor contracted the debt with an intention not to pay the same; or,

"Sixth. That the debtor is an attorney at law; that the debt upon which the judgment on which the execution issued was recovered, was

tion as to such charges, on the ground that all the transfers of property but one were made by him in the State of New

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for money collected by the debtor for the creditor, and that said attorney unreasonably neglects to pay the same.

"And such affidavit and the certificate of the magistrate that he is satisfied there is reasonable cause to believe the charges therein contained, or some one of them, are true, shall be annexed to the execution. If the judgment debtor lives or has his usual place of business in any county in this State, the application for a certificate authorizing his arrest shall be made in that county: otherwise it may be made in any county."

"SECT. 25. If in addition to the first charge specified in section seventeen the judgment creditor, or some one in his behalf, makes affidavit and proves to the satisfaction of the magistrate that there is good reason to believe that the debtor intends to leave the State, the magistrate may, without notice to the debtor, authorize his arrest."

"SECT. 27. When arrested on mesne process the defendant shall be allowed a reasonable time to procure bail, and when arrested on such process, or on an execution, he shall be allowed reasonable time to procure sureties for his recognizance hereinafter mentioned. When arrested on mesne process, if he does not give bail, and when arrested on execution in any case, he shall be taken before some judge of a court of record, or of a police, district or municipal court, or a master in chancery, commissioner of insolvency or, except in the county of Suffolk, a trial justice."

"SECT. 31. If the defendant or debtor, when taken before the magistrate or at any time when entitled thereto, desires to take an oath as hereinafter provided, and to have a time fixed therefor, the magistrate shall appoint a time and place for his examination, and shall issue a notice thereof to the plaintiff or creditor, signed by him and designating his official capacity, substantially in the following form:

"To A—— B——: C—— D——, arrested on mesne process [or execution] in your favor, desires to take the oath for the relief of poor debtors, [or, the oath that he does not intend to leave the State] at [naming the day and hour and place].

"E —— F —— (*Magistrate*).

"Notice may be given that the defendant arrested on mesne process as aforesaid desires to take both of said oaths, and the form of notice may be varied accordingly."

"SECT. 33. When a defendant or debtor has given notice of his desire to take the oath for the relief of poor debtors, no new notice of the same shall be given until the expiration of seven days from the service of the former notice, unless the former notice was insufficient in form or service. But if the oath for the relief of poor debtors has been refused, no application to take the same shall be made by the defendant or debtor until the expiration of seven days from the hour of such refusal." (As amended by the Act of 1888, c. 419, § 8.)

Hampshire, and while he was an inhabitant thereof, and not within the jurisdiction of Massachusetts or of any court or

"SECT. 36. Pending the examination and at any time after the defendant or debtor is carried before a magistrate, the magistrate may accept his recognizance with surety or sureties in a sum not less than double the amount of the execution, or of the *ad damnum* in the writ if he is arrested on mesne process, that he will appear at the time fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon. No recognizance under this chapter, except in case of appeal under section fifty, shall be accepted at any time after the oath has been once refused to the debtor."

"SECT. 38. If the defendant or debtor has given notice that he desires to take the oath for the relief of poor debtors the magistrate shall examine him on oath concerning his estate and effects, the disposal thereof, and his ability to pay the debt or satisfy the cause of action for which he is arrested and shall hear any legal and pertinent evidence that may be introduced by either party. The plaintiff or creditor may upon such examination propose to the defendant or debtor any interrogatories pertinent to the inquiry, and the examination shall, if required by either party, be in writing, in which case it shall be signed and sworn to by the defendant or debtor and preserved by the magistrate.

"SECT. 39. The magistrate, if satisfied upon the examination of the truth of the facts set forth in the oath to be taken by the defendant or debtor, and in the certificate provided for in the following section, and if it appears to him that the defendant or debtor is entitled to his discharge under the provisions of this chapter, shall administer to him the following

"*Oath for the Relief of Poor Debtors.*

"I [here repeat the name] do solemnly swear that I have not any estate real or personal, to the amount of twenty dollars, except the estate, goods and chattels which are by law exempt from being taken on execution, but not excepting intoxicating liquors; and that I have not any other estate now conveyed, concealed or in any way disposed of, with the design to secure the same to my own use or to defraud my creditors: So help me God."

"SECT. 40. After administering the oath the magistrate shall make a certificate thereof under his hand, as follows, to wit:

S——, ss. I hereby certify that A—— B——, a poor prisoner arrested upon execution, (or on mesne process,) has caused E—— F——, the creditor (or plaintiff) at whose suit he is arrested to be notified according to law of his desire to take the benefit of the law for the relief of poor debtors; that in my opinion said A—— B—— has not any estate, real or personal, to the amount of twenty dollars, except the estate, goods and

magistrate therein ; and that, at the time of the filing of such charges, he had been adjudged an insolvent debtor under the

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chattels which are by law exempt from being taken on execution, but not excepting intoxicating liquors; and has not any other estate now conveyed, concealed or in any way disposed of, with design to secure the same to his own use or defraud his creditors. And I have after due examination of said A—— B——, administered to him the oath for the relief of poor debtors.

"Witness my hand, this —— day of —— in the year ——.

"A—— B—— (*Magistrate*).

"Upon taking the oath, the defendant or debtor shall be discharged from arrest or imprisonment, and shall be forever exempt from arrest on the same execution, or on any process founded on the judgment, or on the same cause of action, unless convicted of having wilfully sworn falsely on his examination. If he is arrested or committed on execution, the judgment shall remain in full force against his estate, and the creditor may take out a new execution against his goods and estate as if he had not been committed; and if he is committed on mesne process, any execution which may afterwards issue on a judgment for the same cause of action shall issue against his goods and estate, and not against his body. The death of the execution creditor shall not affect any proceedings instituted under the provisions of this chapter."

"Sect. 44. If the debtor arrested on execution and taken before the magistrate does not desire to take an oath, or fails to procure surety or sureties to the satisfaction of the magistrate as before provided, or if upon his examination the oath or oaths are refused to him, of which refusal a certificate shall be annexed to the execution and signed by the magistrate, he shall be conveyed to jail, and there kept until he has recognized as herein provided, (if the oath for the relief of poor debtors has not been refused him,) or until the execution is satisfied, or he is released by the creditor, or has given notice as before provided and taken the oath for the relief of poor debtors, or the oath that he does not intend to leave the State, in cases where such oath is permitted."

"Sect. 49. When either of the charges named in section seventeen, numbered second, third, fourth, fifth and sixth, is made as therein provided, or when the plaintiff or creditor or any one in his behalf, at any time pending the examination of a defendant or debtor who has given notice of his desire to take the oath for the relief of poor debtors, files such charges in writing, subscribed and sworn to by the plaintiff or creditor or by some person in his behalf, the charges shall be considered in the nature of a suit at law, to which the defendant or debtor may plead that he is guilty or not guilty, and the magistrate may thereupon hear and determine the same. If a person arrested on execution, after such arrest, misspends or misuses to the amount of forty dollars, or to an amount equal to the sum for which he

laws of Massachusetts, by the judge of the court of insolvency for Suffolk County, and all of his right, title and interest in the property mentioned in the charges of fraud had become vested in said court of insolvency. At the same time, he filed with the commissioner a motion to quash the charges, on the ground that it appeared therefrom that the property alleged was conveyed by him while he was a resident in and a citizen of New Hampshire, and was conveyed by him in New Hampshire, and not within the jurisdiction of the courts of Massa-

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is arrested or committed, his goods, effects or credits not exempt from being taken on execution but which cannot be attached by ordinary process of law, without first having offered such goods, effects or credits to the arresting creditor in satisfaction or part satisfaction of his debt, the charge of such misspending or misuse may be filed in the manner herein provided for filing charges of fraud. The plaintiff or creditor shall not upon the hearing give evidence of a charge of fraud not made or filed as herein provided, nor of a fraudulent act of the debtor committed more than three years before the commencement of the original action.

"SECT. 50. When the hearing is had on the charges of fraud mentioned in the preceding section, and judgment is rendered thereon by the magistrate, either party may appeal to the superior court, in like manner as from the judgment of a trial justice in civil actions. The trial in the court appealed to shall be by a jury, unless the court with the consent of both parties hears and determines it without a jury.

"SECT. 51. If the plaintiff or creditor appeals, he shall before the allowance of the appeal recognize with sufficient surety or sureties to enter and prosecute his appeal with effect, to produce at the court appealed to a copy of all the proceedings upon said charges, and to pay all costs if judgment is not reversed. If the defendant or debtor appeals, he shall recognize in like manner and with the further condition that if final judgment is against him he will within thirty days thereafter surrender himself to be taken on execution and abide the order of the court, or pay to the plaintiff or creditor the whole amount of the original judgment against him.

"SECT. 52. If the defendant or debtor, after either of said charges has been made or filed against him, voluntarily makes default at a time appointed for the hearing, or if upon a final trial he is found guilty of any of them, he shall have no benefit from the proceedings under this chapter, and may be sentenced by the magistrate or court before whom the trial is had to confinement at hard labor in the house of correction for a term not exceeding one year, or to confinement in jail not exceeding six months. But the defendant or debtor, after the expiration of any sentence, may renew his application for the oath for the relief of poor debtors, as though he had not been found guilty and sentenced."

chusetts, or of the commissioner, or of the Circuit Court of the United States for the District of Massachusetts, and that he could not be tried by such commissioner, or sentenced by him thereon, if found guilty; and also because all of the charges were vague, and did not, with sufficient certainty set forth any fraudulent transfer of any property belonging to him. Afterwards, an assignment in insolvency of the estate, real and personal, of Stevens, was made by the judge of the court of insolvency, to duly appointed assignees. After the close of the testimony before the commissioner on the charges of fraud, and before his decision thereon was rendered, Stevens requested that his examination as a poor debtor be again taken up, and he be allowed to offer evidence of his releases and conveyance to his assignees in insolvency, at their request, of all his title to the estates so charged to have been fraudulently conveyed by him; and requested also that he be allowed to complete his own examination as a poor debtor; which requests were refused by the commissioner.

On the 25th of January, 1890, the commissioner gave his decision on the charges of fraud, sustaining them and finding Stevens guilty thereof, and sentencing him to be imprisoned for six months in the jail at Boston. Stevens appealed from that decision to the Circuit Court of the United States for the District of Massachusetts, and gave a recognizance with sureties. Thereafter, but on the same day, and before any other or further order or act of the commissioner, and before any finding made on the charge in the affidavit which accompanied the execution as to property, Stevens again requested that his examination as a poor debtor, so suspended, be taken up, and he be permitted to offer evidence of the releases and conveyance above mentioned, and also to complete his own examination as a poor debtor. Both of such requests were refused by the commissioner, and the examination of Stevens as a poor debtor was not completed. No other witness than Stevens was offered during his examination as a poor debtor, and no other evidence except such assignment in insolvency was offered thereon, except that partly given by him. His examination was not read to him and corrected, and he did

not sign or swear to it. On the same day the commissioner made a certificate that it appeared that Stevens "has property and estate to the amount of twenty dollars, besides the estate, goods and chattels which are by law exempt from being taken on execution;" and that, after due examination of him, the commissioner refused to administer to him the oath for the relief of poor debtors. Thereupon Stevens was taken into custody by the marshal of the district, under the execution, and lodged in the Suffolk County jail, where he was detained.

On the foregoing facts, Stevens, on the 28th of January, 1890, obtained from the Circuit Court of the United States for the District of Massachusetts a writ of *habeas corpus*, returnable in that court. At the hearing thereon evidence was introduced by both parties as to what took place at the hearing before the commissioner on the 25th of January, 1890, and the commissioner himself was examined as a witness. The Circuit Court ordered that the writ of *habeas corpus* be discharged and that Stevens be remanded to the custody of the marshal. To review that order Stevens has taken an appeal to this court.

The Circuit Court stated its decision and the grounds thereof in these words: "The court decided that, although no formal request appeared to have been made by either party before the commissioner that the examination of the debtor should be in writing, yet, as it was in fact taken in writing, and this mode of proceeding was adopted with the assent of both parties, this was equivalent to a previous formal request that it should be so taken; that, as the examination was not signed and sworn to by the debtor, as required by the statute, and no opportunity was given him to sign and swear to it, and he never refused to do so, the examination was imperfect and incomplete, and had not reached a stage to justify the commissioner in assuming to pass upon the question whether the debtor was entitled to be admitted to take the oath for the relief of poor debtors; that the commissioner's certificate annexed to the execution was, therefore, premature and irregular; that this irregularity did not, however, have the effect to

render all the proceedings before him absolutely void, so as to authorize the court to direct the discharge of the debtor from custody upon this writ, and thus deprive the creditor of his right to hold the body of the debtor for his debt; but that the debtor's remedy was rather by application to the court to set aside the certificate as irregular, and to direct that he might go at large under his old recognizance, or upon a new recognizance, and that the examination might proceed before the commissioner, and when completed, a new adjudication be made by him."

We are of opinion that the order of the Circuit Court must be affirmed. The matters alleged before that court against the action of the commissioner did not go to the question of his jurisdiction, so as to make such action reviewable on *habeas corpus* by the Circuit Court. He had jurisdiction of the subject matter and of the person of Stevens, under the proceedings instituted in conformity with the statutes of Massachusetts. The objections taken on the part of Stevens, at the hearing before the commissioner, and also urged here, to the proceedings before the commissioner, all of them went only to alleged errors and irregularities in those proceedings, which could not be reviewed by the Circuit Court on a writ of *habeas corpus*, and cannot be taken cognizance of by this court on this appeal.

It was proper for the Circuit Court to admit in evidence the poor debtor examination before the commissioner, and the evidence offered before him on the charges of fraud.

It is conceded in the brief of the counsel for Stevens that the proper affidavit was made and the proper certificate of the commissioner was annexed to the execution authorizing the arrest. The points urged before the Circuit Court and urged here, that Stevens was entitled to have his examination as a poor debtor read over to him, and to have it corrected, and to sign and swear to it, and the other points raised by him as to the proceedings before the commissioner, are mere questions of irregularity, not reviewable by the Circuit Court on *habeas corpus*, or by this court on this appeal.

This rule is well established in cases of original writs of

habeas corpus issued by this court. *Ex parte Parks*, 93 U. S. 18; *Ex parte Reed*, 100 U. S. 13, 23; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Carll*, 106 U. S. 521; *Ex parte Wilson*, 114 U. S. 417, 421.

The same doctrine applies to the Circuit Court in the present case in its review on *habeas corpus* of the proceedings before the commissioner; and it has been applied by this court on appeals to it from inferior courts in *habeas corpus* proceedings. *Benson* v. *McMahon*, 127 U. S. 457, 461, 462; *In re Coy*, 127 U. S. 731, 758, 759; *Hans Nielsen, Petitioner*, 131 U. S. 176, 182, 184; *Savin, Petitioner*, 131 U. S. 267, 279; *Cuddy, Petitioner*, 131 U. S. 280, 285. The case of *Savin, Petitioner*, *supra*, was an appeal from an order of a Circuit Court of the United States dismissing a petition for a writ of *habeas corpus*, where the party had been imprisoned for contempt of court by a District Court of the United States. This court said, speaking by Mr. Justice Harlan, "Our conclusion is that the District Court had jurisdiction of the subject matter and of the person, and that irregularities, if any, occurring in the mere conduct of the case, do not affect the validity of its final order. Its judgment, so far as it involved mere errors, cannot be reviewed in this collateral proceeding, and must be affirmed."

These views are conclusive to show that

The order of the Circuit Court must be affirmed, and it is so ordered.

INDIANA v. KENTUCKY.

ORIGINAL.

No. 2. Original. Argued April 9, 10, 1890. — Decided May 19, 1890.

The waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

The dominion and jurisdiction of a State, bounded by a river, continue as they existed at the time when it was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

Long acquiescence by one State in the possession of territory by another State, and in the exercise of sovereignty and dominion over it, is conclusive of the title and rightful authority of the latter State.

In equity, to settle and determine the boundary line between the States of Indiana and Kentucky.

On the 20th day of December, 1783, the legislature of Virginia by statute authorized and empowered the delegates of the State in the Congress of the United States "for and on behalf of this State, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign and make over unto the United States, in Congress assembled, for the benefit of the said States, all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio."

On the 1st of March, 1784, the delegates from that State in Congress executed and delivered to "the United States in Congress assembled" a deed of "all right, title and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio." This deed was, on the same day, accepted by Congress, and was spread at length upon its records.

Statement of the Case.

On the 13th of July, 1787, Congress enacted an ordinance which was entitled "*An ordinance for the government of the territory of the United States northwest of the river Ohio.*" There were no words of description in this ordinance except those contained in its title.

In 1788 the legislature of Virginia, by an act which recited the passage of this ordinance, enacted: "that the afore-recited article of compact between the original States and the people and States in the territory northwest of Ohio river be, and the same is hereby, ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this Commonwealth to the United States notwithstanding."

The first Congress assembled under the Constitution enacted, on the 7th August, 1789, "*An act to provide for the government of the territory northwest of the river Ohio.*" These words of description were repeated in the act; but there were no other words of description. 1 Stat. 50.

On the 18th December, 1789, the legislature of Virginia passed an act consenting "that the district of Kentucky, within the jurisdiction of said Commonwealth, and according to its actual boundaries at that time, should be formed into a new State." By that act it was further provided that "the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies therein, shall be free and common to the citizens of the United States; and the respective jurisdictions of this Commonwealth and of the proposed State, on the river aforesaid, shall be concurrent only with the States which shall possess the opposite shores of the said river."

On the 26th May, 1790, Congress established a territorial government over "the territory of the United States south of the river Ohio;" 1 Stat. 123; but on the 4th of February, 1791, 1 Stat. 189, it gave its consent to the admission of Kentucky into the Union, "according to its actual boundaries on the 18th day of December, 1789," the date of the passage of the act of the legislature of Virginia.

On the 7th May, 1800, an act was passed "to divide the

territory of the United States northwest of the Ohio into two separate governments." 2 Stat. 58.

On the 30th April, 1802, the enabling act for the admission of Ohio was passed, the Ohio River being made the southern boundary. 2 Stat. 173. By this act everything west of the present boundary of Ohio, and east of the division line established by the act of 1800 was "made a part of the Indiana Territory."

On the 3d February, 1809, the Territory of Illinois was separated from the Territory of Indiana, the Wabash River being the boundary. 2 Stat. 514. And, on the 19th April, 1816, the enabling act for Indiana was passed, in which it was enacted that the State should be bounded "on the south by the river Ohio, from the mouth of the Great Miami River to the mouth of the river Wabash." 3 Stat. 289.

The controversy in this case related to the jurisdiction over the Green River Island, a formation in the river on the Indiana side opposite the mouth of the Green River, entering the Ohio from Kentucky; and the claims of Indiana in respect to it are fully stated in the brief and argument of its counsel. Some of the main issues were issues of fact, concerning which there was a large amount of proof. No good purpose can be served by further reference to it.

An act passed by the legislature of Kentucky in 1873, and an Indiana statute following it in 1875 and the proceedings under the latter were relied upon by the State of Kentucky. These acts are printed in the margin.[1]

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[1] "An Act to fix and determine the boundary line between the States of Indiana and Kentucky above and near Evansville.

"Whereas, Difficulty has arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between said States, and [said] difficulty involves the title to large tracts of land at or near the line between Green River Island and the State of Indiana; therefore,

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky,*

"§ 1. That the Governor of the State be, and is hereby empowered and directed, to select a commissioner, who shall be a resident of Kentucky, and a practical surveyor, who shall act with a similar person selected by the Governor of the State of Indiana, and such persons so selected shall make a survey of the line dividing said States, beginning at the head of the

Mr. Alpheus E. Snow and *Mr. Joseph E. McDonald* (with whom was *Mr. John M. Butler* on the brief) for the State of Indiana.

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island known as Green River Island opposite, or nearly so, from the mouth of Green River; running thence in a direction down the Ohio River to the lower end of said island, upon a line dividing said island and the State of Kentucky from the State of Indiana. Said commissioners shall consult the surveys originally made by the United States government, if there be more than one, and they be not inconsistent with each other, and said commissioners shall be governed in running said line by such survey or surveys made by the government of the United States. Within ten days after such survey, said commissioners shall reduce said survey to writing, causing the metes and bounds and land-marks to be particularly described, and sign the same, and acknowledge the same before any officer authorized to take acknowledgments of deeds, and duplicates of such written statements of survey, signed and acknowledged by the commissioners, shall be filed in the office of the clerk of the Henderson County Court, and in the auditor's office of Vanderburgh, and Warrick counties, Indiana; and such written statement, or a copy duly certified by the clerk of the said Henderson County Court, shall be conclusive evidence of the said line dividing said island, so called, from said State of Indiana, in any of the courts of this State.

"§ 2. The commissioners to be appointed under this act shall report to the Governor, in writing, the result of the survey together with a plat of the same; and when said survey shall have been completed, the commissioner shall file his account with the Governor, and when the same shall be examined and approved by him, the Auditor of Public Accounts is hereby authorized to draw his warrant on the Treasury for said amount in favor of the commissioner appointed: *Provided, however,* said amount shall not exceed the sum of two hundred and fifty dollars.

"§ 3. This act shall take effect and be in force from its passage. Approved April 21, 1873." 1 Sess. Laws 1873, 51, c. 964.

The statute of the State of Indiana of February 27, 1875, referred to in the cross-bill was as follows:

"An Act to ascertain the location of the boundary line between the State of Indiana and Kentucky, above and near Evansville, and making the same evidence in any dispute, and declaring an emergency. (Approved February 27, 1875.)

"Whereas, Difficulty and dispute have arisen between the owners of land in Indiana and Kentucky, in regard to the boundary line between said States, and said difficulty involves the title to large tracts of land above, near the line between the Green River Island and the State of Indiana:

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* that the Governor be and is hereby empowered and directed to select a commissioner, who shall be a resident of the State of Indiana and a prac-

Argument for the State of Indiana.

From a point on the northwest side of the Ohio River, about six miles above the city of Evansville, Indiana, to a point on the same side of the river about one-half mile above that city, the Ohio River curves toward Kentucky. Between these same points a depression or bayou exists which lies on nearly a straight line from one point to the other. The bottom of this depression is at present from twenty to thirty feet above low-water mark of the Ohio River.

There are some evidences that near the upper point, this depression, at some past period, divided into two at the river's

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tical surveyor, who shall act with a similar commissioner to be appointed by the Governor of the State of Kentucky, and the two commissioners so selected, shall make a survey of the line dividing said States, beginning at the head of said Green River Island, near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of said island.

"SEC. 2. In running said line the said commissioners shall consult and be governed by the surveys originally made by the government of the United States, when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated.

"SEC. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgments of deeds, which writing, so acknowledged, shall be recorded in the Recorder's office in the counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the State of Indiana and Kentucky, between the points on said Green River Island heretofore indicated.

"SEC. 4. There is hereby appropriated out of the moneys of the State, in the hands of the Treasurer, a sum not exceeding two hundred and fifty dollars, to pay for making said survey. After rendering the services provided for in this act, the commissioners shall make proof to the judge of the Circuit Court of Vanderburgh County of the value thereof, to which the said judge shall certify, and upon the presentation of such certificate, the Auditor of the State shall draw his warrant in favor of said commissioner for amount so certified not exceeding the said sum of two hundred and fifty dollars.

"SEC. 5. *Whereas*, An emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage."

edge, thus leaving a delta between the two depressions. Opposite the upper point, on the south (Kentucky) side of the Ohio River, the Green River flows into the Ohio.

The land lying between the depression and the Ohio River consists of two connected tracts, one called the "Green River Island" and the other the "Green River Island Tow-head,"—the latter being a tract formed by deposit which has within the last twenty or thirty years become attached to the "Green River Island" tract at all stages of water.

The land lying in the delta of the depression northeast of the "Green River Island" tract is called "Buck Island." The depression or bayou above referred to is called the "Green River Island Bayou."

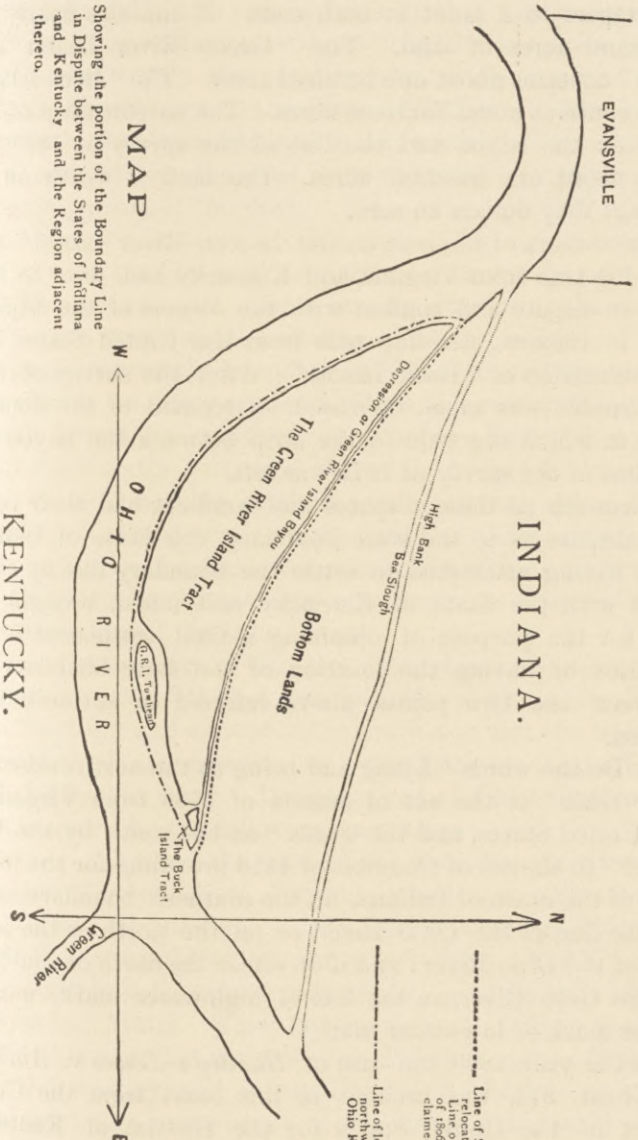
Until the year 1875, it was generally supposed, in the vicinage, that the boundary line between the two States was the low-water mark of the Ohio River on its northwest side, but it was claimed by persons who purported to assert the claims of the State of Kentucky that the low-water mark of the Ohio River on the northwest side was the middle line of the "Green River Island Bayou," and of its northern branch at the point where the bayou divided, and that hence such middle line of the bayou was the boundary line between the two States.

A few persons who claimed under the State of Kentucky, and whose title deeds bounded their land at the state boundary line, claimed that the meander line of the United States survey of 1806, which ran along the top of the north (Indiana) bank of the "Green River Island Bayou," and upon the north (Indiana) bank of the north branch of the bayou where it divided, was the state boundary line.

In the year 1875 a survey was made for the purpose of locating the state boundary line between the two points, above referred to, by commissioners of the two States, under peculiar circumstances hereafter to be discussed. This survey located the state boundary line upon the meander line of the United States survey of 1806.

The "Green River Island" tract is about five and one-half miles long, and a little over a mile wide at its greatest width,

Argument for the State of Indiana.



and tapers to a point at both ends. It contains nearly two thousand acres of land. The "Green River Island Towhead" contains about one hundred acres. The "Buck Island" tract contains about fourteen acres. The narrow strip of land between the bayou and the line of the survey of 1875 contains about one hundred acres. The land is worth on the average fifty dollars an acre.

The owners of the land on the "Green River Island" tract deriving title from Virginia and Kentucky had, prior to 1875, been in dispute and conflict with the owners of the adjacent land in Indiana, deriving title from the United States, over the ownership of "Buck Island." After the survey of 1875, the trouble was much increased, on account of the doubtful state in which the title to the strip between the bayou and the line of the survey of 1875 was left.

Inasmuch as these disputes and conflicts had their origin in a dispute as to the state boundary, the State of Indiana, after having attempted to settle the boundary line by agreement with the State of Kentucky and failed, brought this suit for the purpose of obtaining a final settlement of all disputes by having the location of the state boundary line between the two points above referred to authoritatively settled.

I. Do the words "Lying and being to the northwest of the river Ohio" in the act of cession of 1783 from Virginia to the United States, and the words "on the south by the Ohio River" in the act of Congress of 1816 providing for the formation of the State of Indiana, fix the southern boundary at the middle line of the Ohio River, or on the north or the south side of the Ohio River? and if on either the north or south side of the Ohio River, at the line of high-water mark, medium water mark or low-water mark?

In the year 1820, the case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, was brought in this court from the Circuit Court of the United States for the District of Kentucky. That case was an action of ejectment, in which the plaintiff claimed under a grant from the State of Kentucky and the defendants under a grant from the United States. The title

of the individuals who were parties in that action depended, as Chief Justice Marshall, who delivered the opinion of the court, states, "upon the question whether the lands lie in the State of Kentucky or in the State of Indiana." The land in question in that case was land lying north of the main Ohio River, and between the main river and a bayou which was dry during a portion of the year.

The question involved in that case, so far as the boundary line between the States was concerned, was whether the boundary line between the States was or was not at the medium water mark on the northwest side of the Ohio River. There was no claim that the boundary line was north of the medium water mark on the northwest side, and consequently it was entirely immaterial whether the boundary line went to low-water mark on the northwest side or to the middle line of the river, or to low-water mark on the southeast side. If the boundary line was south of the medium water mark on the northwest side, the land was necessarily in Indiana, whether the boundary line was at low-water mark on either side or at the middle line of the Ohio River.

The court however in that case entered into an inquiry as to the construction of the act and deed of cession of the Northwest Territory and arrived at the conclusion that the boundary between the States was the low-water mark on the northwest side of the Ohio River. The argument of Chief Justice Marshall is shown by the following quotations:

" . . . It is not the bank of the river, but the river itself at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the northwest of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and, in establishing it, Virginia must have had in view the convenience of the future population of the country.

"When a great river is the boundary between two nations or States, if the original property is in neither, and there be

no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domains, and the newly created State extends to the river only. The river, however, is its boundary."

"If instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.

"When the State of Virginia made the Ohio the boundary of States, she must have intended the great river Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above low-water mark.

"The case is certainly not without its difficulties; but in the great questions, which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, we think the great object, when it can be distinctly perceived, ought not to be defeated by those technical

perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate State, the river was the boundary between the new States, erected by Congress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary ought to preserve it. They seem to us to require that Kentucky should not pass the main river and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel."

From what has been said above, it is evident that the conclusion of this court, in the case of *Handly's Lessee* v. *Anthony*, above referred to, relating to the state boundary line, is a *dictum*, and that it is, therefore, open to this court to decide whether the boundary line between these States extends along the middle line of the Ohio River or along the line of high-water mark, medium water mark or low-water mark on the northwestern side or the southeastern side.

There have been few cases in the state courts in which the exact location of the boundary of the States northwest and southeast of the Ohio River has been a material question.

The question has been considered in the state courts, and the following may be said to be the result of the decisions.

The Kentucky courts have always claimed, under the authority of *Handly's Lessee* v. *Anthony*, to the low-water mark on the northwest side of the Ohio River. *Fleming* v. *Kenney*, 4 J. J. Marsh. 155; *Church* v. *Chambers*, 3 Dana, 274; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394; *McFarland* v. *Knight*, 6 B. Mon. 500.

In Indiana the authority of *Handly's Lessee* v. *Anthony* is recognized as applicable to the boundaries of riparian owners, but the right of wharfing out into the Ohio River is insisted upon. *Stinson* v. *Butler*, 4 Blackford, 285; *Cowden* v. *Kerr*, 6 Blackford, 280; *Doe* v. *Hildreth*, 2 Indiana, 274; *Commissioners of St. Joseph County* v. *Pidge*, 5 Indiana, 13;

Bainbridge v. *Sherlock*, 29 Indiana, 364; *S. C.* 95 Am. Dec. 644; *Gentile* v. *State*, 29 Indiana, 409; *Carlisle* v. *State*, 32 Indiana, 55; *Martin* v. *Evansville*, 32 Indiana, 85; *Sherlock* v. *Bainbridge*, 41 Indiana, 35; *Sherlock* v. *Alling*, 44 Indiana, 184.

The same may be said of the courts of Illinois, though there is a strong tendency to claim to the middle of all rivers. *Middleton* v. *Pritchard*, 3 Scammon, 510; *S. C.* 38 Am. Dec. 112; *Ensminger* v. *People*, 47 Illinois, 384; *S. C.* 95 Am. Dec. 495; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535; *Fuller* v. *Dauphin*, 124 Illinois, 542.

In Ohio and Virginia the question has been hotly discussed, and the authority of *Handly's Lessee* v. *Anthony* denied.

Virginia was dissatisfied with the case of *Handly's Lessee* v. *Anthony* because she claimed to high-water mark on the northwest side of the river; Ohio, because she claimed to the middle of the river. See *Commonwealth* v. *Garner*, 3 Grattan, 655; *Benner's Lessee* v. *Platter*, 6 Ohio, 505; *Covington & Cincinnati Bridge Co.* v. *Mayer*, 31 Ohio St. 317; *St. Joseph &c. Railroad* v. *Devereaux*, 41 Fed. Rep. 14.

The conclusion of Chief Justice Marshall is based upon the theory that the act and deed of cession of Virginia are to be treated as a grant of the undisputed territory of Virginia, and that the words "to the northwest of the river Ohio," are to be construed as though they were words of strict boundary rather than of governmental description. He admits that his construction is not without difficulty, and the words are plainly ambiguous.

An examination of the circumstances under which the cession was made establishes that:

1. The words "to the northwest of the river Ohio" in the act and deed of cession of Virginia are not words of boundary, since the territory had not at that time any determinate bounds on the north.

2. These words were used in the previous statutes of Virginia, and in the common and official speech and writing of the time to describe a large tract of territory claimed by England, France, Spain, the United States and Virginia.

3. The act of cession of 1783 is remodelled from the act of 1781, in which the territory of Virginia is divided into two

parts by such description that, if the words of description are construed technically, the Ohio River itself is not described.

4. The act of 1783 is not strictly an act of cession, but a proposition for compromise between Virginia and the United States of a dispute in which the United States claimed that Virginia had no title to the territory southeast or northwest of the Ohio River.

For these reasons it is evident that the words "within the limits of the Virginia Charter to the northwest of the river Ohio" in the act of Virginia of 1783 are words of governmental description of an indeterminate tract, contained in an agreement of compromise, and not words of definite boundary contained in an instrument of grant.

It is therefore improper to treat the act and deed of cession of Virginia as though they were a carefully drawn deed of grant by metes and bounds, and to give to the words "to the northwest of the river Ohio" the same technical significance which they might have if they constituted a part of a carefully drawn description by metes and bounds of a territory admitted to be the undisputed property of the grantor.

By the insertion of the provision respecting the free navigation of the Ohio River, Virginia accomplished three important things.

1. It bound the State of Kentucky to apply to the Ohio River the principles relating to the navigable waters wholly within the Northwest Territory, regarding which it was by the ordinance provided that: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor."

2. It compelled Kentucky to agree with the United States that it would never attempt to control the navigation of the Ohio River. If Kentucky had gone over to Spain, the first act, of course, would have been to close the Ohio and Mississippi rivers to navigation. By keeping Kentucky in the Union

and binding her to exercise only that concurrent jurisdiction which States bounded by navigable rivers would be entitled to exercise by the rules of international law, the possibility of either the Ohio or the Mississippi rivers being closed to navigation would be done away with, since Spain, without Kentucky and the southwest territory, east of the Mississippi, would not have been strong enough to have violated the obligations of the treaty of 1783, which provided for the free navigation of the Mississippi.

3. It bound itself and Kentucky to recognize as having concurrent jurisdiction with itself over the Ohio River "only the States which may possess the opposite shores of said river," that is, the United States and the States to be formed in the Northwest Territory, bounding on the Ohio River. Thus, all complications with the Ohio Company, or any other land company, would be avoided, since the United States, by consenting to the act, would bind themselves to protect Virginia and Kentucky from any such claims of jurisdiction over the Ohio River by any land company.

In this act Virginia treats itself and Kentucky as bounding *on* the Ohio River. The words are: "That the use and navigation of the river Ohio, so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth *lies thereon*," etc.

Further, this act is an admission by Virginia that the State or States possessing the opposite shores of the river, which at that time was the United States, had a right to exercise concurrent jurisdiction over the Ohio River with itself and Kentucky, since it does not purport to grant to the United States any new rights.

Probably nothing was further from the intention of the Virginia legislature in adopting the act of cession of 1783 than to make claim to exclusive territorial rights over the Ohio River, as against the United States. The advantages of the Union were at that time fully recognized, and the immense value of the water-ways to the civilization of that period made it the one idea of the State to keep the great water-ways open to free navigation, the States on both sides possessing jurisdic-

tion over the river for the proper preservation of peace and order thereon.

Unless the terms of written instruments make it absolutely clear that it was the intention that the boundary line between the States on the opposite sides of the river should be elsewhere than at the middle line, that line should be the boundary.

As above shown, the words of the act of cession of the Northwest Territory do not necessarily fix the boundary line elsewhere than at the middle line of the Ohio River.

It is therefore submitted that the middle line of the Ohio River is the boundary line between the States of Indiana and Kentucky.

II. If it be granted that the southern boundary of the State of Indiana is the low-water mark of the Ohio River upon the northwest side, then is that low-water mark of the Ohio River on the northwest side, at the present time, on the north or the south margin of the "Green River Island" tract and the "Buck Island" tract? Does the present location of this low-water mark fix the state boundary line?

The testimony introduced by the State of Indiana proves conclusively that the low-water mark on the northwest side of the Ohio River is, at the present time, south of the "Green River Island Tow-head," and that the whole tract is an accretion to the "Green River Island" tract within the last twenty or thirty years.

III. If it be granted that the low-water mark on the northwest side of the Ohio River is, at the present time, along the southern margin of the "Green River Island" tract, and the "Buck Island" tract; and that the location of this low-water mark at the present time does not fix the state boundary, is it necessary to examine into the facts relating to the location of the low-water mark prior to the year 1816, when the State of Indiana was formed with the Ohio River as its boundary on the south, or does the formation of the State of Indiana, in 1816, with that boundary, so fix the boundary, as against the State of Kentucky, as to make evidence as to the location of the low-water mark prior to that date, immaterial?

It is submitted on the proof that, even if it is necessary for the State of Indiana in this case to make proof of the location of the low-water mark on the northwest side of the Ohio River prior to the present time, it is not necessary that it should in its proof go further back than the year 1816; since in that year the State of Kentucky recognized the right of the United States and of the State of Indiana to exercise jurisdiction at least to the low-water mark of the Ohio River on the northwest side.

IV. If the location of the state boundary line was definitely fixed in the year 1816 at the low-water mark of the Ohio River, was the low-water mark on the northwest side of the Ohio River, in 1816, on the north or south margin of the "Green River Island" tract and the "Buck Island" tract, and has it ever since remained as located in 1816?

It is shown by the testimony of living witnesses, practically without contradiction, that, since 1820, the depression north of the "Green River Island" tract has remained substantially as it is at present, the height of the bottom of the depression above low-water mark changing slightly from year to year by the washing and filling caused by the high water at seasons of overflow, but the average height above low-water mark remaining substantially the same.

It is submitted, therefore, that, if the low-water mark on the northwest side of the Ohio River is the state boundary, the State of Indiana has shown, by living witnesses, that this line of low-water mark, since 1820, has been on the south margin of both the "Green River Island" tract and the "Buck Island" tract. The testimony referred to under the sixth point of this brief shows that the same state of facts existed between 1820 and 1816.

V. If it be necessary for the purpose of determining the state boundary to examine into the location of the low-water mark on the northwest side of the Ohio River as it existed prior to 1816, did the United States survey of 1806, a meander line of which ran along the north side of the "Green River Island" tract and the "Buck Island" tract, affect the location of the state boundary line?

Argument for the State of Indiana.

Considering the uncertain state of the law, at the time of the United States survey of 1806, with regard to the meaning of the words "to the northwest of the river Ohio;" considering also the fact that there was an outstanding Virginia patent on a part of the "Green River Island" tract (the validity of which will be considered later); considering also that the Henderson County Court of Kentucky had taken upon itself to allow surveys to be made on the "Green River Island" tract by Kentucky surveyors, thus incidentally determining that the "Green River Island" tract was not "to the northwest of the river Ohio;" considering also that, for the United States surveyor to have surveyed the "Green River Island" tract at that time would have required of him the determination of a great question which is yet undetermined; considering also that the surveyor of the United States, in going on the "Green River Island" tract to make surveys over the Kentucky surveys would have doubtless exposed himself to personal violence and ejection from the land, it is not to be wondered that he accepted the interpretation of the words, "to the northwest of the river Ohio," placed upon them by the Kentucky courts, and made return that, in his individual opinion, the bank of the bayou was the bank of the Ohio, and that his superiors did not question his survey.

It is submitted, therefore, that the above considerations greatly weaken, if they do not totally destroy any evidential force that the United States survey of 1806 may be claimed to have, as bearing upon the question of the location of the low-water mark, in 1806, with relation to the "Green River Island" tract.

As evidence in itself of the boundary between the States, it is absolutely worthless, since meander lines are not intended to show the low-water mark, but only to approximately determine the location of the banks of the stream meandered. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272.

VI. If the state boundary line was not definitely fixed at the low-water mark on the northwest side of the Ohio River, in 1816, but was so fixed by the deed of cession from Virginia to the United States in 1784, and by the act of cession of Vir-

ginia in 1783, was the low-water mark on the northwest side of the Ohio River, in 1783 and 1784, on the north or the south margin of the "Green River Island" tract and the "Buck Island" tract, and has it ever since remained as it existed in 1783 and 1784?

Counsel discussed the evidence on this point at length, and concluded: Everything, therefore, — science, tradition and evidence of deceased and living persons, — points to the conclusion that the low-water mark on the northwest side of the Ohio River, is, and since 1783, has been along the south margin of the "Green River Island" and the "Buck Island" tracts. And hence the conclusion is irresistible that if the low-water mark on the northwest side of the Ohio River be the state boundary, therefore the state boundary runs to the south of all the disputed tracts, leaving all these tracts within the jurisdiction of the State of Indiana.

VII. If it be granted that the southern boundary of the State of Indiana is the low-water mark on the northwest side of the Ohio River, and that the low-water mark on the northwest side of the Ohio River at the present time is on the southern margin of the "Green River Island" tract and the "Buck Island" tract; but since the year 1816 or the year 1783, the low-water mark has been along the north margin of those tracts; has the process by which the location of the low-water mark has changed been gradual or sudden, and has such change been a change to a new condition or a return to an old condition? If it should be found that the location of the low-water mark has changed, has the state boundary line changed its location in consequence of such a change of location of the low-water mark?

While the principle of accretion is perhaps not strictly applicable to a case of this kind, since there is no claim that the "Green River Island" tract is a piece of land actually formed by process of deposit within the *existing* banks of the Ohio River, yet, taking into consideration that the tract is a formation by the deposit of the Ohio River within its *geological* banks: that the location of the main river channel of the Ohio River has been within the recent historical and geologi-

cal times south of the "Green River Island" tract where it now is; that if the "Green River Island" tract was ever a true island it was such from a temporary detachment from the territory of Indiana, it is right and proper that this court in deciding a question of this kind, which is more properly a question of politics and diplomacy than a question of strict law, should base its decision upon the principles of justice, rather than upon strict and technical rules of law, and should dissolve any doubts which may arise as to the existence or non-existence of claimed facts, which by reason of the unsettled condition of the country cannot be proved with absolute accuracy, by calling to its assistance the principle of accretion, and if it should be of opinion that the low-water mark on the northwest side of the Ohio River is the boundary between the States of Indiana and Kentucky, should adjudge that the boundary of the State of Indiana, to which the disputed tracts are now finally and completely attached, is along the southern margin.

VIII. If this court should find that the state boundary line is along the north margin of the "Green River Island" tract, does it also extend along the north or the south margin of the "Buck Island" tract by reason of the fact that the "Buck Island" tract, is an accretion to or a part of the "Green River Island" tract, or an accretion to or a part of the undisputed soil of Indiana?

It will be noticed that, in the above, two facts are assumed: (1) That the low-water mark on the northwest side of the Ohio River is the state boundary line. (2) That the low-water mark of the Ohio River is on the north margin of the "Green River Island" tract.

Both these facts the State of Indiana expressly denies. If, however, the facts thus assumed to exist were true, the testimony shows that the "Buck Island" tract is an accretion to the undisputed soil of Indiana, and that hence the state boundary line is upon its south margin.

IX. The State of Kentucky has not exercised sovereignty and jurisdiction over the "Green River Island" tract or the "Buck Island" tract in such a manner as to affect the location of the state boundary line.

The "full possession, jurisdiction and control" which the State of Virginia is alleged to have retained after the cession of 1783, is not shown by the evidence.

The cross-bill of Kentucky places her claim of exercise of jurisdiction over the "Green River Island" tract as distinct from the exercise of jurisdiction by Virginia, over the "Green River Island" tract upon four grounds.

The first ground is, "That the owners of soil thereon, hold their title thereto under grants made by her as the original proprietor thereof."

The State of Kentucky was formed June 1st, 1792. It issued its first patent for land on the "Green River Island" tract in 1818. Twenty-six years elapsed, therefore, before the executive officers of the State of Kentucky determined to issue patents for the land on the "Green River Island" tract. Yet it appears from the statement of Zadok Cramer, the author of "The Navigator," published in 1808, that at the time of publishing that book, there were "six or eight families settled" on the "Green River Island" tract.

All the circumstances surrounding the original issue of the Kentucky patents, are consistent with the theory that doubts existed for twenty-six years on the part of the governors of Kentucky as to their right to issue patents for land on the "Green River Island" tract, and that the doubt was finally solved by an acting governor, who was, perhaps, interested in having the question settled one way or the other. A precedent having been once established, the subsequent governors followed it, as was natural and perhaps proper, since the issuing of the first patent determined the position of Kentucky in the matter, and it was as proper to cover the whole tract with patents as to cover any part of it.

Considering the fact that, for twenty-six years, under a system of land laws which permitted the location of land wheresoever the claimant might see fit, no individual took out a patent from Kentucky upon the "Green River Island" tract though during that period there were from six to ten families settled upon it; considering, also, that the facts surrounding the issue of the first patent gave rise to the suspicion that the

state officers issuing the patent may have had an interest in it; considering, also, the great looseness with which the patents were finally issued; considering, also, that it was for the pecuniary interest of the settlers on the island to take title from Kentucky rather than from the United States, and that they could not have obtained title from the United States without having the United States survey of 1806 corrected, it is submitted that the facts surrounding the issue of the Kentucky patents are such as to destroy the force of the issue of those patents as proof of the exercise of jurisdiction by Kentucky over the "Green River Island" tract.

The second claim of Kentucky of right to exercise jurisdiction over the "Green River Island" tract is, "that the property thereon, amounting to many thousands of dollars in value, has always been assessed for taxation by her legally authorized officials, and the taxes thereon paid into her state treasury." This statement is not supported by the evidence.

The third ground on which the State of Kentucky claims to have acquired the right of jurisdiction over the "Green River Island" tract is, "that the residents thereon, possessing the other necessary qualifications, have always voted at her elections as legal voters." It appears that the residents on the "Green River Island" tract voted, when they voted at all, at the town of Henderson, some twenty miles away by the river. Admitting this to be true, it is of little or no effect as showing an exercise of jurisdiction by the State of Kentucky over the disputed tracts.

The fourth ground on which the State of Kentucky claims to have acquired the right of jurisdiction over the "Green River Island" tract is, "that her courts have always exercised undisputed jurisdiction, both civil and criminal, over the said island."

The record in the case of *Garrett* v. *McClain* shows that the jurisdiction of the Kentucky court was disputed in that very case. One of the grounds on which the injunction against the execution of the judgment was asked was, that the Kentucky court which rendered the judgment had no jurisdiction over the "Green River Island" tract, because that tract was "beyond the territorial limits of the State of Kentucky."

X. The State of Kentucky, in her cross-bill, claims that the State of Indiana has always acquiesced in the claims of Kentucky to the "Green River Island" tract. The State of Indiana did not acquiesce in the original issuing of the Virginia patent, since the State of Indiana did not exist at the time the Virginia patent was issued.

It is impossible for a State of this Union to acquire a right of jurisdiction as against another State, over a disputed territory, by any exercise of jurisdiction, however clear and however long continued. To permit a State to acquire jurisdiction by its own action as against another State, would be to apply the equitable doctrine of laches to dealings between sovereign States. Such a doctrine never has been and never could be admitted to exist by the States of this Union. It would be in violation of the common law maxim, — *nullum tempus occurrit regi.*

While a State may allow rights to be acquired against it by its own citizens if it so chooses, it is inconsistent with the idea of sovereignty that one State or nation should acquire rights of territory and jurisdiction by the inaction of another State. The question of state boundaries is a question to be determined by the construction of written instruments, and the examination of the facts in connection therewith, and the application of the principles of law and equity so far as they are consistent with state sovereignty. If it should be admitted that there could be any exercise of jurisdiction or acquisition of territory through the action of one State, and the inaction of another, the result of the doctrine would be to produce disputes regarding the territory, which could finally be settled only by force, since States would not permit the courts to determine claims to acquisition of territory.

Such a doctrine would also be subversive of Article I, section 10, of the Constitution of the United States which provides that, "No State shall, without the consent of Congress, enter into any agreement or compact with another State." If the doctrine of laches or limitation is to apply as between States, it could only be sustained upon the theory upon which the doctrine of laches or limitation is sustained as between

individuals, that is, upon presumption of a prior grant. To hold, therefore, that a State might acquire territory and jurisdiction by its own action, would be practically to hold that one State might enter into compact or agreement with another State, without the consent of Congress, and that the right of jurisdiction which a State of this Union possesses, is a right which may be conveyed by the State without the consent of Congress.

XI. Have the States of Indiana and Kentucky so legislated, and have any acts been done under such legislation which can affect the location of the boundary line between the two States?

The statute of Indiana, of February 27, 1875, referred to in the cross-bill, does not stand by itself. In the year 1873, the State of Kentucky had legislated in regard to the boundary line between the States near the "Green River Island" tract. The statute of Kentucky relating to this matter was approved April 21st, 1873. [This legislation, and the acts of the executive of each State were then reviewed at length, and the results of the examination were claimed to be this:]

The effect of the legislation of Kentucky in 1873, and of Indiana in 1875, since the consent of Congress to it was not obtained, depends, therefore, entirely upon the question whether the meander line of the Ohio River in the United States survey of 1806 was or was not the state boundary line. If it was, it was competent for the two States to provide any evidence of it, as the actual and admitted boundary, which they saw fit.

That the meander line of the United States survey of 1806 was not and could not be the state boundary line is a question which would seem not to admit of argument. When this court held, in the case of *Railroad Company* v. *Schurmeir*, 7 Wall. 272, that the meander lines of the United States surveys were run merely for the purpose of determining the amount of land for which the purchaser from the United States government should pay, it placed a final negative upon any claim that the meander line could ever be a state boundary line. There is not enough in the fact that a meander

Counsel for the State of Kentucky.

line was run along a river forming the boundary of a State of this Union to raise such a meander line from its humble office of determining whether a person should pay a few dollars, more or less, to the dignity of a boundary line between two States.

The absurdity of the survey of 1875 is apparent when it is considered that if the meander line of the United States survey of 1806 should have been adopted as the boundary of Indiana along the Ohio River, a large and valuable part of the city of Evansville and of the other towns and cities of Indiana on the Ohio River would have become a part of the State of Kentucky. If it was proper for the state boundary line to be fixed at the meander line adjacent to the "Green River Island" tract, it was equally proper that it should be so fixed at all points along the Ohio River.

If these statutes of Indiana and Kentucky made or attempted to make the meander line of the United States survey of 1806 the boundary line, they impaired the obligation of the contract made by the United States with the patentees from the United States adjacent to the "Green River Island" tract, on the north, since these statutes made no provision for compensation to these patentees, for the land taken from them between the bayou and the meander line of the survey of 1806.

It is submitted, therefore, — whether the act of Indiana of 1875 is to be treated as part of a proposed "agreement or compact" between the State of Indiana and the State of Kentucky, or whether it stands by itself as furnishing a proposed rule of evidence in the Indiana courts, — that the acts required to be performed as a prerequisite to the taking effect of the statute were never performed and never can be performed; that the statute itself is unconstitutional and void and that therefore neither this statute nor the acts done thereunder have any effect upon the location of the state boundary line.

Mr. P. W. Hardin, Attorney General of the State, and *Mr. J. Proctor Knott* for the State of Kentucky.

Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a controversy between the State of Indiana and the State of Kentucky growing out of their respective claims to the possession of and jurisdiction over a tract of land nearly five miles in length and over half a mile in width, embracing about two thousand acres, lying on what is now the north side of the Ohio River.

Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the river Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana.

Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated "as the river Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.

The territory lying north and west of the Ohio, embracing the State of Indiana, as well as the territory lying south of that river, embracing the State of Kentucky, was, previous to 1776, and down to the cession of the same to the United States, held by the State of Virginia. Indeed, that Commonwealth claimed that all the territory lying north of the Ohio River and west of the Alleghanies and extending to the Mississippi was within her chartered limits. As stated by Chief Justice Marshall, in *Handly's Lessee* v. *Anthony*, 5 Wheat.

374, 376, at an early period of the Revolutionary War, "the question whether the immense tracts of unsettled country which lay within the charters of particular States ought to be considered as the property of those States or as an acquisition made by the arms of all for the benefit of all, convulsed our confederacy and threatened its existence." To remove this cause of disturbance, Congress in September, 1780, passed a resolution recommending "to the several States having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union." The Commonwealth of Virginia yielded to this recommendation, and on the 20th of December, 1783, an act was passed by her legislature authorizing her delegates in Congress to convey to the United States all her right, title and claim, as well of soil as of jurisdiction, "to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio," subject to certain conditions, among which was that the territory should be laid out and formed into States containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as the circumstances would admit, and that the States so formed should be distinct republican States, and admitted members of the Federal Union, having the same rights, sovereignty, freedom and independence as the other States. In pursuance of this act the delegates in Congress, on the 1st of March, 1784, executed a formal deed ceding to the United States all the right, title and claim as well of soil as of jurisdiction which the Commonwealth had to the territory or tract of country within the limits of the Virginia charter, "*situate, lying and being to the northwest of the river Ohio*," for the uses and purposes and subject to the conditions mentioned in the act of the Commonwealth.

By the act of Congress of July 13, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio," a modification was made of the terms of the cession of Virginia, to the effect that there should be formed in the ceded territory not less than three

nor more than five States, the fixed and established boundaries of which were designated, and of which the Ohio River was declared to be one.

As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river. Early in the history of the State, doubts were raised on this point, and to quiet them, its legislature, on the 27th of January, 1810, passed the following act declaring the boundaries of certain counties in the Commonwealth:

"Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line, extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which

"*Be it enacted by the General Assembly*, That each county of this Commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the main land opposite thereto, within this State, and the several county tribunals shall hold jurisdiction accordingly." 1 Statute Law of Kentucky, (1834,) p. 268 Sess. Laws 1810, 100.

Upon this question of boundary we also have, happily, a decision of this court rendered so early as 1820. In *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, ejectment was brought to recover land which the plaintiff claimed under a grant from the State of Kentucky, while the defendants held under a grant from the United States, and the title depended upon the question whether the land lay in the State of Kentucky or in the State of Indiana. It was separated from the mainland of Indiana by a bayou, a small channel, which made out of the Ohio, and entered that river again a few miles below. This bayou was from four to five poles wide and its bed was

dry during a portion of the year. The court said that the question whether the land lay within the State of Kentucky or of Indiana depended chiefly upon the land law of Virginia and on the cession of that State to the United States. And in determining this question it went into the consideration of the proper construction to be given to the deed of cession, and reached the conclusion that the boundary between the States was at low-water mark on the northwest side of the river.

"In pursuing this inquiry," said the court, p. 379, "we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the northwest of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it Virginia must have had in view the convenience of the future population of the country. When a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is its boundary. . . . If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling are annual than where they are diurnal. Wherever the river is a boundary between States, it

is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark. When the State of Virginia made the Ohio the boundary of States, she must have intended the great river Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the mainland only by a narrow channel, through the whole of which the waters of the river do not pass until they rise ten feet above the low-water mark."

This decision has been followed by the courts of Kentucky. See *Church* v. *Chambers*, 3 Dana, 279; *McFarland* v. *Mc Knight*, 6 B. Mon. 500, 510; *Fleming* v. *Kenny*, 4 J. J. Marsh. 155, 158; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394. In this last case, the defendant, a justice of the peace for a Cincinnati township, in the State of Ohio, solemnized a marriage on a ferry-boat upon the Ohio River, midway between Newport in Kentucky and Cincinnati in Ohio, and was indicted in the courts of Kentucky for unlawfully solemnizing a marriage, and was convicted of the offence, he not having been authorized to perform that ceremony by the county court of that State. The Court of Appeals of Kentucky in affirming the conviction referred to the authority of *Handly's Lessee* v. *Anthony*, and said: "That the boundary and jurisdiction of the State of Kentucky rightfully extend to low-water mark on the western or northwestern side of the river Ohio must now be considered as settled." The same doctrine was maintained in *Commonwealth* v. *Garner*, 3 Gratt. 655, by the General Court of Virginia, at its June term, 1846, after elaborate consideration, against the earnest contention of some of its judges that the jurisdiction of the State after the cession extended to the line of high-water mark on the northwest side of the river.

We agree with the observations of the court in *Handly's Lessee* v. *Anthony*, that great inconvenience would have fol-

lowed if land on either side of the river, that was separated from the mainland only by a mere bayou, which did not appear to have ever been navigable, and was dry a portion of the year, had been attached to the jurisdiction of the State on the opposite side of the river; and, in the absence of proof that the waters of the river once flowed between the tract in controversy in this case, and the mainland of Indiana, we should feel compelled to hold that it was properly within the jurisdiction of the latter State. But the question here is not, as if the point were raised to-day for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established? There is much evidence introduced on the part of Indiana to show that since her admission into the Union the Ohio River has not passed between the island and the mainland except at intervals of high water; and that at low water the mainland has been accessible for portions at least of the year from the island, free from any water obstructions. Aside from the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a State, the tract was attached to and formed a part of the territory then ceded, out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the mainland of Indiana so as to justify its designation as an island in the river. Much evidence has also been given on that subject by Kentucky, and a great number of transactions shown, which proceeded upon the assumption that the tract was within the jurisdiction of that State. It is clear, we think, from the whole testimony, that at an early day after Kentucky became a State, the channel between the island and the mainland of Indiana was often filled with water the whole year and sometimes to the width of two hundred yards; and that water passed through it, of more or less depth, the greater part of the year, until down to a period subsequent to the admission of Indiana into the Union.

But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to

the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island* v.

Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on the same subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars.[1] Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II, c. 11, § 149. And Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim

[1] La tranquillité des peuples, le salut des États, le bonheur du genre humain, ne souffrent point, que les possessions, l'empire, et les autres droits des Nations, demeurent incertains, sujets à contestation, et toujours en état d'exciter des guerres sanglantes. 2 Vattel, ed. Pradier-Fodéré, (1863), 134.

of every other person to the article of property in question.' Part II, c. IV, § 164.

Potential as are the considerations drawn from the long silence and acquiescence of Indiana in the claim and pretensions of Kentucky, her affirmative action is not the less persuasive in favor of Kentucky's claim. It appears that on March 26, 1804, Congress authorized a survey into townships, six miles square, of the public lands north of the Ohio River and east of the Mississippi River. 2 Stat. 277, c. 35. Under this act a survey was made of the land in the vicinity of Green River Island in the month of December, 1805, and in April, 1806, and it did not include the island within the territory north of the Ohio, but treated the bank of the bayou or channel north of the island as the bank of that river. The notes of this survey were given in evidence and show conclusively that the officers of the government at that time did not consider the tract in controversy as forming any part of the territory of Indiana, but did consider that the waters of the Ohio River running north of it made the tract now in controversy an island of the river. This survey, from the time it was made, has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island. It is now insisted that the lines of this survey were intended merely as meander lines run for the purpose of defining the sinuosity of the bank and the means of ascertaining the quantity of land then subject to sale, and was not intended as a boundary line of the island. Conceding, for the purposes of this case, that this is true so far as related to the fixing of the precise line of low-water mark, to which the territory of Indiana extended, it does not affect the force of the survey, as evidence that the island was not included within that territory, according to the judgment at that time of the surveying officers of the United States. With knowledge of this survey, the legislature of that State, on the 27th of February, 1875, passed an act entitled, "An act to ascertain the location of the boundary line between the States of Indiana and Kentucky above and near Evansville, and making the same evidence in any dispute." This act recited that difficulty and

dispute had arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between the two States, and that such difficulty involved the title to large tracts of land above and near the line between Green River Island and the State of Indiana, and empowered and directed the Governor to select a commissioner, who should be a resident of the State and a practical surveyor, to act with a similar commissioner to be appointed by the Governor of Kentucky; and provided that the two commissioners so selected should make a survey of the line dividing the States, beginning at the head of Green River Island near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of the island.

The second and third sections of this act are as follows:

"SEC. 2. In running said line the said commissioners shall consult and be governed by the surveys originally made by the government of the United States when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated.

"SEC. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgments of deeds, which writing, so acknowledged, shall be recorded in the recorder's office in the counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky, between the points on said Green River Island heretofore indicated."

An appropriation was also made for the survey.

An act of similar purport had been passed by the State of Kentucky on the 23d of April, 1873, authorizing the Governor of that State to appoint a surveyor to act with the person selected by the Governor of Indiana and make a survey of the

line. In pursuance of these acts the States each appointed a commissioner to survey the line. The commissioners accordingly, in 1877, made a survey, and ran a line on the north side of Green River Island, and also of the small tract known as Buck Island. In doing this, they followed the lines of the United States survey of 1806. By this survey both these islands were left within the State of Kentucky. Complaint being made of the action of the commissioners in running the line on the high bank, the Governor of Indiana directed the commissioner of that State to suspend any further action under the act, and subsequently visited Evansville, a city in Indiana, northwest of the island, and near the survey made, and examined the line of the survey, and in a subsequent letter to the commissioners stated that the line thus run did not in any part conform to the low-water mark of the river, but that the greater part was upon the bank, and the residue at a distance from it, leaving a tract of land between it and the river.

Subsequently the legislature of Indiana, upon the recommendation of the Governor, repealed the law authorizing the survey, and on the 14th of March, 1877, passed an act authorizing the Governor to enter into negotiations with the Governor of Kentucky for the acquisition from the latter State of all her rights of jurisdiction and soil over the Green River Island and her claim for any ground on the Indiana side of the river at said island, or to establish the line between the States by surveys, to be made in such manner as they might deem just; provided that the Governor of Kentucky should be authorized to enter into the agreement by the legislature of that State, and the consent of Congress should be obtained thereto. These efforts to adjust the boundary line failing, the Governor was authorized to direct the prosecution in this court of a suit for the purpose of determining and settling the boundary.

Now whilst no agreement between the States would be of any validity under the Constitution without the consent of Congress, and the survey made pursuant to the joint action of the two States would not have been legally binding even had it not been withdrawn before the report of the commissioners was filed in the offices designated in the acts, still the

law of Indiana authorizing the line to be fixed in accordance with the survey of the United States, and no other was made except the one in 1806, although the act speaks of surveys, was a plain recognition on her part that the boundary of the State was north of the island, though it was uncertain where the line should be drawn on the land, inasmuch as the channel of the bayou had been filled up. It is an admission entitled to great weight in explaining the cause of the State's general acquiescence, from the time it was admitted into the Union up to the passage of that act, in the claim and jurisdiction of Kentucky. Independently of the necessity of obtaining the consent of Congress to the execution of any agreement between the two States, it was competent for the State of Indiana to provide for a survey of a line already established, and to make such survey evidence in subsequent controversies upon the subject.

Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the law declaring the boundaries of her counties on the Ohio River, passed in January, 1810; and there was action taken in the courts of the United States and of the State by parties claiming under her or her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. On the 10th of February, 1784, Virginia issued a military land warrant to one John Slaughter. In March, 1785, Slaughter had a tract of six hundred acres surveyed, upon which he located a part of that warrant, and the tract was conveyed to him by the Commonwealth of Virginia on the 10th of February, 1790, by patent, in which the land was described by metes and bounds as lying in the district set apart for the officers and soldiers of the Virginia Continental line, on the first large island in the Ohio below the mouth of Green River. That island was Green River Island. In September, 1821, Slaugh-

ter's heirs, who were residents of Virginia, brought a suit in ejectment in the Circuit Court of the United States for the District of Kentucky, to recover the land conveyed to their ancestor by this patent, against Garrett and others, who were in possession. The cause was not tried until 1834, when the plaintiffs, who relied entirely upon the validity of the patent to Slaughter, recovered judgment and were awarded restitution of the premises. When the marshal went upon the land to execute the writ for its possession, he was accompanied by one Levi Jones, who claimed to have an equitable title under Slaughter's heirs, and was there to receive possession. Garrett, one of the defendants, concluded to purchase one hundred acres of the land upon which he was living from Jones, and for part of the purchase-money executed to Jones his note. Jones assigned this note to James Rouse, who in turn assigned it to Jackson McLean. McLean brought an action at law upon the note in the Circuit Court of Henderson County, in Kentucky, in which he recovered judgment by default, and sued out a writ of execution, whereupon Garrett filed a bill in equity in the same court, making Jones and Rouse co-defendants with McLean, to enjoin the enforcement of the judgment at law upon the following, among other, grounds: First, that the process in the common law action had been served upon him at his residence on Green River Island, which was not within the territorial limits of the State of Kentucky, but beyond the jurisdiction of the court, and that, therefore, the service of process, judgment and execution were null and void; second, that neither Jones, nor Slaughter, under whom he claimed, had ever had a valid title to the land which Jones had sold him, because the military land warrant upon which Slaughter's patent had been issued could not be located upon land which lay northwest of the Ohio and north of the mouth of the Green River. As evidence that the tract of land in controversy lay in Indiana and not in Kentucky, he filed a copy of the deed of cession from Virginia to the United States as part of his bill. The question of Kentucky's title and right of jurisdiction over Green River Island was thus put in issue and its decision was necessary to the determina-

tion of the case. Several depositions were taken by each party upon the point, but, upon a full hearing of the case, Garrett's bill was dismissed, with costs and charges. Here were two adjudications, one by the United States Circuit Court and the other by a Circuit Court of the State, that Green River Island was within the jurisdiction of Kentucky. And the record shows that between 1818 and 1877 numerous grants of parcels of land on the island were made by Kentucky, and that between these dates taxes were assessed by her officers upon the lands as being within her territory and jurisdiction.

We have spoken of the character of the testimony introduced on the part of Indiana, and of the fact that it does not touch upon the condition of the channel above the island previous to her admission as a State into the Union. The testimony of the witnesses introduced by the State of Kentucky consisted to a great extent of recollections, which must of necessity have been more or less imperfect. They showed, as already stated, that in former times at some periods of the year there was a large volume of water which passed north of Green River Island, and that sometimes this volume continued throughout the whole year; but they also showed that at a very early period great changes had taken place in the channel north of the island, so that in some portions of the year it was easy to pass on foot from the island to the mainland.

The facts as they existed at the time of the cession of Virginia to the United States in 1784, and even at the time of the admission of Kentucky into the Union, have long since passed beyond the memory of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence which in many cases rises little above that of hearsay; such as notices by travellers and maps given by them indicating the position of the tract in question. Of the latter it may be said that they all represent the tract as an island in the river.

Great changes in the bed of the river were to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, according to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great water-courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous forces thus brought into operation.

We have not deemed it important to take up the testimony of each of the numerous witnesses produced in the case by the States of Indiana and Kentucky. It would serve no useful purpose to attempt an analysis of the testimony of each, and to show how little and how much weight should be attributed to it. All the testimony is to be taken with many allowances from imperfect recollection, from the confusion by many witnesses of what they saw with what they heard, or of what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts we have mentioned, corroborated as they are by nearly everything of record presented, leave on our minds a much more satisfactory conclusion than anything derived from the oral testimony before us. The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.

Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the

tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Judgment in favor of the claim of Kentucky will be entered in conformity with this opinion; and commissioners will be appointed to ascertain and run the boundary line as herein designated, and to report to this court, upon which appointment counsel of the parties will be heard on notice. And it is so ordered.

THAW *v.* RITCHIE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 264. Argued April 15, 16, 1890. — Decided May 23, 1890.

Under the statute of Maryland of 1798, c. 101, sub-ch. 12, § 10, the orphans' court of the District of Columbia had authority to order a sale by a guardian of real estate of his infant wards for their maintenance and education, provided that before the sale its order was approved by the Circuit Court of the United States sitting in chancery.

The statute of Maryland of 1798, c. 101, sub-ch. 12, § 10, is not repealed by the act of Congress of March 3, 1843, c. 87.

The authority of the orphans' court of the District of Columbia under the statute of Maryland of 1798, c. 101, sub-ch. 12, § 10, to order a sale of an infant's real estate for his maintenance and education is not restricted to legal estates, or to estates in possession.

A testator devised all his real and personal estate to his widow for life, in trust for the equal benefit of herself and their two children or the survivors of them; and devised all the property, remaining at the death of the widow, to the children or the survivor of them in fee; and if both children should die before the widow, devised all the property to her in fee. *Held*, that the widow took the legal estate in the real property for her life; that she and the children took the equitable estate therein for her life in equal shares; and that the children took vested remainders in fee, subject to be divested by their dying before the widow.

The minute book of a court of chancery is competent and conclusive evidence of its doings, in the absence of an extended record.

Real estate devised to the testator's widow for life for the equal benefit of

Statement of the Case.

herself and their two infant children, and devised over in fee to the children after the death of the widow, and to her if she survived them, was ordered by the orphans' court of the District of Columbia, with the approval of the Circuit Court of the United States sitting in chancery, to be sold, upon the petition of the widow and guardian, alleging that the testator's property was insufficient to support her and the children, and praying for a sale of the real estate for the purpose of relieving her immediate wants and for the support and education of the children. *Held*, that the order of sale, so far as it concerned the infants' interests in the real estate, was valid under the statute of Maryland of 1798, c. 101, sub-ch. 12, § 10.

An order of the orphans' court of the District of Columbia, approved by the Circuit Court of the United States sitting in chancery, under the statute of Maryland of 1798, c. 101, sub-ch. 12, § 10, for the sale by a guardian of real estate of his infant wards for their maintenance and education, cannot be collaterally impeached for want of notice to the infants, or of a record of the evidence on which either court proceeded, or of an accounting by the guardian for the proceeds of the sale.

This was an action of ejectment, brought December 12, 1882, by Columbus Thaw against Maria Ritchie to recover possession of an undivided half of lots 1 and 4 in square 160 in the city of Washington.

At the trial, on the general issue, before Chief Justice Cartter, the plaintiff introduced evidence that his father, Joseph Thaw, died in 1840, seized and possessed of these lots under a title derived from the United States, and leaving a will, dated February 26, 1840, and duly admitted to probate in the same year, which (omitting the formal commencement and conclusion) was as follows:

"Imprimis. I hereby appoint and constitute my beloved wife, Eliza Van Tyler Thaw, to be the guardian of my two youngest children, to wit, my daughter, Columbia Thaw, and my son, Columbus Thaw, and to act in trust for them in all things as fully as I would do if living.

"Item. I give and bequeath to my said beloved wife Eliza all my property of every description, real and personal, to hold and enjoy during her natural life, in trust for the equal benefit and maintenance of herself and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property as above for

the equal benefit of herself and the survivor of the two above-named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall hold the said property during her natural life for her sole own use and benefit; and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life for the maintenance of herself and of the two children aforesaid, while they, or of either, while either of them shall live, or of herself, while she shall survive them both.

"Item. I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole.

"Item. If both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description.

"I do moreover hereby constitute and appoint my beloved wife, Eliza Van Tyler Thaw, above named, the sole executrix of this my last will and testament, and authorize her to administer and execute the same without giving security in any way whatever."

The plaintiff also introduced evidence tending to show that his mother, Eliza V. Thaw, died in February, 1866; and, for the purpose of showing a severance of the joint tenancy claimed to have existed between himself and his sister Columbia Thaw in these lots, put in evidence a deed, dated May 16, 1848, from his sister and one Henry Walker of their interest in these lots to Agricol Favier; a deed, dated October 22, 1874, from a trustee appointed in a suit in equity for the partition of Favier's real estate after his death, purporting to convey the whole of these lots to one Ingersoll; a deed of the lots, dated May 24, 1878, from Ingersoll to Mary J. France; and the will of Mrs. France, admitted to probate in January, 1881, devising all her real estate to the defendant.

It was admitted that the real estate sought to be recovered was worth more than $12,000; and that the defendant was in possession thereof, claiming title adversely to the plaintiff.

The defendant claimed title under a deed of the two lots to Favier from Eliza V. Thaw, dated March 17, 1848, purporting to be executed pursuant to an order of sale made upon her petition by the orphans' court for the county of Washington in the District of Columbia, and approved by the Circuit Court of the United States of the District of Columbia, sitting as a court of chancery. In support of this defence, the defendant offered in evidence, and the court admitted, against the objection and exception of the plaintiff, the following matters:

(1) From the office of the Supreme Court of the District of Columbia, a book, entitled "Chancery Rules No. 4," of its predecessor, the Circuit Court of the United States of the District of Columbia, containing this entry:

"No. 344. Eliza V. Thaw, guardian to Columbus and Columbia Thaw, infant children of Jos. Thaw, dec'd. Petition, exhibit, decree of orphans' court. 1844, Oct. 12. — Decree affirming decree of orphans' court."

(2) From the same office, the only paper on file there in said case No. 344, certified by E. N. Roach, register of wills, under date of April 29, 1844, to be "a true copy from an original filed and recorded in the office of the register of wills for Washington County aforesaid;" and consisting of a petition addressed to the judge of the orphans' court for that county, dated March 29, 1844, signed by Eliza V. Thaw, and having annexed to it a certificate of a justice of the peace to her oath that "the facts contained in the within petition are true to the best of her knowledge and belief;" together with the order of the orphans' court thereon; which petition and order were as follows:

"To the Hon. N. P. Causin, judge of the orphans' court of Washington County:

"The petition of the subscriber respectfully represents that she has paid all the debts due by her deceased husband, Joseph Thaw, and that the property left by the deceased is insufficient to support her and the children provided for in the

will of the deceased; and a portion of the estate belonging to the deceased consists of two vacant and unimproved lots of ground situate, lying and being in the city of Washington, in the District of Columbia, to wit, lots numbers one and four in square number one hundred and sixty. Your petitioner respectfully prays that the court will deem it expedient and cause the said lots to be sold for the purpose of relieving the immediate wants of the petitioner and for the support and education of the children named in the will of the said Joseph Thaw, deceased, and that an order may be granted for the sale thereof at an early a day as practicable; and, as in duty bound, will ever pray, etc.

"29th March, 1844. ELIZA V. THAW."

"Orphans' Court of Washington, D.C.

"In the Case of the Petition of Eliza V. Thaw, Executrix and Guardian to Columbia and Columbus Thaw, Minor Children of Joseph Thaw, deceased.

"This case coming on to be heard in the orphans' court on the petition, exhibits, accompanying proofs and representation of said Eliza V. Thaw in her capacity as guardian and executrix aforesaid, the same were by the court read and duly considered; and thereupon it is by the said court, this 29th day of March, 1844, ordered, adjudged and decreed, provided that the Circuit Court of the District of Columbia for the county of Washington, sitting as a court of chancery, shall by its proper order in the premises approve thereof, that the said guardian, for the petitioner's minor children of said Joseph Thaw and herself, be and she is hereby authorized and empowered to sell the said real estate mentioned in said petition, at public or private sale, after such notice by advertisement as she shall deem reasonable and sufficient, on the following terms, viz., either for cash or on credit, at the option of the said guardian; and on the full payment of the purchase-money and interest, and on the ratification of the sale by this court, to execute to the purchaser, his heirs or assigns, at his or their cost and request, a valid and sufficient deed of conveyance in fee simple of the said premises, with all the right and estate therein of the said

Columbia and Columbus Thaw, minor children aforesaid; provided that the said guardian, before proceeding to act hereunder, shall file with the register of wills her bond, with security, to be approved by the judge of this court, in the penalty of seven hundred and fifty dollars, with the usual condition for the due and faithful performance of the trust reposed in her as guardian of said children, and immediately after making said sale to report the same under oath to this court.

"Nath'l Pope Causin."

(3) Certified copies of two bonds, each executed by Eliza V. Thaw as principal, and Henry Walker and John Walker, as sureties, to the United States.

One of these bonds, dated March 22, 1844, was in the penal sum of $725, and upon the condition that if "the above-bounden Eliza Van Tyler Thaw, as guardian to Columbia and Columbus Thaw, orphans of Joseph Thaw, of Washington County, deceased, shall faithfully account with the orphans' court of Washington County, as directed by law, for the management of the property and estate of the orphans under her care, and shall also deliver up the said property agreeably to the order of the said court, or the directions of law, and shall in all respects perform the duty of guardian to the said Columbia and Columbus Thaw, according to law, then the above obligation will cease; it shall otherwise remain in full force and virtue in law."

The other bond, dated May 17, 1845, was in the penal sum of $750, and upon this condition: "Whereas Eliza V. Thaw, by a decree of the orphans' court of Washington County aforesaid, and confirmed by an order of the Circuit Court of the District of Columbia for the county of Washington, aforesaid, has been appointed trustee to sell the real estate of the late Joseph Thaw, mentioned in said order, for the support and maintenance of Columbia and Columbus Thaw, minors, as will more fully appear by the said decree, reference being thereto had: Now the condition of the above obligation is such that if the above bounden Eliza V. Thaw do and shall

well and faithfully perform the trust reposed in her as trustee aforesaid by the said decree, or that may be reposed in her by any further decree or order in the premises, then the above obligation to be void; otherwise in full force and virtue in law."

(4) A book of records from the office of the register of wills for the District of Columbia, entitled "Guardians' Docket No. 2," containing numerous entries relating to proceedings of guardians in the orphans' court from 1818 to 1860, but no proceedings of the court relating to the sale of real estate, and the only entry in which relating to Eliza V. Thaw's guardianship was as follows:

"Eliza V. Thaw, guardian to Columbia Thaw and Columbus Thaw, orphans of Jos. Thaw. Bond, March 22, 1844, $725; H'y Walker, Jno. Walker, sureties. Trustee bond, 17 May, 1845, $750; H'y Walker, E. Walker, sureties."

(5) Another book of records from that office, entitled "Liber E. N. R. No. 2. Proceedings 1846 to 1861," the entries in which appeared to be consecutive, and which was the only record in that office of proceedings between those dates relating to sales of real estate, and was made by binding up loose scraps of paper in the handwriting of E. N. Roach, register of wills during those years, previously kept in portfolios; and contained the only record to be found in the office relating to the real estate of Joseph Thaw, namely, among the proceedings of the orphans' court on Friday, January 21, 1848, the following: "Sale of real estate of Jos. Thaw, dec'd, filed. Order of approval filed," or "for," the last word being indistinct and uncertain.

(6) Testimony of the assistant clerk of the Supreme Court of the District of Columbia, and of persons who had served or had made searches in the registry of wills, that there was great confusion in the records, both of the Circuit Court of the United States of the District of Columbia, and of the orphans' court, before the organization of the Supreme Court of the District of Columbia in 1863 under the act of March 3, 1863, c. 91. 12 Stat. 762.

(7) Docket entries in a great number of other cases on the

chancery side of the Circuit Court of the United States of the District of Columbia before and after October 12, 1844, and between 1823 and 1863, and on the equity side of the Supreme Court of the District of Columbia between 1863 and July 8, 1865, showing that the practice and forms of proceeding in such cases during those periods were similar to the practice in said case No. 344; and also many later cases in the orphans' court before 1881, in which the practice and forms of proceeding were similar.

(8) The deed executed by Eliza V. Thaw to Agricol Favier, dated and acknowledged March 17, 1848, and recorded March 7, 1867, containing this recital:

"Whereas a decree was passed on the twenty-ninth day of March in the year one thousand eight hundred and forty-four, by the orphans' court for the county of Washington in the District of Columbia, upon the petition of Eliza V. Thaw, guardian of her infant children, Columbus and Columbia Thaw; and whereas the said Eliza V. Thaw was thereby appointed a trustee to sell lots numbered one and four in square one hundred and sixty in the city of Washington; which decree was on the twelfth day of October in the year one thousand eight hundred and forty-four confirmed by the Circuit Court for the county of Washington, sitting as a court of chancery; and the said Eliza Thaw having, in conformity with said decree, filed a bond with sureties, which was approved by the said orphans' court; and having, in like conformity with said decree, sold said lots above mentioned, and reported the same to said court, which report was by said court, on the twenty-first day of January in the year one thousand eight hundred and forty-eight, duly approved, ratified and confirmed; and whereas the said Agricol Favier was the purchaser of said lots from her, the said Eliza V. Thaw, the trustee as aforesaid, under the power vested in her by the said decree."

By the terms of this deed, "the said Eliza V. Thaw, for and in consideration of the sum of ————, lawful money of the United States, to her in hand paid by the said Agricol Favier at or before the sealing and delivery of these presents, the re-

ceipt whereof is hereby acknowledged," conveyed to Agricol Favier, in fee, these two lots, "and all the estate, right, title, interest, claim and demand whatsoever, legal and equitable, of her, the said Eliza V. Thaw, as guardian and trustee as aforesaid, and as well as in her own right as of the said infant children, Columbus and Columbia Thaw, to the same."

(9) A deed of partition of other lands between the plaintiff and his sister Columbia, dated March 1, 1871, which recited that "their said mother, after disposing of the real estate acquired by said will, and investing the proceeds thereof in other real estate," died intestate.

The plaintiff requested the court to instruct the jury as follows:

"1st. Under Joseph Thaw's will, during the life of Mrs. Thaw, his widow, she held the legal title to the real estate devised thereby for her life, in trust for herself and the two children, Columbia and Columbus, according to the terms prescribed in the will. The interest which Columbus Thaw took in the real estate under his father's will during the life of his mother was a remainder in fee after the termination of her life, and was not an estate in possession until after the death of his mother. The orphans' court had no power during Mrs. Thaw's life to decree the sale of the estate in remainder of Columbus Thaw. Her deed, therefore, purporting to convey said estate is void,

"2d. The Maryland act of 1798, chapter 101, sub-chapter 12, § 10, did not apply to remainders; and such estates of infants were not subject to sale on petition of the guardian to the orphans' court, with the approval of the Court of Chancery, as provided in said act.

"3d. The alleged entry in the records of the orphans' court, purporting to be of the date of January 21, 1848, in these words: 'Sale of real estate of Jos. Shaw, dec'd filed. Order of approval for,' is indefinite, uncertain and insufficient to authorize Mrs. Thaw's deed; inasmuch as it does not state what sale, or what real estate was sold, nor by whom, to whom or for what consideration the sale was made; and inasmuch as no report of sale is shown, and no guardian's account, and no

record evidence of any payment whatever, and the deed itself does not recite any consideration.

"4th. The act of Congress of March 3, 1843, entitled 'An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia,' repealed the Maryland act of 1798, so far as concerned the sale of the real estate of infants; and since that act of Congress was passed, the real estate of infants could only be sold upon a bill filed therefor as prescribed by said act of Congress; and, as no such bill was filed in reference to the real estate in question, the deed of Eliza V. Thaw to Agricol Favier did not convey the interest of Columbus Thaw therein.

"5th. The orphans' court of the District of Columbia, at the date of the proceedings therein relating to the sale of the real estate by Eliza V. Thaw, guardian, was one of limited jurisdiction; and a party claiming title to real estate under its proceedings must show affirmatively that it had jurisdiction; and that not having been shown in this case, the deed from Mrs. Thaw to Agricol Favier did not convey the interest of the plaintiff in the real estate in question."

But the court refused so to instruct the jury, and directed a verdict for the defendant; a verdict and judgment were rendered accordingly; and the plaintiff excepted to the refusal and direction.

The court in general term, Justices Hagner and James sitting, reversed the judgment, for the reasons stated in an opinion delivered by Mr. Justice Hagner, and reported in 4 Mackey, 347, 358–390. Upon the defendant's petition, a reargument was ordered before the whole court, and the original judgment was affirmed, for the reasons stated in the opinion delivered by Mr. Justice Cox, and reported in 5 Mackey, 200–228, Mr. Justice Hagner dissenting. The plaintiff sued out this writ of error.

Mr. F. P. Stanton and *Mr. S. R. Bond* for plaintiff in error.

The principal questions for consideration are:

First. Did the Maryland act of 1798 give jurisdiction to

the orphans' court, with the approval of its order by the late Circuit Court, to decree the sale of real estate of infants?

Second. If such jurisdiction was conferred by said act, was it in force in this District at the date of the alleged decree and sale, or was it repealed or superseded by the act of Congress of March 3, 1843, entitled "An act to provide in certain cases for the sale of real estate of infants within the District of Columbia?"

Third. Assuming that the act of 1798 conferred upon the orphans' court the power to decree the sale of an infant's real estate under its provisions, does the record in this case show that it acquired jurisdiction for that purpose and that the alleged sale was legally made?

Fourth. Was the infant's interest in the property in question real estate in such a sense as to be the subject of such a sale?

I. The Maryland act of 1798, c. 101, sub-chapter 12, provides, in § 6, that every guardian appointed by the court having the care of real estate, shall, within three months after executing his bond, procure the said estate to be viewed and reported on by two skilful, discreet persons, not related to either party, and appointed by the orphans' court, who shall take an oath to appraise the same without favor or prejudice, and shall estimate the annual value thereof, and set down what improvements, etc., are on the land, and their condition, etc., and shall make a certificate of all they have done, and the same shall be returned by the guardian to the orphans' court within three months.

Section 7 provides that "No guardian shall commit waste on the land; but the court may, on his application, allow him to cut down and sell wood and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance."

Section 8 provides that the guardian shall either cultivate or lease such real estate, or may with the court's approbation, undertake the estate on his own account and be answerable for the annual value.

Section 9 provides that the guardian shall account for all profit and increase of the estate, etc.

Section 10 is as follows:

"And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans' court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order: Provided, nevertheless, That no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the Court of Chancery or General Court, as well as of the orphan's court."

This proviso is claimed by the counsel for the defendant to confer upon the orphans' court plenary power, upon the *ex parte* petition of the guardian, without bill or citation of any kind to the infant, to pass a decree for the sale of his real estate upon an *ex parte* ratification of the decree by the late Circuit Court, and this in the face of the express provision in the same act establishing the orphans' court, "that the said orphans' court shall not, under any pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this or some other law."

We deny the correctness of this interpretation. Looking at the specific and guarded provisions of that act to protect the rights of an infant in respect to his personalty and to his slightest interest in the realty, such as the cutting and selling wood therefrom, or its careless cultivation even, it is beyond reason and belief that the same legislative body should, in the same act, have intended to confer upon the orphans' court, to which it positively prohibited the exercise of any incidental or constructive jurisdiction, authority to sell the infant's realty, including timber and improvements, without the slightest direction as to the manner of sale or the proceedings by which the same was to be effected.

The authority, if any, must be expressly conferred. Where are the words found which give any such express grant of

power? The brief proviso, negative in its terms, "that no part of the real estate shall, on account of such maintenance and education, be *diminished* without the approbation of the Court of Chancery or General Court, as well as of the orphans' court," is the sole expression in the law upon which our opponents rely as the grant of such power. The words *sell* or *sold* do not occur in it. If it was intended to confer the power to *sell* real estate it would have said so, as nothing was to be taken by implication. The acts of Congress of 1843, 5 Stat. 621, c. 87, and 1856, 11 Stat. 118, c. 163 (Rev. Stat. D. C. §§ 968, 973), relating to the sale of real estate of infants, etc., explicitly treat the proceeds of such sale as real estate standing in the place of that which was sold.

In the Maryland system of jurisprudence at that time there was no necessity to confer such power upon the orphans' court, nor could any exigency arise wherein the interest of infants could demand its exercise; for whenever there was a proper occasion for the sale of the realty, the guardian could procure such sale through the more guarded and appropriate proceedings of a Court of Chancery.

The courts of Maryland have maintained the jurisdiction of the Court of Chancery of that State, independent of statute, to decree the sale of an infant's real estate upon a proper showing, and through proper proceedings. In *Corrie's Case*, 2 Bland, 488, Chancellor Bland says it has always been admitted that the Chancellor of Maryland was invested with all the powers in relation to infants with which the Chancellor of England had been clothed. To the same effect are *Dorsey* v. *Gilbert*, 11 G. & J. 87; *Downin* v. *Sprecher*, 35 Maryland, 474; *Long* v. *Long*, 62 Maryland, 33; *Taylor* v. *Peabody Heights Co.*, 65 Maryland, 388.

The office of that proviso was this; *after* a sale through a Court of Chancery, to authorize the application of the proceeds of the sale, by the concurrent action of the Court of Chancery and the orphans' court, to such maintenance and education. In this way the act supplied a seeming defect in the then existing law whenever a case should arise where the infant's personal estate was insufficient for his support and education;

but the instances are numerous which show with what caution the realty was allowed to be encroached upon, especially as its possession was a qualification to vote or to hold office; and until the act of 1785, c. 80, § 9, authorized the guardian to apply a tenth part of his ward's personal estate, annually, for his education, no part of the principal of the personalty could be so used. The orphans' courts were generally presided over by laymen presumably unqualified to supervise, especially without specific statutory directions, the often complicated proceedings, as practised in a Court of Chancery, for the sale of real estate and the protection of all the rights and interests involved. There are numerous Maryland decisions showing how jealously the orphans' court was excluded from control over, or interference with, real estate. *Stewart* v. *Patterson*, 8 Gill, 46; *Hayden* v. *Burch*, 9 Gill, 79.

It is argued, in avoidance of the fact that the practice pursued in this case was never adopted in Maryland, that after the organization of the courts in the District of Columbia they were not bound to follow the Maryland courts in their construction of the act in question. We do not deny that the District judiciary is independent of that of Maryland. We only maintain that the adjudications and practice in the State where the act was originally passed, and where it remained in force, certainly until 1816, and from which it was, in 1801, adopted as the law of this District, are most persuasive, if not conclusive, arguments in favor of the construction which they have placed upon the act. *Metropolitan Railroad* v. *Moore*, 121 U. S. 558.

We deem it wholly irrelevant to the argument what may have been the opinion or practice upon this question in any other jurisdiction than that of Maryland, as the only point in the argument is to shed light upon the intention of the legislative body which passed the act under consideration, and that intention must be judged by the occasion supposed then and there to exist for its passage.

Before closing this point of our argument we would call attention to section 16 of sub-chapter 12 of the act of 1798, which provides that "nothing in this act contained shall be

construed to affect the general superintending power exercised by the Court of Chancery with respect to trusts." As will appear when we come to comment upon the will of Joseph Thaw, the estate with which the orphans' court attempted to deal in this case, was a trust estate during the life of Mr. Thaw, and therefore came within the inhibition above quoted.

II. As to the effect of the act of Congress approved March 3, 1843, entitled "An act to provide in certain cases for the sale of real estate of infants within the District of Columbia." 5 Stat. 621, c. 87; incorporated in Rev. Stat. D. C. § 957. This act was passed more than a year before the proceedings were instituted by Mrs. Thaw which resulted in the alleged sale, and about four years before the sale is supposed to have taken place, no date of sale anywhere appearing. It was in full force at that time, and we confidently claim that it superseded any authority that can possibly be held to have been granted by the act of 1798 to the orphans' court to decree the sale of the real estate in question, and furnished the course of proceeding necessary to be pursued to accomplish that purpose.

There is no exigency supposed to be provided for by the former act that is not included in the later one, which is broader in its scope, more definite in its provisions and ample in every way to accomplish, by a better and safer method, everything that can possibly be contemplated by the former. On well-settled principles of statutory construction, the former law, so far as it related to the subject-matter covered by the latter, was superseded and repealed by it. *United States* v. *Tynen*, 11 Wall. 88; *Claflin* v. *United States*, 97 U. S. 46.

A similar act was passed in Maryland in 1816, and amended by act of 1818 providing for the sale of a part or the whole of an infant's real estate through the guarded proceedings of a Court of Chancery whenever it shall appear to the court, after hearing and examination, etc., "that it will be for the interest and advantage of the infant" to sell the same, and proceedings for the sale of infant's realty in that State have ever since been required by its courts to conform to the provisions of that law, though, like the act of 1843, it contains no repealing clause, and its title is to authorize the sale in "cases

therein mentioned," as that of the act of 1843 is to authorize it in "certain cases." *Hunter* v. *Hatten*, 4 Gill, 115; *S. C.* 45 Am. Dec. 117; *Williams's Case*, 3 Bland's Ch. 186, 203, 204.

In closing this point we will add that the practice in this District has now come into conformity with what we claim to be the only practice for the sale of an infant's real estate which has any legal warrant, as is shown by the list of cases filed by us and made part of the record and by a comparison of the numbers and dates of those cases with those of the list filed by the defendant; and we do not think that a practising attorney would now ask, or the court grant, an order of sale upon proceedings similar to those pursued in this case; yet what is the law now, in that respect, was the law in 1844 and 1848, when the proceedings relied upon by the defendant were instituted and prosecuted.

III. Whatever construction may be placed upon the acts of 1798 and 1843, we contend that the record totally fails to show jurisdictional facts sufficient to empower the orphans' court to divest the plaintiff in error, then an infant, of his interest in the property in question.

The proceedings in the orphans' court and in the Circuit Court of the District consist only of brief docket entries and of the certified copy of a petition in the former court by Mrs. Thaw, not even describing herself as guardian, with a decree thereon, exhibited in the Circuit Court, and there, without any other pleadings or parties, summarily approved. The record of these doings is meagre, informal and deficient. We are well aware that, in courts whose jurisdiction is not questioned, such deficiencies are overlooked and often supplied by intendment and presumption. The authorities quoted to show what great informalities in such cases are disregarded, we do not answer, because we do not dispute them.

But we claim that the orphans' court, at the time of these proceedings, was an "inferior court," in that sense which required everything necessary to give jurisdiction to be shown in its record.

It is expressly made so by the act establishing it, which provides that "the said orphans' court shall not, under pretext of

incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this or some other law."

Among the numerous decisions showing with what strictness this principle has been enforced, we cite the following: *Scott* v. *Burch*, 6 H. & J. 67; *Townshend* v. *Brooke*, 9 Gill, 90; *Conner* v. *Ogle*, 4 Maryland Ch. 425; *Lowe* v. *Lowe*, 6 Maryland, 347; *Yeaton* v. *Lynn*, 5 Pet. 224, 230.

Referring back to the provisions of the act of 1798, as given under point I of this brief, we see with what specific safeguards the real estate of an infant is surrounded by sections 6, 7, 8 and 9. Then when we come to section 10, under which the alleged sale in this case is claimed to have been made, we find these safeguards still further maintained. Down to the *proviso*, for which such potency is claimed, this section is one single provision of the law, the several parts of which are separated only by commas and semicolons — in fact, it is one single sentence of which all the clauses are interdependent. It would seem necessary, therefore, that the court should have the account required of the guardian, if not the report of the appraisers as per section 6, in order to know the condition of the estate and to determine the annual sum to be expended for the orphan. The language of the statute makes this a *condition precedent*, and surely it is only a reasonable condition for the sale of an orphan's realty.

The proviso which immediately follows and qualifies the provisions of the act of 1798 commented on above has been construed to authorize the extraordinary proceedings shown in this case, that is to say, a simple petition by Mrs. Thaw, the guardian, though not stating that she is or acts as such, in the orphans' court, and a decree thereon; and a certified copy of this petition and decree exhibited in the Circuit Court and there approved summarily, *ex parte*, eventuating in the docket entry in the chancery rules No. 4, case No. 344, of date October 4, 1844. This is the whole case.

We deny the validity of this interpretation of the law of 1798. The jurisdictional facts must appear on the face of the proceedings; the judgment of a court without jurisdiction is void, and its proceedings must be in accordance with the funda-

mental and well-established principles of practice. Especially is this so of courts of limited jurisdiction, as we have shown above. *Bloom* v. *Burdick*, 1 Hill, 130; *S. C.* 37 Am. Dec. 299; *Thatcher* v. *Powell*, 6 Wheat. 119; *Elliott* v. *Peirsol*, 1 Pet. 328; *Bank of the United States* v. *Ritchie*, 8 Pet. 128; *Shriver's Lessee* v. *Lynn*, 2 How. 43; *Hickey's Lessee* v. *Stewart*, 3 How. 750; *Williamson* v. *Berry*, 8 How. 495; *Windsor* v. *Mc Veigh*, 93 U. S. 274.

IV. As to the interests of the infants in the property at the time of the alleged sale.

By the will of Joseph Thaw the widow was invested with a life estate "*in trust* for the equal benefit and maintenance of herself and of her daughter Columbia and of her son Columbus." In the same clause it was provided that if either or both the children should die before the mother, she should hold the property, *during her natural life, in trust*, for the equal benefit of herself and the surviving child, and in case of the death of both children then "for her own sole use and benefit." This part of the will is explicit in creating a life estate only, and in raising a *trust* of that estate for the benefit of all three as long as the mother should live.

Now, at the time of Mrs. Thaw's application to the orphans' court in 1844, this trust estate for her life was in existence, separate and distinct from the remainder in fee. If the property was sold under the decree of that court this trust was included and disposed of by Mrs. Thaw's deed. But if any thing in this case be certain and undeniable, it is that the orphans' court was wholly without any jurisdiction over trust estates. Maryland act of 1798, c. 101, sub-ch. 12, sec. 16. We think this point decisive of the whole case.

That clause of the will which gives to the two children, and to their heirs and assigns, all the estate real and personal, that shall remain after the death of the mother, would undoubtedly have given the children a *vested* remainder in fee, if that had been all. But this clause is followed by another, which says, "if both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife,

Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description." Be it observed, that this last clause does not devise the property to the mother in the event of the children dying *without issue*, but simply on the condition of their dying before her. If both had married and had children and then died before the mother, we presume the last clause of the will would have prevailed, and the mother would have taken the estate. Did she not have an interest in remainder by virtue of this last clause giving the estate to her and her heirs, an event quite possible to happen? If the estate in remainder might take effect in her, it could not have been vested at the same time in the children. Powell on Devises, Vol. I, 206, and Vol. II, cxiii.

As contingent remainders are not subject to sale or conveyance, it matters not that here both parties to this double contingency are claimed to have united in the deed.

Mr. George F. Appleby for defendant in error.

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

In the consideration and decision of this case, we have been greatly aided by the able and exhaustive opinions delivered in the court below.

The principal question is whether the orphans' court, with the approval of the Circuit Court of the United States of the District of Columbia sitting in chancery, had jurisdiction to order the sale of real estate of infants for their maintenance and education.

It may be assumed that in Maryland before 1798 the orphans' court had no authority to order a sale of a ward's real estate for any purpose; although the Court of Chancery was empowered by statute to direct a sale of an infant's land for the purpose of making partition, and perhaps had inherent authority to order a sale of an infant's real estate for his support and education. Maryland Stats. 1715, c. 39, §§ 9, 33, and 1758, c. 4, Bacon's Laws of Maryland; February, 1777, c.

8, 1 Kilty's Laws; 1785, c. 72, § 12, and c. 80, § 9, and 1798, c. 101, 2 Kilty's Laws; 4 Mackey, 361, 368; 5 Mackey, 202-206.

The earliest statute of Maryland, which authorized a sale by a guardian of the principal of the personal property of his ward, was the statute of 1785, c. 80, § 9, by which, after providing that a guardian should not profit by any increase or lose by any decrease "of the estate of the minor under the care of such guardian," and should annually settle an account "of such estate" with the orphans' court, in which "the increase and profits of the estate" should be accounted for, or the loss or decrease thereof allowed, and he should be allowed by the court a commission "upon the whole annual produce of such estate" for managing "such estate," it was further enacted as follows: "And in case the produce of the estate is not sufficient to maintain and educate the minor in a proper manner, and it shall appear to the orphans' court aforesaid that it will be for the benefit and advantage of the orphan to apply some part of the principal of the personal estate to which he shall be entitled towards his education, it shall and may be lawful for the said court to allow the guardian to apply a part of the principal of such personal estate, not exceeding one tenth part thereof annually, to the purpose aforesaid."

The Maryland statute of 1798, c. 101, which is understood to have been drawn up by Chancellor Hanson at the request of the legislature of Maryland, is entitled "An act for amending, and reducing into system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons," and is divided into several sub-chapters, the twelfth of which relates to guardians and wards, and contains the following provisions:

By § 1, whenever a male under the age of twenty-one years, or a female under the age of sixteen, entitled to land by descent or devise, or to personal property of a deceased person by way of distributive share, or of legacy or bequest, shall not have a natural guardian, or a guardian appointed by last

will, "the orphans' court of the county where the land lies, or in which administration of the personal estate is granted, shall have power to appoint a guardian to such infant."

By § 5, on the guardian's executing his bond, the orphans' court shall have power to order "the land, distributive share or other property" of the ward to be delivered to the guardian.

By § 6, "every guardian appointed by the court, having the care of a real estate," shall, within three months, procure an appointment by the orphans' court of appraisers "to examine the estate and estimate the annual value thereof."

By § 7, "no guardian shall commit waste on the land; but the court may, on his application, allow him to cut down and sell wood, and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance."

By § 8, "each guardian, having a real estate under his care, shall either cultivate the same," "or he shall lease the same from year to year, or for any term not exceeding three years, and within the non-age of the ward; or he may, with the court's approbation, undertake the estate on his own account, and be answerable for the annual value."

By § 9, "every guardian shall account for all profit and increase of the estate, or annual value as aforesaid, and shall not be answerable for any loss or decrease sustained without his fault, to be allowed by the orphans' court."

Section 10 (upon the construction and effect of which this case turns) is as follows: "And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans' court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order: provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education,

be diminished without the approbation of the Court of Chancery, or General Court, as well as of the orphans' court."

By § 11, "on the first account to be rendered by a guardian, he shall state the property by him received from an executor or administrator, or otherwise belonging to his ward, and every increase, and the profits thence arising, if any."

By § 12, "in case the personal property of a ward shall consist of specific articles," "the court, if it shall deem it advantageous for the ward, may at any time pass an order for the sale thereof for ready money, or on credit, the purchaser, with security, giving bond to the said ward, bearing interest."

By § 13, "every account of a guardian shall state his expenditures in maintaining and educating the ward, not exceeding the income of the estate, unless allowed by the court."

By § 15, on the ward's arrival at age, the guardian shall exhibit a final account to the orphans' court, and shall deliver up, agreeably to the court's order, to the ward, "all the property of such ward in his hands."

By § 16, "nothing in this act contained shall be construed to affect the general superintending power exercised by the Court of Chancery with respect to trust."

By § 20 of sub-chapter 15, it is declared that "the said orphans' court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by this act, or some other law."

The statute of Maryland of 1798, by the terms of its final section, took effect on June 1, 1799, and was to continue in force until the end of the year 1801; and it was continued in force in the District of Columbia, and equity jurisdiction was vested in the Circuit Court of the United States of the District, by the act of Congress of February 27, 1801, c. 15, §§ 1, 5. 2 Stat. 105, 106.

On consideration of § 10 of sub-chapter 12 of the statute of 1798, in connection with the other sections of that sub-chapter, and in the light of the previous law of Maryland upon the subject, we concur in the final conclusion of the court below, that the orphans' court, with the approval of the Circuit Court of the United States of the District of Columbia sitting

in chancery, had power to order a sale of the real estate of infant wards for their maintenance and education.

By the terms of that section, the orphans' court, upon settling the guardian's account annually or oftener, "shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal, and to sell part of the same, under its order: provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the Court of Chancery, or General Court, as well as of the orphans' court."

The orphans' court is thus empowered to allow the guardian, for the suitable maintenance and education of the ward, to exceed "the income of the estate," and to use and sell part of the principal thereof. The words "the estate," in their natural and legal meaning, include the whole property of the ward in the guardian's hands; and the words "the property," "the estate" and "the income of the estate" are habitually and repeatedly used in that sense, both in other sections (§§ 6, 8, 9, 11, 13, 15) of the same sub-chapter, and in the earlier statute of 1785, c. 80, § 9, as appears in the passages already quoted from each of those statutes. Wherever an authority to sell is intended to be limited to personal property, it is so expressed, as in § 9 of the statutes of 1785, and in § 12 of the statute of 1798. Compared with the express restriction of the authority to sell any part of the principal to "personal estate" in the act of 1785, the omission of any such restriction in the act of 1798 strongly tends to show that it was purposely omitted in the latter act.

This conclusion is confirmed by the proviso "that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the Court of Chancery, or General Court, as well as of the orphans' court." As observed by Mr. Justice Story, speaking for this

court, "the office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." *Minis* v. *United States*, 15 Pet. 423, 445. The insertion of this proviso, therefore, manifests the understanding and intention of the legislature that real estate was and should be included in the preceding general authority to order a sale of part "of the estate," except so far as qualified by the proviso. Indeed, if that authority did not include real estate, the proviso would be superfluous.

The necessary construction of the whole section, including the proviso, appears to us to be that express authority is thereby granted to the orphans' court to order a sale of any part of the ward's estate, real or personal, for his maintenance and education; but that, before any sale of real estate can be made for this purpose, the order of the orphans' court shall be approved by the Court of Chancery or the General Court. Whether the property to be sold for this purpose is personal or real, the application is to be made to the orphans' court, and the order granted by that court in the first instance. In the case of personal property, no action of any other court is required. In the case of real estate, the order of sale, after being passed by the orphans' court, must be presented to and approved by the Court of Chancery or the General Court; but no separate suit need be instituted in either of those courts.

This construction has prevailed in the courts of the State of Maryland, as well as in those of the District of Columbia.

In *Goltier's Case*, which is reported in 3 Bland, 200, note, and an authenticated copy of the proceedings in which has been filed in this case and sent up with the record, a petition presented in December, 1810, to the orphans' court of Cecil County in the State of Maryland, by a father and guardian, alleged that his infant children and wards had become entitled, in right of their mother, to one-ninth part of a grist mill and about one hundred and forty acres of land in that county, the

other owners of which, after consulting with the petitioner, had "concluded that a sale of the said mill and lands would be highly advantageous to all the persons interested," and had contracted to sell them to one Alexander Scott for the sum of $6424.25, provided the petitioner should be able to convey his children's part; and that the petitioner believed that such a sale would "much promote the interest and welfare of his said children, and enable him to educate and support them more to their advantage than if no such sale were to be made;" and therefore prayed the orphans' court to "order that he may be able to make the necessary conveyance." On December 12, 1810, the orphans' court, "on due consideration of the allegations contained in the within petition," was "of opinion that the sale prayed for was to the advantage of" the wards, "and should be confirmed, and that the petitioner be authorized to make conveyance of that part of his wards' real estate." In the Court of Chancery, six days afterwards, Chancellor Kilty signed a decree, which in the authenticated copy, quoted in 4 Mackey, 370, is stated as follows: "Under power vested in this court by the act of 1798, c. 101, sub-ch. 12, § 7, the above order of the orphans' court is approved." This decree, as printed in 3 Bland, 200, note, differs only in substituting § 10 for § 7. That it was not made under the act of 1785, c. 72, § 12, is quite clear, because no partition was sought, as well as because the petition was addressed to the orphans' court, and not to the Court of Chancery, in the first instance. *Tilly* v. *Tilly*, 2 Bland, 436, 438 and note. Both versions of the decree agree in stating that it was made under the power vested in the Court of Chancery by the act of 1798, c. 101, sub-chapter 12; and § 7 of that sub-chapter concerns only the cutting and sale of standing wood by authority of the orphans' court, without requiring the approval of any other court. The inference is irresistible, that the insertion of § 7 in the record of the decree was a clerical error, and that the decree was really made, as Chancellor Bland understood it to have been, under § 10, for the better support and education of the wards.

The Court of Appeals of Maryland, in 1828, decided that

the value of buildings constructed on the land of a ward by direction of his guardian, and under order of the orphans' court, at an expense exceeding the income of his estate, real and personal, could not be recovered from the ward, because section 10 of the act of 1798 did not empower the orphans' court to order any part of the principal of the ward's estate to be applied to any other purpose than his support and maintenance. But the court added: "Should an application of the personal estate not suffice to maintain and educate suitably to the future destination of the ward, then such maintenance and education may also induce an application of a part of the real estate, with the approbation of the Court of Chancery or General Court, as well as the orphans' court." *Brodess* v. *Thompson*, 2 Harris & Gill, 120, 126, 127.

Chancellor Bland, in a case decided in the same year, cited those two cases and expressed a similar opinion. *Williams's Case*, 3 Bland, 186, 199, 200, 207. In 1841 the Court of Appeals said: "According to our laws a guardian cannot encroach on the capital of his ward's estate without the order of the orphans' court, nor can the real estate be diminished but by the approbation of the Court of Chancery." *Hatton* v. *Weems*, 12 Gill & Johns. 83, 108. And it is admitted on all hands, that the Circuit Court of the United States of the District of Columbia, and its successor, the Supreme Court of the District of Columbia, have always interpreted the section in question according to what we now hold to be its true construction and effect. 5 Mackey, 213; 4 Mackey, 383, 386.

It is argued for the plaintiff, that so much of the Maryland act of 1798 as concerned the sale of the real estate of infants has been repealed by the act of Congress of March 3, 1843, c. 87, entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia," by which it is enacted that when "the guardian of any infant shall think that the interest of his or her ward will be promoted by the sale of his or her real estate, or any part thereof, it shall be lawful for such guardian" to bring a suit in equity in the Circuit Court of the District of Columbia, in which the infant shall be made a party, and shall be represented by a

guardian *ad litem*, and the facts alleged in the bill, whether admitted or not, shall be proved by disinterested witnesses, and the court, upon being satisfied that "the interest of the infant manifestly requires the sale of his real estate, or any part thereof," and that "by such sale the rights of others will not be violated," may decree a sale, in which case the proceeds of the sale shall be invested and applied for the benefit of the infant, "either in the purchase of real estate, or in such manner as the court shall think best," and upon his death shall descend as real estate. 5 Stat. 621, 622; Rev. Stat. D. C. §§ 957–968.

But this act contains no express repeal of the Maryland act of 1798; it does not mention the maintenance or education of infants, but authorizes the sale of their real estate whenever their interest manifestly requires it; its chief purpose evidently is to authorize a change of investment; and it cannot be presumed to have been intended to take away the authority of the orphans' court, when discharging its appropriate duty of ascertaining the amount proper to be expended for an infant's maintenance and education, to order a sale of his real estate for this single object with the approval of the Court of Chancery.

There is nothing in the nature of the interest that these children took under the will of their father, which should prevent a sale of it under the statute of 1798, when necessary for their maintenance and education. That statute is not restricted to legal estates, or to estates in possession. The effect of the testator's dispositions, though obscured by some confusion and superfluity of language, was to give the legal estate in all his land to his widow for life; the equitable and beneficial estate for her life to her and the two children, or the survivors of them, in equal shares; and the legal estate in remainder, after the death of the widow, to the two children, in fee; with two limitations over in fee, by way of executory devise, (neither of which impaired the precedent estates, or ever took effect,) the one, of the share of a child, dying before the mother, to the surviving child; and the other, of the whole estate to the mother, in case she should survive both

children. The legal estate in remainder in the children, which nothing but their own death before the determination of the widow's life estate could prevent from vesting in possession, vested in them from the death of the testator, subject to be divested by their dying before the widow. *Doe* v. *Considine*, 6 Wall. 458, 476; *McArthur* v. *Scott*, 113 U. S. 340, 379. Their legal estates in remainder, as well as their equitable estates for life, were present interests, which might be sold for their maintenance and education.

The records of the orphans' court, and of the Circuit Court of the United States of the District of Columbia sitting in chancery, produced from the proper custody, clearly prove the following facts: Mrs. Thaw, who by the will of her husband was appointed executrix thereof, and guardian of their two children, and exempted from giving bond as executrix, gave bond as guardian on March 24, 1844. On March 29, 1844, she presented to the orphans' court a petition on oath, representing that she had paid all her husband's debts, and that the property left by him was insufficient to support her and the children, and praying for an order of sale of the real estate for the relief of her immediate wants and for the support and education of the children. On that petition, the orphans' court, on the same day, by an order reciting that it had heard and considered the case "on the petition, exhibits, accompanying proofs and representation of Eliza V. Thaw in her capacity of guardian and executrix," decreed that, provided the Circuit Court of the United States of the District of Columbia sitting as a Court of Chancery should by proper order approve thereof, she should be authorized, as guardian of the children and for herself, to make sale and conveyance of the said real estate, first giving bond for the performance of the trust thereby imposed upon her, and immediately after the sale making report thereof to the court. On or about April 29, 1844, a copy of that petition and order, duly certified by the register of wills, was filed on the chancery side of the Circuit Court of the United States of the District of Columbia. On October 12, 1844, the order of the orphans' court was approved by the Circuit Court sitting in chancery, as is

shown by the entry on its docket or minute book, which, in the absence of any extended record, is competent and conclusive proof of its doings. *Philadelphia, Wilmington & Baltimore Railroad* v. *Howard*, 13 How. 307, 331. On May 17, 1845, the petitioner gave bond with sureties for the performance of the trust imposed upon her by the order so approved. The dates of the sale and of the report thereof to the orphans' court do not appear. But it does appear, by the minutes of its proceedings, that on January 21, 1848, there was filed in and approved by that court a "sale of real estate of Joseph Thaw, deceased," which, in the absence of evidence of any other sale of his real estate having been ordered or made, must be inferred to have been a report of this sale. All the facts recited in the deed executed by Mrs. Thaw to Agricol Favier on March 17, 1848, are thus proved by independent evidence, the competency of which is beyond doubt.

The objection that the petition presented by Mrs. Thaw to the orphans' court was irregular and insufficient to support the jurisdiction of that court, because it asked for a sale of the land for the benefit of the petitioner, as well as of her wards, is sufficiently answered by Mr. Justice Cox, delivering the judgment below, as follows: "It is true that the guardian, in her application, confused somewhat her own interests with those of the wards, and alleged the insufficiency of the property to support *herself* and the children as a ground for selling, and asked the sale as well to relieve *her own immediate wants* as for the support of the children. But it is fair to read this part of the application as referring to her own undivided interest for life in the property. It is not to be read as an application to sell the estate of the children for her support. It is also true that the court had no jurisdiction over the wife's interest in the property, and could not pass title to it by its decree. But if the wife chose to unite in the sale and convey her interest, which she must be held to have done, we see no reason why the court could not decree a sale of the share of the infants." "And if there was error in the form of the decree because it embraced the widow's interest also, it did not affect its efficacy as to the interest of the infants, but was a

harmless and inoperative error not to be noticed collaterally. The only question that could arise would be as to the proper apportionment of the proceeds between the mother and the wards. But this question could only arise after the sale, and would not affect the transfer of title." 5 Mackey, 227.

The petition and the order of the orphans' court thereon, fairly and reasonably construed, show that a sale of the infants' interest in the real estate under the will of their father was prayed for and ordered as necessary for their maintenance and education. So far as concerned the interest of the infants, therefore, the court had before it everything that was necessary to support its jurisdiction. In this form of proceeding, the guardian sufficiently and fully represented the infants, and no notice to them was required by the statute of Maryland or by any general rule of law. The want of proof of such notice, or of any record of the evidence on which the orphans' court proceeded in making the order, or the chancery court in approving it, or of any subsequent accounting by the guardian for the proceeds of the sale, is immaterial. The orders of those courts within their jurisdiction were conclusive proof in favor of the purchaser and grantee at the sale, and cannot be collaterally impeached on any such ground. *Thompson* v. *Tolmie*, 2 Pet. 157; *Grignon* v. *Astor*, 2 How. 319; *Comstock* v. *Crawford*, 3 Wall. 396; *McNitt* v. *Turner*, 16 Wall. 352; *Mohr* v. *Manierre*, 101 U. S. 417.

The cases, on which the plaintiff relies, of *Bank of United States* v. *Ritchie*, 8 Pet. 128, and *Hunter* v. *Hatton*, 4 Gill, 115, 124, were wholly different. Both were cases of decrees in equity upon suits *inter partes* in the ordinary form. In the one case, the decree was directly attacked by bill of review, in the nature of a writ of error; and in the other case, a notice required by express statute had not been given.

Judgment affirmed.

GIBBONS *v.* MAHON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 16. Argued December 19, 20, 1888. — Decided May 19, 1890.

Under a will bequeathing stock in a corporation and government bonds, in trust to pay "the dividends of said stock and the interest of said bonds as they accrue" to a daughter of the testator "during her lifetime, without percentage of commission or diminution of principal," and directing that upon her death "the said stocks, bonds and income shall revert to the estate" of the trustee, "without incumbrance or impeachment of waste," a stock dividend declared by a corporation which from time to time, before and after the death of the testator, has invested accumulated earnings in its permanent works and plant, and which, since his death, has been authorized by statute to increase its capital stock, is an accretion to capital, and the income thereof only is payable to the tenant for life.

THIS was a bill in equity by Mary Ann Gibbons against Jane Owen Mahon to compel the transfer to the plaintiff of shares in the Washington Gaslight Company held by the defendant as trustee under the will of Ann W. Smith. The case was heard upon bill and answer, by which, and by the acts of Congress concerning that company, the facts appeared to be as follows:

Mrs. Smith, a widow, and the mother of both parties to this suit, died March 26, 1865, owning two hundred and eighty shares in that company, and leaving a last will, dated February 11, 1865, and admitted to probate April 8, 1865, containing the following bequest:

"I hereby give, devise and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gaslight Company, also forty-five shares of stock of the Franklin Insurance Company, both in the city of Washington aforesaid; also eight thousand five hundred dollars in government bonds of the government of the United States of America; said stock and bonds or any portion of them remaining at my death a

part of my said estate; to have and to hold the same in and upon the trusts and provisions following: That is to say, in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds as they accrue to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal; and in case of the death of the said Mary Ann Gibbons, then the said stocks, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

The Washington Gaslight Company was incorporated by the act of Congress of July 8, 1848, c. 96, with a capital of $50,000, divided into shares of $20 each. 9 Stat. 722. It was authorized to increase its capital stock to $350,000 by the act of August 2, 1852, c. 79, and to $500,000 by the act of January 3, 1855, c. 22. 10 Stat. 734, 835. At the death of the testatrix, the capital stock amounted to $500,000, consisting of 25,000 shares of $20 each. By the act of May 24, 1866, c. 97, the capital stock was increased to $1,000,000. 14 Stat. 53.

The company from time to time declared and paid dividends in money upon its stock, and such dividends were paid by the defendant to the plaintiff.

Before and after the death of Mrs. Smith, and before and after the passage of the act of 1866, and before November 1, 1868, the company from time to time invested portions of its net earnings, income and profits in the enlargement and extension of its permanent works and plant employed in its legitimate business under its charter; and the actual cost of its works and plant, as shown by its construction account, amounted on January 1, 1865, to $842,623.02; on January 1, 1866, to $892,224.08; on January 1, 1867, to $935,039.55; on January 1, 1868, to $963,803.37; on July 1, 1868, to $988,914.84; and on January 1, 1869, to $1,039,287.17; and amounted, in fact, at the time of the passage of the act of 1866, to not less than $900,000, and on October 1, 1868, to more than $1,000,000.

Argument for Appellant.

On November 1, 1868, the board of directors of the company adopted the following resolution: "Whereas the construction account of this company exceeds one million of dollars, and as the capital of the company has been increased by an act of Congress to one million of dollars, therefore be it resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the first of October, 1868."

On September 29, 1868, the defendant surrendered to the company the certificate for the two hundred and eighty shares mentioned in Mrs. Smith's will, and those shares were transferred on the books of the company to the name of the defendant, as trustee; and on November 17, 1868, the company made out and delivered to the defendant, as trustee, a certificate for the five hundred and sixty shares.

The defendant paid to the plaintiff from time to time the dividends afterwards declared on the five hundred and sixty shares, but never transferred to her the two hundred and eighty new shares.

The court dismissed the bill, and delivered an opinion reported in 4 Mackey, 130; and the plaintiff appealed to this court.

Mr. Henry E. Davis for appellant.

I. By the terms of Mrs. Smith's will, the appellee holds the original 280 shares "for the advantage and behoof" of the appellant, whom the will entitles to receive the dividends of those shares, as such dividends accrue, during her lifetime.

(*a*) What are dividends?

Whether the testator makes use of the expression, "dividends," or "dividends and profits," or "dividends, interest and profits," or "interest, dividends, profits and proceeds," all of them come to the same thing, and furnish no circumstance to found a distinction upon. *Hooper* v. *Rossiter*, 1 McClel. 527, 536.

"Dividends," as used in the will, is unqualified; it includes, in its technical sense, as well as in its ordinary and com-

mon acceptation, all distributions to corporators of the profits of the corporation, whether such distributions are large or small, or whether made at long or short intervals, and without any regard to the manner or place of their declaration or *mode of payment*. *Clarkson* v. *Clarkson*, 18 Barb. 646, 657.

Dividends, accordingly, may take various forms. The ordinary form is the distribution of money to shareholders, but common forms are those known as stock and scrip dividends. If the definition given by the court in *Clarkson* v. *Clarkson* be accepted, as it should be, the question involved is readily answered: By the terms of that definition the appellant is clearly entitled to the 280 new shares; for —

(*b*) The new shares are in effect and in substance a stock dividend. *Daland* v. *Williams*, 101 Mass. 571, 574; *Rand* v. *Hubbell*, 115 Mass. 461; *Commonwealth* v. *Pittsburg, Fort Wayne &c. Railroad Co.*, 74 Penn. St. 83; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 635, 636.

(*c*) And the tenant for life of stock is entitled to all dividends declared thereon during his life, irrespective of the time when they were earned, provided only that they do not impair the capital of the trust fund. *Bates* v. *Mackinley*, 31 Beavan, 280; *Richardson* v. *Richardson*, 75 Maine, 570; *Goodwin* v. *Hardy*, 57 Maine, 143; *S. C.* 99 Am. Dec. 758; *Jermain* v. *Lake Shore Railroad Co.*, 91 N. Y. 483. And it is immaterial whether the dividend be in stock or in money; any distinction on that score being, in the language of Lord Eldon, "too thin." *Paris* v. *Paris*, 10 Ves. 185.

II. But the question, though seemingly simple, has been much considered by courts, and an examination of the reported cases will reveal much difference upon the subject.

(*a*) *The English adjudications.* The leading cases on the subject in England are: *Brander* v. *Brander*, 4 Ves. 800; *Irving* v. *Houston*, 4 Paton, 521; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363; *Barclay* v. *Wainewright*, 14 Ves. 66; *Price* v. *Anderson*, 15 Sim. 473; *Norris* v. *Harrison*, 2 Madd. 268; *Hooper* v. *Rossiter*, 13 Price, 774; *S. C.* 1 McClel. 527; *Cuming* v. *Boswell*, 2 Jurist (N. S.) 1005; *In re Barton's Trust*, L. R. 5 Eq. 238.

In the light of the earlier English adjudications, the law on the subject is thus stated in Hill on Trustees, 386: "It is settled that any extraordinary *bonus* or addition to the usual annual income of stock or other property, which is settled in trust for one for life with remainder over, must be treated as capital and added to the principal fund. The trustees, therefore, will not be justified in paying over these unusual additions to the beneficial tenant for life, but they must invest them for the benefit of all parties." But this statement is qualified in note 1 to the 4th American edition, and is disowned in *Clarkson* v. *Clarkson*, 18 Barb. 646, above cited, as well as in the later English cases, also above cited.

(*b*) *The rule established in Massachusetts.* If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustee as a lawful dividend thereon accrue as capital, although they represent the net earnings of the corporation. "A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expense of going behind the action of the directors and investigating the concerns of the corporation, especially if it is out of our jurisdiction. A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital. The court [A.D. 1868] are of opinion that this rule is more in conformity with the legal and equitable rights of shareholders than any other that has been suggested." *Minot* v. *Paine*, 99 Mass. 101; *S. C.* 96 Am. Dec. 705.

This case has since been followed in Massachusetts. In 1869, it was followed in *Daland* v. *Williams*, 101 Mass. 571. In the same year, in *Leland* v. *Hayden*, 102 Mass. 542, the court said: "We must regard the principle as settled that stock dividends are to be regarded as principal, and cash dividends as income;" and, in 1872, in *Rand* v. *Hubbell*, 115 Mass. 461, it was held: "By the law of this Commonwealth, as declared by this court, a dividend made in new stock is ordinarily to be deemed capital."

(*c*) *The New York cases.* In 1855, James J., delivering

the opinion of the court, after doubting the statement in Hill on Trustees, 386, above quoted, and citing the English cases, said:

"I am not satisfied with these decisions, and there is no sound principle upon which they can be upheld.

"I am satisfied that these decisions will never be followed in this country, and will be repudiated, if they are not already, in England. . . . The stock payment of 60 per cent made upon this investment was properly dividends, extraordinary in amounts, not in manner of payment, that being a matter of policy with the company. 'Dividends,' as used in the will, is unqualified. It includes, in its technical sense as well as in its ordinary and common acceptation, all distributions to corporators of the profits of the corporation, whether such distributions are large or small, or whether made at long or short intervals, and without any regard to the manner or place of their declaration or mode of payment. . . . The 60 per cent stock dividend, made December 30th, 1850, belonged to the tenants for life, and the trustees must be decreed to deliver over to them the said stock or its substitute and all income, dividend, or increase received thereon, or pay the value thereof." *Clarkson* v. *Clarkson*, 18 Barb. 646. This was followed in *Simpson* v. *Moore*, 30 Barb. 637; *In re Woodruff's Estate*, Tucker, 58; *In re Pollock*, 3 Redfield, 100; *Whitney* v. *Phœnix*, 4 Redfield, 180.

(*d*) *The rule in Pennsylvania* was laid down in *Earp's Appeal*, 28 Penn. St. 368. In *Wiltbank's Appeal*, 64 Penn. St. 256, that rule is defined as follows: "The principle established in that [*Earp's*] case is that the earnings or profits of stock made after death are income and not capital, even though in *form* of capital by the issue of new stock. *Equity, seeking the substance of things, found that the new stock was but a product and was therefore income. Precisely so it is here, equity discovers the subject of controversy is a mere product, a right incidental to the stock, and is therefore income.*" See also *Moss's Appeal*, 83 Penn. St. 264; *Biddle's Appeal*, 99 Penn. St. 278; and *Vinton's Appeal*, 99 Penn. St. 434.

(*e*) *The rule in New Jersey.* In *Van Doren* v. *Olden*, 19 N. J.

Eq. 176; *S. C.* 97 Am. Dec. 650; Chancellor Zabriskie, after citing *Earp's Appeal*, *Clarkson* v. *Clarkson* and *Simpson* v. *Moore*, said: "The principle upon which these cases are decided I hold to be the correct one, by which I must be guided in preference to the early English decisions. That principle is that where trust funds, of which the income, interest or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustees, or at the death of the testator, in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, as is frequently the case, such additional value is part of the capital; that this, as well as the par value of the shares, must be kept intact for the benefit of the remainderman; but the earnings on such capital, as well as upon the par value of the shares, belong to the life tenant; and when an extra dividend is declared out of the earnings or profits of the company such extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital." This ruling was followed in *Ashurst* v. *Field*, 26 N. J. Eq. 1.

(*f*) *The decisions in New Hampshire.* A testator gave to his son the income of two shares in a corporation during his life, the shares, on his decease, to go to the testator's heirs. $500 had been paid in on each share constituting the original estate, but by increase in the value of the property of the corporation, the shares were, at the time of the making of the will, of the value of about $1500 each, and it appeared that the testator so valued them in making the bequest. The corporation having made regular dividends of income up to a certain date, after the decease of the testator, at that time voted to sell its property and divide the proceeds, which was done; *Held*, in 1846, that the dividends received by the executor after this vote were to be regarded as dividends of the capital, substituted for the shares, and that the son was entitled to the income which should be derived from the sums so received, the

principal, on his decease, belonging to the heirs. *Wheeler* v. *Perry*, 18 N. H. 307. See also *Lord* v. *Brooks*, 52 N. H. 72; *Peirce* v. *Burroughs*, 58 N. H. 302.

In no other of the United States has the question been considered, except, in 1881, in Georgia, where it is governed by the code of that State. See *Millen* v. *Guerrard*, 67 Georgia, 284.

An examination of the authorities above cited shows on how unsound a basis the rule in England and Massachusetts rests. The intention of the corporation making the dividend seems to be given paramount consideration in those jurisdictions.

This "intention of the corporation" and the simplicity claimed for the rule of *Minot* v. *Paine* are the supports, and the only supports of the English and Massachusetts rule. The New Hampshire court emphatically and, as I submit, most properly denies to corporations the right to make or change the wills of their stockholders, and the Pennsylvania court does not scruple at characterizing the "simple rule" of Massachusetts as "bungling." If simplicity of the rule to guide trustees be alone sufficient to support a principle, what simpler rule can there be than to give the life tenant all dividends, whether in cash or in stock?

The true rule is that laid down in *Bates* v. *Mackinley:* No matter when a dividend was earned or how long the profits to be distributed have been accumulating, the person entitled to the dividends at the time of declaration should have all dividends from profits or earnings without regard to their form. This is a "simple rule for the guidance of trustees;" it avoids all difficulties as to accounting; preserves the integrity of corporate action; makes no disturbance of corporate management; and, recognizing all individual interests, assures the harmonious continuance of corporate existence and the unembarrassed exercise of corporate functions: results attainable on no other principle, and to which all other considerations should, within due limits, be subordinated so long as corporations hold their place as accredited instruments of industrial and commercial enterprise not inconsistent with individual

interest. The clear reasoning in *Lord* v. *Brooks* logically leads to this position and in its thoroughness refutes all arguments to the contrary.

Mr. J. Hubley Ashton for appellee.

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

The question presented by the claims made in the bill and answer, and by the arguments of counsel, is whether the two hundred and eighty new shares of stock in the Washington Gaslight Company are to be treated as dividends, to the whole or part of the principal of which the plaintiff is entitled under the will, or are to be treated as an increase of the capital of the trust fund, and the plaintiff therefore entitled to receive only the income thereof.

The court below held that the new shares must be treated as capital, the income only of which was payable to the plaintiff. She contends that the new shares are in the nature of a dividend, to the whole of which she is entitled, or, if that position should not be maintained, that so much of the new shares as represents earnings made by the corporation since the death of the testatrix should be held to be income payable to her. Upon full consideration of the case, on reason and authority, this court is of opinion that the decision below is correct.

The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts. *Van Allen* v. *Assessors*, 3 Wall. 573, 584; *Delaware Railroad Tax*, 18 Wall. 206, 230; *Tennessee*

v. *Whitworth*, 117 U. S. 129, 136; *New Orleans* v. *Houston*, 119 U. S. 265, 277.

Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.

Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, "in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors." *New York, Lake Erie & Western Railroad* v. *Nickals*, 119 U. S. 296, 304, 307.

Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof.

Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock, for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee; or should be distributed and paid out as income, to the tenant for life or for years, excluding the remainder

man from any participation therein; is a question to be determined by the action of the corporation itself, at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts, as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation, through a master in chancery or otherwise, of the affairs and accounts of the corporation, as of the dates when the provisions of the will of that shareholder take effect, and with regard to his shares only.

In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest

of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.

In *Bailey* v. *Railroad Co.*, 22 Wall. 604, cited for the plaintiff, the point decided was that certificates, issued by a railroad corporation to its stockholders as representing earnings which had been used in the construction and equipment of its road, and payable, at the option of the company, with dividends like those paid on the stock, were within that provision of the internal revenue laws, which enacted that any railroad company "that may have declared any dividend in scrip or money due or payable to its stockholders," "as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such" "dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable." Acts of June 30, 1864, c. 173, § 122, 13 Stat. 284; July 13, 1866, c. 184, § 9, 14 Stat. 138, 139. The question at issue was not between the owners of successive interests in particular shares, but between the corporation and the government, and depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings. The opinion delivered by Mr. Justice Clifford, though containing some general expressions which, taken by themselves, might seem to ignore the settled distinction, (affirmed by this court in earlier and later cases above cited,) between the property of the corporation and the interests of the shareholders, yet explicitly recognized that "net earnings of such a company may be expended in constructing or equipping the railroad, or in the purchase of real estate or other properties," and "may be distributed in dividends of stock or of scrip or of money;" that "purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned;" that, "as a general

rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the company," and that "such a dividend, if earned and declared, necessarily increases the value of the old stock, if new stock is not issued, and in that mode reaches substantially the same result." 22 Wall. 635–637.

In Great Britain, it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life.

From the beginning of this century, it has been established, by decisions of the Court of Chancery in England, and of the House of Lords on appeal from Scotland, that where a bank, having no power by law to increase its capital stock, has used its accumulated profits as floating capital, and invested them in securities which can be turned into cash at pleasure, an extraordinary dividend or bonus declared out of such profits is capital, and not income, of each share, as between owners of the life interest and of the interest in remainder therein, without inquiring into the time when the profits were actually earned. *Brander* v. *Brander*, 4 Ves. 800; *Irving* v. *Houstoun*, 4 Paton, 521; *Cuming* v. *Boswell*, 2 Jurist (N. S.) 1005, 1008; *S. C.* 28 Law Times Rep. 344; 1 Paterson, 652. In *Irving* v. *Houstoun*, Lord Eldon (Lord Rosslyn and Lord Alvanley concurring) said that if an owner of bank stock "gives the life interest of his estate to any one, it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century;" and that to take an account of the precise amount of profits which had accumulated before and after the commencement of the life interest in particular shares would lead to inconveniences which would be intolerable. 4 Paton, 530, 531. In *Cuming* v. *Boswell*, above cited, and relied on by the present plaintiff, the person held entitled to bonuses declared on bank stock was, as stated in the judgment delivered by Lord Cranworth,

"not a liferenter but an absolute fiar," in other words, not a mere tenant for life, but an owner in fee, although his estate was determinable by his death without issue.

It is unnecessary, for the purposes of this case, to consider how far the English decisions upon the question whether a dividend in money, not declared to be made out of accumulated earnings, should be considered as capital or as income, can be reconciled with each other, or with sound principle. But there are two recent cases of great authority, concerning stock dividends, which directly bear upon the question before us.

In one of those cases, shares in a steam navigation company were settled by their owner upon trust to pay "the interest, dividends, shares of profits or annual proceeds" to a woman during her life, and after her death in trust for her children. The directors, acting within the scope of their authority, retained part of a half-year's profits, and applied it to pay for new boats, and the company passed a resolution to issue to existing shareholders new shares representing the money so applied. It was argued that "the company had no power to compel the tenant for life to risk any more in the venture than the shares originally held, and could not be allowed for themselves, by declaring or withholding a dividend out of the profits, to alter the rights as between tenant for life and remainderman." But Vice Chancellor Wood (afterwards Lord Chancellor Hatherley) held otherwise, and said: "As long as the company have the profits of the half-year in their hands, it is for them to say what they will do with it, subject, of course, to the rules and regulations of the company." "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain. The only mode in which a tenant for life could act would be to use his influence with his

trustees as to their votes with reference to the proposed arrangement." "If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children, and not to the tenant for life (their mother)." *Barton's Trust*, L. R. 5 Eq. 238, 243–245.

In the most recent English case on the subject, William Bouch bequeathed to his executor, in trust for his widow for life, and after her death to the executor, his personal estate, including shares in an iron company, whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends or repairing or maintaining the works. Four years after the testator's death, the company, upon the recommendation of the directors, and out of a fund so reserved in the testator's lifetime, and of undivided profits, about half of which accrued before his death, made a bonus dividend, and an allotment of new shares, with liberty to each shareholder to apply the bonus dividend in payment for the new shares. Bouch's executor took the new shares and applied the bonus dividend in payment therefor. The House of Lords, reversing the judgment of the Court of Appeal, and restoring an order of Mr. Justice Kay, held that the corporation did not pay or intend to pay any sum as a dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and the widow was not entitled either to the bonus or to the new shares. The difference of opinion was not as to the general principle which should govern, but only as to its application to the action of the corporation in the particular case. The House of Lords fully approved the statements of the general principle by Vice Chancellor Wood in *Barton's Trust*, above

cited, and by Lord Justice Fry, in delivering the judgment of the Court of Appeal, as follows: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares; and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." "In most, if not in all cases, the inquiry as to the time when the profits were earned by the company is an immaterial one as between the tenant for life and remainderman. Their rights have been made dependent on the legitimate action of the company, and" (subject to any rights arising from the law of apportionment, which was not in question) "are determined by the time, not at which the profits are earned by the company, but at [by] the time at which they are by the action of the company made divisible among its members." *Sproule* v. *Bouch*, 29 Ch. D. 635, 653, 658, 659; *Bouch* v. *Sproule*, 12 App. Cas. 385, 397, 402, 407, 408.

The same principle was established in Massachusetts before the case of *Sproule* v. *Bouch* had come before the courts of England. *Atkins* v. *Albree*, 12 Allen, 359; *Minot* v. *Paine*, 99 Mass. 101; *Daland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Rand* v. *Hubbell*, 115 Mass. 461; *Gifford* v. *Thompson*, 115 Mass. 478. And in Connecticut, Rhode Island and Maine, a dividend of new shares, representing accumulated earnings, is held to be capital and not income. *Brinley* v. *Grou*, 50 Conn. 66; *Brown's petition*, 14 R. I. 371; *Richardson* v. *Richardson*, 75 Maine, 570, 574.

In New York, the recent judgments of the Court of Appeals appear to have practically overruled the decisions of the lower courts in *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v.

Moore, 30 Barb. 637; *Woodruff's Estate*, Tucker, 58, and *In re Pollock*, 3 Redfield, 100, cited in behalf of the plaintiff; and to have settled the law of that State in accordance with that of England and of Massachusetts.

In *Hyatt* v. *Allen*, 56 N. Y. 553, the defendant, by a contract made August 11, 1871, under which he transferred to the plaintiffs certain stock in a manufacturing corporation, agreed to pay them "all profits and dividends of and upon the stock up to the first day of January, 1872." In April, 1872, the corporation declared a dividend of fifteen dollars a share, five sixteenths of which were found by a referee to have been derived from the increase in value of its property between August 11, 1871, and January 1, 1872; and the court below gave judgment for the plaintiff for that proportion of the dividend. But the Court of Appeals reversed the judgment, and said: "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made." "When, therefore, a contract is made in relation to dividends or profits, it must be deemed to have reference to dividends or profits to be ascertained and declared by the particular company, and not to growing profits from day to day, or month to month, to be ascertained upon an investigation by third persons, or courts of justice, into the accounts and transactions of the company." 56 N. Y. 557, 558.

In *Williams* v. *Western Union Telegraph Co.*, 93 N. Y. 162, the Court of Appeals, in the course of an elaborate discussion of the right of a corporation, when unrestrained by statute, to make a stock dividend, said: "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts." "Whether they shall be made in cash or property must also rest in the discretion of the directors." "Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus." "After a stock dividend a corporation has just as

much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before." 93 N. Y. 192, 189.

Finally, in *Kernochan's Case*, 104 N. Y. 618, the Court of Appeals applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust; rejected the test of determining what part of a cash dividend should be deemed principal and what part income by ascertaining how much was earned before and how much after the death of the testator; approved the general principle laid down in the cases of *Barton's Trust*, L. R. 5 Eq. 238, 245, and *Sproule* v. *Bouch*, 29 Ch. D. 635, 653, above cited; and said: "From the shares in question no income could accrue, no profits arise to the holder, until ascertained and declared by the company and allotted to the shareholder; and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise." "The rule is a reasonable and proper one, which limits the rights of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient; and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority." 104 N. Y. 628, 629.

In *Earp's Appeal*, 28 Penn. St. 368, on the other hand, the Supreme Court of Pennsylvania declined to follow the early English cases, and adopted the rule, that where a corporation,

after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock, and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator should be deemed capital, and so much as had accumulated since his death should be deemed income; and in *Wiltbank's Appeal*, 64 Penn. St. 256, where a corporation voted to increase its capital stock by an issue of new shares to be subscribed and paid for by the stockholders, and a trustee holding shares sold the right to take some new shares, and took others and sold them at an advance, that rule was carried so far as to hold that the sums so received by the trustee were income of the old shares, for the reason that the right to subscribe to new shares, the court thought, "was not a part of the capital of the old stock, but a mere product of an advantage belonging to it," "a right incidental to the stock and therefore income." The rule upon which those two cases proceeded has since been treated as settled in Pennsylvania, although there has been some difficulty, if not inconsistency, in applying it; and in one case Mr. Justice Paxson, now Chief Justice of Pennsylvania, spoke of both those cases as exceptional and depending on peculiar circumstances. *Moss's Appeal*, 83 Penn. St. 264, 269, 270; *Biddle's Appeal*, 99 Penn. St. 278; *Vinton's Appeal*, 99 Penn. St. 434. The only other States, so far as we are informed, in which the Pennsylvania rule prevails, are New Jersey and New Hampshire. *Van Doren* v. *Olden*, 4 C. E. Green, 176; *Ashhurst* v. *Field*, 11 C. E. Green, 1; *Van Blarcom* v. *Dager*, 4 Stew. Eq. 783, 793; *Lord* v. *Brooks*, 52 N. H. 72; *Peirce* v. *Burroughs*, 58 N. H. 302, 303. Upon the grounds already stated, that rule appears to us to be open to grave objections, both in principle and in application, as well as opposed to the weight of authority.

In the case at bar, the testatrix bequeathed to her daughter, Jane Owen Mahon, two hundred and eighty shares of stock in the Washington Gaslight Company, as well as some shares in an insurance company and bonds of the United States, "in trust for the advantage and behoof of" her daughter, Mary Ann Gibbons; and directed that after the decease of the tes-

tatrix the trustee should "cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

Upon the face of the will, it is manifest that the testatrix used the word "dividends" as having the same scope and meaning as "income" and "interest," and nothing more; and intended that the plaintiff, as equitable legatee for life, should take the income, and the income only, of the shares owned by the testatrix at the time of her death; and that the whole capital of those shares, unimpaired, should go to the defendant, as legatee in remainder.

The admitted facts present the following state of things: The accumulated earnings of the company were kept undivided, and actually added to the capital of the corporation, by investing them from time to time in its permanent works and plant, until the value of the works and plant amounted to a million dollars; no owner of particular shares, or of any interest therein, had the right to compel the company to divide or apportion those earnings; and while they remained so undivided and invested, the capital stock of the company was increased to the same amount by the act of Congress of May 24, 1866. The greater part of the earnings in question had been so invested before the making of the will and the death of the testatrix in 1865, a still larger proportion before the passage of the act of Congress of 1866, and the whole before the resolution of the directors of November 1, 1868, under which the new shares were issued to the defendant, and in which it was recited, in accordance with the truth, that the construction account of the company exceeded $1,000,000, and that its capital had been increased by act of Congress to that amount, and it was therefore "resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868."

To hold the plaintiff to be entitled to the whole of the new shares issued to the defendant would be to allow the plaintiff the exclusive benefit of earnings, the greater part of which had accrued and had been invested by the company as capital before her interest began, and would be contrary to all the authorities. To award to her a proportion of those shares, based upon an account of how much of those earnings actually accrued after the death of the testatrix, would be to substitute the estimate of the court for the discretion of the corporation, lawfully exercised through its directors, and would be open to the practical inconveniences already stated.

The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by Mr. Justice James, delivering the opinion of the court below: "Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in this increased plant in the capital of the corporation, that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust.* She stood after the issue of the new shares just as she had stood before; and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust.*" 4 Mackey, 136

Decree affirmed.

Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in the decision.

SHERMAN *v.* ROBERTSON.

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

No. 180. Submitted November 25, 1889. — Decided December 2, 1889.

Hartranft v. *Oliver*, 125 U. S. 525, affirmed and applied to this case.

THIS case was submitted by the parties on a stipulation in which, after reciting the trial and judgment in the court below it was said:

"Now it is conceded by the Attorney General, in behalf of the defendant in error, that the facts in this cause, as shown by the plaintiffs' bill of exceptions, contained within the record on this appeal, duly filed in the office of the clerk of this court, are, in all substantial respects, the same as the facts upon which judgment was rendered for the plaintiffs in the court below in the cause *Hartranft* v. *Oliver*, which was argued in this court March 22, 1888, and is reported in Vol. 125 of the United States Reports at page 525: that is to say:

"1. The plaintiffs herein imported white cotton goods into the port of New York. The vessel carrying the goods arrived at that port on the 30th day of June, 1883, and was immediately boarded by customs officers of the United States, who took into their custody all goods on board.

"2. The plaintiffs could not have obtained possession of their said goods from the said customs officers without a certain 'permit,' to be issued by the defendant after the goods were 'entered' by the plaintiffs at the custom-house of the said port, and the goods could not be so entered there until after the vessel itself was entered or reported there.

"3. The plaintiffs had a clerk waiting at the said custom-house for the purpose of entering their said goods as soon as the vessel should be so entered or reported there on the said 30th day of June, 1883, but that the vessel was not so entered

or reported there until at or about 2 o'clock P. M. of that day, and that it was then too late to enter the said goods in the usual course of business within that day in the said custom-house.

"4. The first day of July, 1883, was a Sunday. The said goods were duly entered at the said custom-house on the second day of July, 1883, having remained meantime solely in the custody of the said customs officers on board the said vessel.

"5. The said goods were not in any public storehouse or bonded warehouse on the first day of July, 1883, otherwise than as hereinabove appears.

"6. The defendant, as collector of said port, levied customs duties upon plaintiffs' said goods, at the rates provided for by section 2504 of the Revised Statutes of the United States, amounting to $2754.41.

"The plaintiffs objected and protested against such levy upon the ground that the levy should have been made under the act of Congress entitled 'An act to reduce internal revenue taxation, and for other purposes,' approved March 3, 1883, under which last-mentioned act the duties upon the said goods would have amounted to $2179.59, but they paid the amount of the said levy of the defendant and duly brought this action to recover the difference or excess so paid, to wit, to recover $574.82.

"And hereupon the counsel for both parties deem it not necessary to print the record on this appeal or to argue the appeal before the court, and the Attorney General, in behalf of the defendant, submits to the direction of the court upon the motion of plaintiffs' counsel for judgment."

Mr. Waldo Hutchins and *Mr. William Forse Scott* for plaintiffs in error.

Mr. Solicitor General for defendant in error.

PER CURIAM. The judgment of the court below is *Reversed with costs, on the authority of the decision of this court in the case of* Hartranft *v.* Oliver, (*No. 190 of October term, 1887*), *125 U. S. 525, and the cause is remanded with directions to enter judgment for the plaintiffs.*

INLAND AND SEABOARD COASTING COMPANY *v.* TOLSON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 532. Submitted December 23, 1889. — Decided January 6, 1890.

At a special term of the Supreme Court of the District of Columbia a judgment was rendered in favor of the plaintiff against a sole defendant. The defendant appealed to the general term and gave sureties. The general term affirmed the judgment below, and entered judgment against the defendant and against the sureties. The defendant sued out a writ of error to this judgment without joining the sureties. The defendant in error moved to dismiss the writ for the non-joinder of the sureties, and the writ was accordingly dismissed. The counsel for the plaintiff in error then moved to rescind the judgment of dismissal, and to restore the case to the docket. Briefs being filed on both sides; *Held*, that the motion should be granted, and the case should be restored to the docket.

This cause was first tried in the Supreme Court of the District of Columbia, at special term, where the following judgment was entered:

"Now, again, come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say that they find said issue in favor of the plaintiff, and assess his damages by reason of the premises at the sum of eight thousand dollars, besides costs; therefore it is considered that the plaintiff recover against said defendant eight thousand dollars for his damages in manner and form as aforesaid assessed and $ —— for his costs of suit, and have execution thereof."

An appeal from this judgment was taken to the general term by the defendant, the Inland and Seaboard Coasting Company, and an undertaking given as provided by the rules of court, Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter being the sureties.

The court in general term thereupon entered judgment as follows:

"Now again come here as well the plaintiff as the defend-

Statement of the Case.

ant by their respective attorneys, whereupon it appearing to the court that the defendant's exceptions to the admissibility of evidence and to the rulings and instructions of the court in special term were not well taken; and the defendant by its counsel having, in open court, abandoned its various appeals and applications for new trial on other grounds, the motion for a new trial on exceptions is now overruled and the judgment of the court in special term is affirmed with costs. And it is further adjudged that the plaintiff recover upon his said judgment, to wit, the sum of eight thousand dollars as of the date of the said judgment of the special term and the costs as well against the said defendant, and as against Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter, its sureties, on said appeal to this court, and have execution against them and each of them."

The writ of error recited that the judgment to which it was directed was against the Inland and Seaboard Coasting Company; and in the citation that company was described as plaintiff in the writ, and no mention was made of the sureties.

The cause being docketed here counsel for the defendant in error, on the 21st of October, 1889, moved to dismiss the writ because the judgment was rendered against the company and the several sureties; and the sureties had not joined with the company in the writ; citing *Hampton* v. *Rouse*, 13 Wall. 187; *Masterson* v. *Herndon*, 10 Wall. 416; *Simpson* v. *Greeley*, 20 Wall. 152; *Feibelman* v. *Packard*, 108 U. S. 14; *Estis* v. *Trabue*, 128 U. S. 225; *Wilson's Heirs* v. *New York Insurance Co.*, 12 Pet. 140; *Hilton* v. *Dickinson*, 108 U. S. 165.

Counsel for plaintiff in error opposed this motion, contending as follows:

It is respectfully submitted that the judgment of the general term affirming the judgment below, which was a judgment against the defendant, the Inland and Seaboard Coasting Company, for a specific sum of money, was a separate judgment against the Inland and Seaboard Coasting Company.

The fact that the court proceeded further to *adjudge* that

the plaintiff *recover* on his *said judgment* (meaning the judgment of the special term) the amount therein named, and the costs as well against the said defendant as against its sureties and have execution against them and each of them, did not deprive the defendant of its right to a separate writ of error to the judgment that was separately against it.

The most that can be claimed as to the adjudication by the court in general term is, that it was a separate judgment against the company, and also another judgment against the sureties.

Estis v. *Trabue*, 128 U. S. 225, so far from supporting the motion, is authority for saying that if a judgment is "distributive" and can be regarded as containing a separate judgment against a defendant who is a principal, *and, also*, a judgment against the *sureties*, the defendant against whom the judgment is entered as a principal can have his separate writ of error.

The practice of allowing judgment on the forthcoming bond, referred to in the case of *Estis* v. *Trabue*, above, is statutory. *Amis* v. *Smith*, 16 Pet. 303.

An affirmance of a judgment or decree against sureties can only be rendered when there is a statutory provision authorizing it. *Hiriart* v. *Ballon*, 9 Pet. 156; *Beall* v. *New Mexico*, 16 Wall. 535; *Moore* v. *Huntington*, 17 Wall. 417; *Smith* v. *Gaines*, 93 U. S. 341; *Marchand* v. *Frellsen*, 105 U. S. 423.

But in the present case there was no authority of law for the entry of a judgment by the court in general term. The judgment was entered in accordance with what is believed to be a new practice under a rule of court, and the defendants had no personal knowledge that the judgment had been entered.

On the 4th of November, 1889, the court ordered the writ to be dismissed, and judgment was entered accordingly.

On the 23d of December, 1889, the counsel for the plaintiff in error moved to rescind that judgment, and to restore the case to the docket and for leave to amend the writ of error by

inserting therein as plaintiffs in error the names of the several trustees, stating that it was too late to sue out another writ of error.

He further said: In respect of the original suit, the court in general term affirmed its judgment in special term against the plaintiff in error. It then took up and considered the undertaking, made after the judgment at special term, and rendered judgment upon that. These were in fact, and in law, two judgments. The defendants in the second judgment occupy precisely the same relation to the judgment they would occupy if, instead of a judgment rendered in the same cause on the undertaking, there was a separate suit to enforce the undertaking after a judgment rendered for the tort.

In such a suit it is plain that the parties to the undertaking could not show error in the suit in which the undertaking was given, aud they can no more show it here than in such separate suit. The defendants in the undertaking are proceeded against by reason of the contract. They have said: we agree that if the judgment appealed from be affirmed, judgment may be rendered against us, and upon this contract judgment is rendered. The sureties were no parties to the tort suit, and although the plaintiff in error was a party to both, it is proceeded against in distinct capacities, in the suit, as a tort feasor, and, on the undertaking, as a party to a written contract.

In New York, an undertaking by the appellant and his sureties has, to a great extent, taken the place of a bond in error, but suit must then be brought on the undertaking.

The legal character of such an undertaking has been fully considered by the courts of that State. *Robinson* v. *Plympton*, 25 N. Y. 484; *Hinckley* v. *Kreitz*, 58 N. Y. 583.

The terms of the judgment are that the plaintiff recover upon the judgment entered at the special term against the defendant and its sureties, "*and have execution against them and each of them.*" These words authorize execution against either. At common law the execution had to be against all, although it might be levied upon any one. Where, as in this case, a judgment provides that execution may be sued out

against all or either of them, referring to the persons named in the judgment, this necessarily means that the judgment is joint and several. If it is several, then certainly each one of the persons against whom it is rendered has a right to sue out a separate writ of error in his own name.

In the case of *Estis* v. *Trabue*, 128 U. S. 225, this court said: "There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; *and execution is awarded against all of the parties jointly.* In such a case the sureties have the right to a writ of error."

If, however, the court shall be of opinion that the judgment referred to in the writ of error was not a separate judgment against the plaintiff in error, and a separate judgment against the persons named therein as sureties, but was a joint judgment against the plaintiff in error and the sureties, then it is submitted, that the writ of error may be amended, under the authority conferred by section 1005 of the Revised Statutes. *Pearson* v. *Yewdall*, 95 U. S. 294; *Moore* v. *Simonds*, 100 U. S. 145; *Knickerbocker Life Ins. Co.* v. *Pendleton*, 115 U. S. 339.

Counsel for defendant in error resisted this motion contending: The judgment of the general term of the court below is a joint judgment against the plaintiff in error, and its sureties in the undertaking on appeal. This court has already so held in this cause. Prior decisions of this court are to the same effect. *Estis* v. *Trabue*, 128 U. S. 225, and cases there cited.

By the terms of their appearance they espouse the cause of the appealing party, and join him in becoming actors in the general term, and agree to pay the judgment if they cannot succeed in having it set aside.

The court had express statutory power to make the rule, and it is binding upon the court and upon the parties. *Bank*

of Columbia v. *Okely*, 4 Wheat. 235; *Mills* v. *Bank of the United States*, 11 Wheat. 431; *Hiriart* v. *Ballon*, 9 Pet. 156.

The objection to the writ of error is jurisdictional and it cannot be cured by amendment. *Estis* v. *Trabue*, 128 U. S. 225; *Owings* v. *Kincannon*, 7 Pet. 399; *Wilson* v. *N. Y. Insurance Co.*, 12 Pet. 140.

In *Moore* v. *Simonds*, 100 U. S. 145, the appeal was taken in the name of a firm. But the supersedeas bond showed the names of the individual members of the firm and was executed by them. It was held that the appeal might be amended by the bond. In delivering the opinion of the court Chief Justice Waite, referring to a case in 11 Wall. 82, which had been dismissed for a similar defect, said that, "it does not appear that the defect could have been remedied by reference to anything in the *appeal papers*."

In the case of the *Knickerbocker Ins. Co.* v. *Pendleton*, 115 U. S. 339, while a part of the names of the plaintiffs below did not appear as defendants in the writ, they did appear as obligees in the supersedeas bond, and the amendment was made by that.

There is no case in this court, so far as we know, where a writ of error or appeal, defective in parties, has been amended, where there was nothing in the "*appeal papers*," by which the amendment could be made.

The supersedeas bond and citation in this case have not been printed, but they follow the writ of error in the recital of the parties to the judgment below. There is, therefore, nothing by which the amendment can properly be made.

In this case it is clear that but one of the five defendants in the court below intended to sue out the writ of error, and there was no summons and severance. The judgment referred to in the writ, bond and citation, is said to be one in which Tolson is plaintiff and the plaintiff in error is defendant. But the judgment in the record sent up in return to the writ is a judgment against plaintiff in error and four others. Clearly the writ could not confer jurisdiction upon this court to review the record of that judgment. To allow the insertion of the names of the other defendants below as plaintiffs in the

present writ would be to make a new writ and not to amend the present one, and would necessitate a new bond and citation.

But even if the amendment be within the discretion of the court it should not be granted.

PER CURIAM. (January 6, 1890): The motion to rescind the judgment of dismissal, entered November 4, 1889; to restore the cause to the docket; and to amend the writ of error herein by inserting therein, as plaintiffs in error, the names of Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter is

Granted and case returned to the docket.

Mr. Nathaniel Wilson for plaintiff in error.

Mr. Arthur A. Birney and *Mr. Charles C. Cole* for defendant in error.

IRWIN *v.* SAN FRANCISCO SAVINGS UNION.

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

No. 181. Submitted January 23, 1890. — Decided February 3, 1890.

Wright v. *Roseberry*, 121 U. S. 488, affirmed and applied to this case.

THE United States, being the real party interested as plaintiffs in error, by their counsel filed the following statement as a brief for the plaintiff in error:

"This is an action of ejectment, brought in the Superior Court of Solano County, California, and afterwards removed into the United States Circuit Court, to recover a large body of swamp and overflowed lands contiguous to the mainland of Mare Island, upon which island the United States have a navy-yard, and have erected extensive buildings, etc.

"The plaintiff in error, the defendant below, was the officer

in command of the said navy-yard at the time the suit was brought, and had no other interest in the controversy.

"The case was tried without a jury, under a stipulation in writing, and judgment rendered for the plaintiffs, to the effect that they were entitled to the possession of the lands in controversy.

"This writ of error raises but one question.

"The plaintiffs claimed title to the swamp and overflowed lands in question, under the State of California, and introduced in evidence a patent from the State to one John W. Pearson, from whom they derived title.

"This evidence was objected to by the defendant on the ground: 'That a patent issued by the State to any individual for swamp or overflowed lands does not convey title to the lands therein described, unless it be shown that the same lands have been patented by the United States to the State, or listed to the State by the Land Department of the United States. That it has not been shown by competent evidence that it has been determined by the proper authority of the Land Department of the United States that the lands described in the patent, or any part thereof, are swamp or overflowed lands within the meaning of the act of Congress approved September 28, 1850, commonly known as the Arkansas land act.'

"The objection was overruled and the patent read to the jury, whereupon the defendant excepted.

"The plaintiffs then introduced other evidence, parol and documentary, for the purpose of showing that the land sued for answered to the description of swamp and overflowed lands, and the defendant moved the court to strike out and exclude all said evidence, including the patent, but the court denied the motion, and thereupon the defendant excepted.

"The opinion of the eminent Circuit Justice upon the questions raised by the bill of exceptions, appears to be sustained by the subsequent opinion of this court in *Wright* v. *Roseberry*, 121 U. S. 488.

"The case is, therefore, submitted without further observation."

Statement of the Case.

PER CURIAM. It is conceded by counsel for plaintiff in error that this case is governed by *Wright* v. *Roseberry*, 121 U. S. 488, and the judgment is, therefore, upon the authority of that case, *Affirmed.*

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. George A. Nourse for defendants in error.

DAVENPORT *v.* PARIS.

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

No. 268. Submitted April 8, 1890. — Decided April 14, 1890.

Glenn v. *Fant*, 134 U. S. 398; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Andes* v. *Slauson*, 130 U. S. 435; and *Bond* v. *Dustin*, 112 U. S. 604, affirmed and applied to the stipulation filed in this case by counsel, the jury being waived.

THIS was an action to recover on bonds and coupons issued by the defendant, a municipal corporation, in aid of the construction of a railroad. The record contained the following stipulation "as to facts, etc." being signed by the counsel:

"It is stipulated in the matter of *Charles Davenport* v. *The Town of Paris*, in assumpsit, now pending in the U. S. Circuit Court for the Southern District of Illinois, that the instruments sued on, being bonds numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 31, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 and 80, with coupons now attached, which purport to be the bonds of the town of Paris, were signed, respectively, by Henry Van Sellar and James A. Dittoe on the dates of said instruments, and that the said Henry Van Sellar was on that date supervisor of said town of Paris, and that the said James A. Dittoe was on said date the town clerk of said town of Paris.

Syllabus.

"It is also agreed that a jury is waived in said matter. The above coupons are as *are as* follows: 61 of series 8, 9 and 10 and 51 of series 7, being 234 coupons.

"It is further stipulated that said bonds and coupons are identical in character with the bonds and coupons in the matter of *Skinner* v. *Town of East Oakland*, tried in this court and appealed to the U. S. Supreme Court, tried there and reported in 94 U. S. 255, and issued in same manner, the only difference being that these bonds and coupons were issued by the town of Paris instead of the town of East Oakland.

"In case of appeal to the U. S. Supreme Court this case may be submitted under rule 20 on written briefs."

Judgment below for the defendant, to review which the plaintiff sued out this writ of error.

Mr. George A. Sanders for plaintiff in error.

Mr. R. B. Lamon for defendant in error.

Per Curiam. The judgment in this case is affirmed on the authority of *Glenn* v. *Fant*, 134 U. S. 398; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Andes* v. *Slauson*, 130 U. S. 435; and *Bond* v. *Dustin*, 112 U. S. 604, and cases cited.

Affirmed.

MASON *v.* UNITED STATES.

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

No. 214. Submitted May 5, 1890. — Decided May 19, 1890.

A postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appeared and defended; the suit was abated as to one of the sureties who had died; and the other sureties made default, and judgment of default was entered against them.

Statement of the Case.

On the trial a verdict was returned for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who had appeared sued out a writ of error to this judgment without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of those parties; *Held*, that the motion must be denied.

This was an action against the postmaster of Chicago and the sureties upon his official bond, the alleged breach being that he had not accounted to the United States for large sums of money received by him from the sale of postage stamps and other sources connected with the postal service. The principal defence was that the moneys had been deposited in a bank which had failed, and which was a designated depositary of public moneys. The process was against the postmaster and seven of the sureties, jointly. Two of the sureties died before trial, and the suit was abated as to them. Two appeared, and, together with the postmaster, went to trial in defence. The default of the remaining three sureties was taken before proceeding to trial. The jury assessed the damages at $116,559.14, and judgment was entered therein against all the remaining parties impleaded, (the postmaster and five sureties,) "and that the United States have execution thereof." To this judgment two of the sureties sued out a writ of error, without joining the other parties, or summons and severance.

The case was reached on the docket on the 19th of March, 1890. The counsel for plaintiffs in error commenced the opening of the case; but the court, upon examination of the record, declined to hear further argument for the present, and ordered the case to be passed.

On the 5th of May, 1890, the counsel for the plaintiffs in error, made the following motion:

"And now comes Carlisle Mason, John Alston, John McArthur, James Steele, Thomas S. Dobbins and Solomon McKichan, who, jointly, and severally, move for leave to amend the writ of error by inserting therein their names, they being all of the defendants in the judgment rendered by the

Circuit Court for the Northern District of Illinois, on the 16th day of July, 1886, and also by a similar amendment to the citation and bond;

"And that the said John McArthur may be allowed to join in the errors assigned by the said Carlisle Mason, and John Alston;

"Or, in case said application cannot be allowed, that an order and judgment of severance be entered so that the judgment rendered in the court below against said John McArthur, James Steele, Thomas S. Dobbins, and Solomon McKichan may be allowed to stand, and the said Carlisle Mason and John Alston permitted to prosecute the writ of error and their assignments made upon the record herein.

"Or, that such other and further order may be entered as may be consistent with the rules and practice of this court in order to permit a review of the rulings and decisions of the court below.

"W. C. GOUDY,

"*Attorney for the above-named persons.*"

The following papers were filed with this motion:

"The undersigned, John McArthur, James Steele, Thomas S. Dobbins and Solomon McKichan, against whom, with Carlisle Mason and John Alston, a judgment was rendered by the Circuit Court of the United States on the fourteenth day of July, 1886, in favor of the United States of America, for three hundred thousand dollars debt, to be satisfied upon making the sum of $108,648.50 damages, together with costs, and from which judgment a writ of error was prosecuted and is now pending in the Supreme Court of the United States.

"Do hereby enter our appearance in the Supreme Court of the United States and consent to an amendment of the writ of error in any way which said court may see proper to allow, and also, if permitted by the court, join in the assignments of error, and, in case that shall not be allowed, consent to a judgment of severance so that the said writ of error may be prosecuted by our co-defendants in said judgment, Carlisle Mason and John Alston, and to any further order that may be neces-

sary to enable the plaintiffs in error to prosecute said suit in said Supreme Court.

"JOHN MCARTHUR,
"JAMES STEELE,
"SOLOMON MCKICHAN,
"THOMAS S. DOBBINS,
"By his attorney,
"WILLIAM C. GOUDY."

"SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1889.

"Carlisle Mason and John Alston,
Plaintiffs in Error,
v.
The United States. } No. 214.

"In error to the Circuit Court of the United States for the Northern District of Illinois.

"Wm. C. Goudy, being sworn, says that he represented John McArthur, Carlisle Mason, John Alston, James Steele and Thomas S. Dobbins, in the Circuit Court of the United States for the Northern District of Illinois in this suit commenced by the United States against them and others, from about the first of January, 1878, in connection with John W. Ela until some time in the year 1885, when this deponent assumed the sole defence for said persons, the said John W. Ela becoming unable to attend to the business at that time because of sickness.

"That the deponent represented all of said persons on the trial in 1886, which resulted in the judgment of July 14, 1886, and was authorized to take all such steps in their behalf, as were necessary to bring the case to the Supreme Court of the United States for review. That he procured the writ of error, which now appears in the record, from the clerk of the Circuit Court of the United States for the Northern District of Illinois, supposing that the cause would be brought to this court for review of the alleged errors in the court below, the same as if said writ of error had named all of the defendants in said judgment, and that if the same should be reversed, that it would be reversed as to all, that being the practice in

the State of Illinois; and that his attention was not called to the practice prevailing in the Supreme Court until the cause came on for argument. Deponent further says that he had authority to have used the names of John McArthur, John Alston, Carlisle Mason, James Steele and Thomas S. Dobbins in the prosecution of a writ of error, and that as he understands it, he had the right to use the name of Solomon McKichan in connection with the other defendants, according to the rules of law, but the deponent further says that he now perceives that said writ of error is defective in describing the suit as one between the United States of America, plaintiff, and Carlisle Mason, John Alston and others, defendants, when the writ should have named all of the defendants in the judgment for the purpose of correctly describing the suit, and that the same error exists in the citation, and the suit should have been docketed in this court in the names of all of the defendants in said judgment.

"The deponent further says that he has procured the signatures of John McArthur, James Steele and Solomon McKichan to a paper attached hereto entering their appearance and consent to such proceedings as may be necessary to enable the court to determine the errors assigned, and that he could have procured the personal signature of Thomas S. Dobbins, the remaining defendant, except for the reason of his absence from Chicago, his place of residence, in Colorado at some point which deponent has been unable to ascertain in time to procure the signature during the present term, and for that reason he has exercised the authority which he has as attorney by signing the name of said Thomas S. Dobbins to said paper. And deponent further says that he has been fully authorized to sign all the said names except that of Solomon McKichan, as attorney, without obtaining their consent at the present time, but that he preferred having them append their signatures in person to such consent and has done so as far as possible at the present time.

"William C. Goudy.

"Subscribed and sworn before me this 1st day of May, 1890.

"J. L. McKittrick,

"*Notary Public.*"

Opinion of the Court.

PER CURIAM. (May 19, 1890): The motion for leave to amend the writ of error, citation and bond in this cause is denied, and the writ of error is *Dismissed.*

Mr. W. C. Goudy for plaintiffs in error.

Mr. Solicitor General for defendants in error.

IN RE BURRUS, Petitioner.

ORIGINAL.

No. 10. Original. Submitted March 10, 1890. — Decided May 19, 1890.

A District Court of the United States has no authority in law to issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grand-parents.

THE case is stated in the opinion.

Mr. G. M. Lambertson for the petitioner.

Mr. John Schomp opposing.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an application by Thomas F. Burrus to this court, in the exercise of its original jurisdiction, for a writ of *habeas corpus* to relieve him from the custody and unlawful imprisonment, as he declares, in which he is held by Brad. D. Slaughter, United States marshal of the State of Nebraska, in the jail at Omaha in said State, by virtue of an order of the District Court of the United States for that district. Upon the filing of the petition in this court, a rule was entered and served upon Slaughter to show cause why said writ of *habeas corpus* should not issue. To this rule Slaughter made return. In this return he says that "the said petitioner is in his custody under and by virtue of an order and judgment of the Honor-

able Elmer S. Dundy, Judge of the United States Court for the District of Nebraska, a copy of which order is hereto attached, and forms a part of this my return to aforesaid writ." He further attaches to this return a "true and correct copy of the whole proceedings in the controversy that brought about the judgment and order aforesaid, and he holds the said Thomas F. Burrus in his custody subject to and in pursuance of the aforesaid order and said judgment of the court, and submits whether he is entitled to his discharge as prayed for." This return is signed "Brad. D. Slaughter, marshal of the United States for the District of Nebraska."

The substance of this record shows that Louis B. Miller, of the town of Oxford, county of Butler, and State of Ohio, and a citizen of that State, was the father of a child named Evelyn Estelle Miller, who was born on the 7th day of October, 1881; that his wife died on the 18th of May, 1882, while he and his wife were residing in Nemaha County, in the State of Nebraska; and that while his wife was lying sick of measles, from which she ultimately died, the child was taken, under the directions of a physician, to the residence of the grandfather, Thomas F. Burrus, and Catherine Burrus, his wife, who were, and now are, residents of said Nemaha County and citizens of the State of Nebraska. Since that time, Miller has married again, and, having a house and home, and being well prepared to take care of his child, he has desired its care and custody, and made frequent demands of the said Thomas and Catherine Burrus that they deliver it up to him, which they have uniformly refused to do.

Under these circumstances, Miller made application, on the 4th day of April, 1889, to Hon. Elmer S. Dundy, District Judge of the United States for the District of Nebraska, for a writ of *habeas corpus* to recover the care and custody of the child, reciting the circumstances hereinbefore stated, and also some other matters tending to show that the home of Burrus was not a fit place for the child to be brought up in. Upon this petition the writ was issued, and the defendant Burrus and his wife appeared before Judge Dundy at a regular term of the District Court. They stated the fact that they had had the

care and custody of the infant from a very short time after its birth and still had it; and that they had taken good care of it, were capable of taking good care of it, and were very much attached to it, and it was attached to them; and they claimed the right to continue in the custody and control of the child, who was then between eight and nine years old.

Afterwards, on the 25th day of June, 1889, Judge Dundy made an order that said Evelyn E. Miller, the child, was improperly detained and kept by Thomas Burrus and Catherine Burrus, and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis E. Miller, the petitioner, and that said Burrus and wife produce the child before the court within five days from the date of said order. From this order an appeal was taken to the Circuit Court for that District, before Judge Brewer, who decided that neither he nor the Circuit Court had any jurisdiction to hear the case on appeal, and remitted the case to the District Court. On the 16th of December, 1889, an order was made reciting that the court had heard the argument of counsel on a motion to stay proceedings and dismiss the cause for want of jurisdiction of the court, and the court being of opinion that the cause was properly before it, and that the judge had jurisdiction of the same, and ordering that the stay of proceedings theretofore granted be terminated, and that the judgment of the court made on the 25th day of June, 1889, be carried into effect. It appears that the order for the delivery of the child to the father was obeyed in the presence of the court, but that, Miller having started from Omaha for his home in Ohio with the child, the petitioner Burrus and his wife got into the same train, and crossed the Missouri River on that train, and that when they reached Council Bluffs, in the State of Iowa, on the opposite side of the river, they again made efforts to secure possession of the child. The result of these efforts was, that the father proceeded somewhat further into the State of Iowa, whilst the defendants, taking possession of the child with violence and against the will of the father, returned with it to the State of Nebraska. Thereupon Burrus and his wife were called before the District Court by a writ of attachment

for contempt in disobeying the orders of the court, and for this contempt Burrus was committed to imprisonment for three months in a county jail, in the custody of the marshal of Nebraska. It is from this imprisonment that he now seeks to be relieved by the present proceedings in this court; and the foundation of his claim of right to be so relieved is, that neither the District Court of Nebraska nor Judge Dundy, the judge of that court, had any jurisdiction whatever in the original case of *habeas corpus* before him. That is the only question in the present case, for we have no power under this writ to inquire into mere errors committed by the District Court in the progress of that case, and if we had, we are not satisfied that any such errors exist save as to the alleged error of the assumption of jurisdiction in the case. Whether such jurisdiction existed is, therefore, the sole question before us.

The question of the extent of the authority of the courts of the United States to use the writ of *habeas corpus* as a means of releasing persons held in unlawful custody has always been clouded with more or less doubt and uncertainty. The Constitution, by declaring that "the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it," added to the exalted estimate in which that writ has always been held in this country and in England. By the fourteenth section of the act establishing the judicial courts of the United States, it is declared "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the Justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in jail unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

It will be seen in this section, that, while there may be many writs not specifically provided for in the statute which shall be within the powers of the courts of the United States, the framers of that statute were careful to mention specifically the writs of *scire facias* and of *habeas corpus*, and to make some special provisions in regard to the latter. As to the power of the courts to issue any of these writs it was said, that they must be necessary to the exercise of the jurisdiction of the respective courts and agreeable to the principles and usages of law. In reference to the writ of *habeas corpus*, it is expressly enacted that either of the Justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant the writ for the purpose of an inquiry into the cause of commitment. This latter clause has been interpreted occasionally as authorizing the issuing of the writ in any case where a person is imprisoned or confined by an order of a court, for the purposes of an inquiry into the cause of commitment. But the proviso, proceeding upon the idea of the first clause, that in order to the issuing of this writ it must be necessary for the exercise of the jurisdiction of the court which issues it, declares that the writ "shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This statute, of course, left cases of prisoners in confinement by order of state authorities without the benefit of this writ from the courts or justices or judges of the United States, and the law remained in this condition until the events connected with the nullification proceedings in South Carolina, by which officers of the United States engaged in collecting the revenue and performing other duties in that State were for that reason subjected by the laws of South Carolina to imprisonment. In the recent case of *Cunningham* v. *Neagle*, 135 U. S. 1, we have had occasion to review the course of legislation by Congress on the subject of the writ of *habeas corpus*, which has mainly, as now found in the Revised Statutes of the United States, reference to provisions for protecting the individual

liberty of persons, citizens of the United States and subjects or citizens of foreign governments, from illegal imprisonment under state authority. It is not necessary to go over that field on this occasion. It is sufficient to say that the net result of the discussion is, that all the courts of the United States, and the justices and judges of all its courts, are authorized to issue the writ of *habeas corpus* in any case where a party is imprisoned or held in custody for an act done by or under the authority of the laws of the United States, or where his imprisonment is in violation of the Constitution of the United States, or where it is supposed to be in violation of the law of nations or of the United States, in all which cases the federal courts and judges have jurisdiction to make inquiry into the matter, and, in the language of the statute, when the prisoner is brought before them and the matter is inquired into, the court or justice or judge shall "dispose of the party as law and justice require." It is not now the law, therefore, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of *habeas corpus*. In order to obtain the benefit of this writ and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States.

It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the prisoner is brought before the court, or justice, or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued; and it is upon such hearing to be finally determined by the tribunal before whom the prisoner is brought whether his imprisonment or custody is in violation of the Constitution or laws or treaties of the United

States. The cases on this subject, as they have been decided in the courts of the country, are not altogether in accord, but we think this is a fair statement of the law as it stands at the present time, under the statutes of the United States and the decisions of this court.

This subject was considered with much ability in *Ex parte McCardle*, 6 Wall. 318. In that case, although the court was speaking mainly of the jurisdiction of this court by way of appeal, yet it made the following observation with reference to the act of February 5, 1867, 14 Stat. 385, then recently passed. The language of that statute was, that, in addition to the authority already conferred on the several courts of the United States and the justices and judges of said courts, they shall have power "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of *habeas corpus*, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States." In reference to this statute, Chief Justice Chase, speaking for the court, in that case, said: "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the national Constitution, treaties or laws. It is impossible to widen this jurisdiction. It is to this jurisdiction that the system of appeals is applied." The provision of this statute is reproduced, with others on the same subject, in section 753 of the Revised Statutes.

In *Ex parte Dorr*, 3 How. 103, an application was made to

this court for a writ of *habeas corpus* to bring up the body of Thomas W. Dorr, of Rhode Island, on whose behalf it was alleged that he was held under sentence of death in violation of the Constitution and laws of the United States. The law then existing on the subject of the powers of the court in awarding writs of *habeas corpus* was the fourteenth section of the Judiciary Act of 1789, which we have already recited. This court, construing that section, said: "The power given to the courts, in this section, to issue writs of *scire facias*, *habeas corpus*, etc., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction; and that they qualify and restrict the preceding provisions of the section is indisputable. Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness; and it is immaterial whether the imprisonment be under civil or criminal process." The motion for the *habeas corpus* was overruled. It was on account of this limited power of the federal courts to issue writs of *habeas corpus* that the various statutes referred to in *Ex parte Neagle* have since been passed; among the rest, the one construed by this court in *Ex parte McCardle*, in which it is clear, from the language of Chief Justice Chase, that the original limitation upon the power remains, except as it is extended by the statute of 1867 and others on the same subject.

In the case before us there was no pretence that the child was restrained of its liberty, or that the grandfather withheld it from the possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States. The whole subject of the

domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution.

The case of *Barry* v. *Mercein* is very instructive on this subject. Mr. Barry, who was a subject of the Queen of Great Britain, married an American lady, and after the birth of two children they separated, Mr. Barry residing in Nova Scotia and the wife in the State of New York. Mr. Barry made application first to the Court of Chancery of New York, by a writ of *habeas corpus*, to recover possession of his daughter. In the case of *The People* v. *Mercein*, 8 Paige, 47, 55, Chancellor Walworth refused the relief he asked, saying that "a writ of *habeas corpus ad subjiciendum* is not, either by the common law or under the provisions of the Revised Statutes [of New York], the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant."

Mr. Barry then made application to the Circuit Court of the United States for the Southern District of New York, where his case was heard by Judge Betts, who delivered a very careful and a very able opinion, which has been furnished to us, in which he held that his court could not exercise the common law function of *parens patriæ*, and therefore had no jurisdiction over the matter, nor had it jurisdiction by virtue of any statute of the United States. The petitioner in that case alleged that he was a native born subject of the Queen of Great Britain, residing in Nova Scotia, and that his wife was a daughter of Mary Mercein, then a citizen of the State of New York, and that the mother and daughter held the custody of his child in violation of law. Judge Betts then, in a very able opinion, discusses the jurisdiction of the courts of the United States generally, and especially of the Circuit Court, in regard to a case like this, with the result which we have stated.

Opinion of the Court.

Prior to this the petitioner had made application to this court, in the exercise of its original jurisdiction, for the writ of *habeas corpus*, but the court declared that the case was not of that class of which it could assume original jurisdiction, and that no ground for the exercise of appellate jurisdiction was presented; and it therefore refused the application. *Ex parte Barry*, 2 How. 65. From the judgment of the Circuit Court by Judge Betts, Mr. Barry brought the case to this court by a writ of error, and a motion was made to dismiss the case for want of jurisdiction in this court. In this case, which was very elaborately argued, the opinion of the court was delivered by Chief Justice Taney, in which he said that "in the argument upon this motion, the power of the Circuit Court to award the writ of *habeas corpus*, in a case like this, has been very fully discussed at the bar. But this question is not before us, unless we have power by writ of error to re-examine the judgment given by the Circuit Court, and to affirm or reverse it, as we may find it to be correct or otherwise." He then proceeds to say that the appellate jurisdiction of the Supreme Court is governed by the amount or value in controversy, and adds: "In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care and society of their child. This is the matter in dispute; and it is evidently utterly incapable of being reduced to any standard of pecuniary value, as it rises superior to money considerations." *Barry* v. *Mercein*, 5 How. 103, 119, 120.

So far as the question whether the custody of a child can be brought into litigation in a Circuit Court of the United States, even where the citizenship of the opposing parties is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of *Barry* v. *Mercein*. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the Circuit Courts by declaring that they shall have original cognizance, concurrent with the courts of the several States, of all civil suits arising under the Constitution or laws of the United States, or treaties made, or

which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them.

But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the Circuit Court of the United States, but a judgment of the District Court of the same District. There is apparently a studied effort in the record before us to treat the proceeding as one in the District Court of the United States for the District of Nebraska, and also as one before the judge of that court, but we apprehend that it must be considered for what it is worth, as the judgment of the District Court, both the order for the delivery of the child to its father and the order for the imprisonment of the present petitioner for contempt being made in that court. The jurisdiction of that court is not founded upon citizenship of the parties; and though the original petition of Miller, the father of the child, was amended after the judgment was rendered, so as to show that he was a citizen of the State of Ohio, and the defendants, Burrus and wife, were citizens of Nebraska, it is not perceived how that averment aids the parties in the present case, for the District Courts of the United States have not jurisdiction by reason of the citizenship of the parties. If, therefore, there was no other ground of jurisdiction of that court in the *habeas corpus* case, by which the child was delivered to its father, it was entirely without jurisdiction.

We have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of *habeas corpus* is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction. Of course

this does not mean that they have jurisdiction in all cases to issue the writ of *habeas corpus*, but that they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ. Whatever, therefore, may be held to be the powers of the Circuit Courts in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds two thousand dollars in value, we know of no statute, no provision of law, no authority intended to be conferred upon the District Court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case. According to this view of the subject, the whole proceeding before the District Judge in the District Court was *coram non judice* and void, and the attempt to enforce the judgment by attachment and imprisonment of Burrus for contempt of that order is equally void. *Ex parte Rowland*, 104 U. S. 604.

The petitioner is, therefore, entitled to his discharge, and the rule against Slaughter, the marshal, is made absolute, and the writ of habeas corpus will issue, if that be necessary to his release.

Mr. Justice Brewer dissented.

The opinion of Judge Betts in *In the matter of John A. Barry*, referred to by Mr. Justice Miller, *ante*, 594, was given in the Circuit Court of the United States for the Southern District of New York on the 25th of May, 1844. A very brief summary of it was printed in 7 Law Reporter, 374. At the request of members of this court it is here printed in full.

Betts, J. On the first day of term the petitioner presented in open court, and filed, his petition praying that "the people's writ of *habeas corpus ad subjiciendum* may issue in his behalf directed to Mary Mercein, relict of the late Thomas R. Mercein, deceased, of the city of New York, and to Eliza Anna Barry, wife of the

petitioner, commanding them forthwith, immediately on the receipt of said writ, to have the body of Mary Mercein Barry, daughter of the petitioner, by them imprisoned or detained, with the time and cause of such imprisonment or detention, before this court, to do and receive what shall then and there be considered of the said Mary Mercein Barry."

The petitioner alleges that he is a native-born subject of the Queen of Great Britain, resident in Nova Scotia, and that he has never been naturalized or claimed naturalization under the laws of the United States.

That, in April, 1835, in the city of New York, he intermarried with Eliza Anna, daughter of the late Thomas R. Mercein, a citizen of said city.

That, in the month of May thereafter, he returned to Nova Scotia accompanied by his wife, and there resided about a year, when he removed his family to the city of New York, where he resided until April, 1838, when he returned to Nova Scotia with a portion of his family, and has continued to reside there from that time.

That a son and daughter were born of said marriage during his residence in the city of New York, and on his removal to Nova Scotia he left his wife and two children temporarily with her father in the city of New York. That in the month of May thereafter he returned to New York, when difficulties arose between him and his wife respecting her removal to Nova Scotia, and she declared her determination to part with him rather than think of going to Nova Scotia.

That he remained in New York until the 28th of June, 1838, and with a view to arrange amicably the differences between himself and wife, he finally agreed to allow her to continue in New York at her father's house until the first day of May, 1839, and to retain in her care their said daughter, Mary Mercein, during that period, and also their son until such time as the petitioner might think proper to require him.

That in September following he returned to New York and made every possible effort to conciliate his wife and induce her to consent to go at some future time to her own proper home in Nova Scotia, but she utterly refusing and declaring that she had no expectation of so doing, the petitioner returned himself taking his son along with him.

That these attempts to conciliate her were frequently repeated

Note. In the Matter of Barry.

without avail, and the petitioner awaited the expiration of the time he had agreed she should remain with her father, and on the 2d day of May, 1839, formally demanded of the said Thomas R. Mercein the surrender of his said wife and child, which demand was not complied with.

That his wife, from that time to the present period, has refused to return to his home and has absented herself therefrom, contrary to his desires, and has detained and does still keep from him, unlawfully, his daughter, who is now in the seventh year of her age. That Thomas R. Mercein has lately deceased, and that thereby the wife of the petitioner is left without any present property, and little or no prospect of any in reversion, and that she has no property whatever of any kind in her own right, and has no means known to the petitioner for the present or future support of herself and their daughter, and that she resides with and is harbored in her present vicious and illegal condition by her mother, Mary, relict of the late Thomas R. Mercein.

The petitioner alleges his own ability to provide comfortably for the support and education of his daughter, and especially claims that she is a British subject, allegiant to the crown of Great Britain, at least during her minority.

The petitioner sets forth many other matters of aggravation in the separation from him, persisted in by his wife, and the countenance and support of her by her family in her conduct and refusal to return to her home.

These particulars it is unnecessary to rehearse, and the right to the remedy or relief claimed by the petitioner is not, in this stage of the case, to be determined by a consideration of the relative conduct of these parents toward each other or the child, or of the advantages to the infant, to be placed with the one rather than the other.

These matters would be most material if the case had proceeded so far as to require from the court a decision upon the question as to the fit or proper disposal of the infant.

The point now to be considered is, whether the petitioner has presented a case coming within the jurisdiction of this court; or, if this court has cognizance of the matter, whether the facts stated by the petitioner entitle him to the interference of the court in the manner prayed for.

The same petition in substance was presented to the Supreme

Court of the United States, at the last term, and was supported by an elaborate argument on the part of the petitioner.

The court observes, (*Ex parte Barry,*) 2 How. 65: "It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition. . . . Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof."

This instruction of the Supreme Court seems to be regarded by the petitioner as a declaration of that high tribunal that the United States Circuit Court for this district has the power to grant the relief demanded by the petition.

The expression of such opinion by that court, even in an incidental manner and not on a point under adjudication, would have the highest influence with this court, and would undoubtedly be adopted here as the rule of decision.

But the cautious and reserved phraseology employed by the Supreme Court in respect to the competency of any other United States tribunal to take cognizance of the subject, is, in my opinion, to be regarded rather as an admonition to the inferior courts, that grave difficulties rested over the matter, than an assurance to them that their original jurisdiction contained the authority to award the common law writ of *habeas corpus ad subjiciendum*, prayed for. That court says of itself: "We cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States," language plainly not employed to import that a Circuit Court has in this behalf a capacity transcending that of the Supreme Court, and can create a jurisdiction to itself by awarding writs of *habeas corpus*.

This opinion of the Supreme Court, I think, supplies no authority or suggestion in aid of the jurisdiction now invoked, and, taken most favorably, for the petitioner, merely leaves the question as to its power to award the writ to be settled by the

Note. In the Matter of Barry.

Circuit Court in consonance with the Constitution and laws of the United States.

The application to the Supreme Court was supported by an exposition of this case, intended to show that this petitioner's claim had been unjustly adjudged against in the courts of this State, and that the interposition of that tribunal was necessary to correct these erroneous judgments and secure the legal rights of the petitioner.

That argument with the decision of the Supreme Court on this motion, was also submitted to me with the petition, when filed.

On the perusal of these papers, I at first hesitated as to the course most proper to be pursued, preliminarily; whether to grant a rule against Mrs. Barry and Mrs. Mercein to show cause why the writ should not issue, or even to award the writ, with a view to have the entire case spread before the court, or such points presented as would lead to a definite decision of the case.

But as the adoption of either alternative must involve great delay and expense, both in the disposition of the case in the first instance, and in removing it by either party to the Supreme Court, for revision, and as the right of the petitioner to relief in this court, under any aspect of the case, was doubtful, I conceived it the least expensive and more convenient course to inquire and decide whether the petitioner presented a case of which this court should take cognizance.

When the cause of imprisonment or detention shown by the petition satisfies the court that the prisoner would be remanded, if brought up, the writ will not be awarded. *Watkins' Case*, 3 Pet. 193, 201, *per* Marshall, C. J.; *Milburn's Case*, 9 Pet. 704, 706; 2 Story Const. Law, 207, § 1341; *Ex parte Bollman*, 4 Cranch, 75.

The practice in the English courts is the same. Bac. Ab. Habeas Corpus B. No. 44, case cited; 4 Comyn Dig. (Day's ed.) 550 and note 3; Hallam's Const. Law, 20; *Penrice & Wynn's Case*, 2 Mod. 306; *Slater* v. *Slater*, 1 Levinz, 1; *The King* v. *Marsh*, 3 Bulst. 27; *Sir William Fish's Case*, cited in *White* v. *Wiltsheine*, 2 Rolle, 137, 138.

If upon the facts stated by the petitioner it shall be determined that the court cannot grant the relief prayed for, either for want of jurisdiction or because the law is against his demand, it would be inexpedient and oppressive to cause the parties implicated to be arraigned before this court and held under its control, pending

the discussion and consideration of the subject, and, accordingly, upon the doubts arising from a perusal of the papers, I deemed it proper to invite the petitioner in the first instance to support his petition by arguing these two points:

(1) Whether the United States Circuit Court has jurisdiction over the subject matter of his petition;

(2) If such jurisdiction exists, do the facts stated upon the petition give the petitioner, under the law of the land, a title to the remedy prayed for?

The petitioner has read an argument prepared with great research and ability in support of the affirmative of both inquiries, bringing into review numerous English and American decisions upon the same question, and has submitted the manuscript to the examination of the court. With the aid of this most ample discussion of this subject, I proceed to pronounce the result of my reflections upon this interesting and important case.

The incongruity of awarding proofs, at the instance of husband or wife, to take away an infant child from the parent having it in nurture and keeping, upon the allegation that such keeping is a wrongful imprisonment, is most palpable and striking. It is a bold figure of speech, or rather fiction, to which the law ought not to resort, unless indispensably necessary to be employed in preservation of parental rights, or the personal fondness of the child. The courts, however, assume such supposititious imprisonment to exist as the foundation for jurisdiction, to a limited extent, over the detention of infants, even by their parents, on the ground that the writ is rather to be considered a proceeding in the name and behalf of the sovereign than by one named person against the other. *Commonwealth* v. *Briggs*, 16 Pick. 203.

There is no reason to doubt that originally the common law writ was granted solely in cases of arrest and forcible imprisonment under color or claim of warrant of law.

As late as 2 James II, the court expressly denied its allowance in a case of detention or restraint by a private person, *Rex* v. *Drake*, Comberbach, 35; 16 Viner, 213; and the *habeas corpus* act of Charles II, which is claimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges. 3 Bac. Ab. 438, note.

It is not important to inquire at what period the writ was first employed to place infant children under the disposal of courts of

Note. In the Matter of Barry.

law and equity. This was clearly so in England anterior to our Revolution, *Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Delaval*, 3 Burrow, 1434; *Blisset's Case*, Lofft, 748; and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day. *King* v. *DeManneville*, 5 East, 221; *De Manneville* v. *DeManneville*, 10 Ves. 52; *Ball* v. *Ball*, 2 Sim. 35; *Ex parte Skinner*, 9 J. B. Moore, 278; *King* v. *Greenhill*, 4 Ad. & El. 624; and this indifferently, whether the interposition of the court is demanded by the father or mother. 4 Ad. & El. 624, *ubi sup.*; 9 Moore, 278, *ubi sup.*

The late act of 2 and 3 Vict. c. 54, (1839,) sanctions the principle, and would seem to reinstate the old dictum that the judgment and discretion of the court is not to be controlled by any supposed legal right of the father in exclusion of that of the mother, if the infant be within the age of seven years. An act of the State of New York, passed in 1830, had established the same doctrine within this State by positive law; and, independently of this statute, the course of the American courts in this respect had been substantially in consonance with the decisions in England, antecedent to the Revolution. *In re McDowle*, 8 Johns. 332; *In re Eliza Waldron*, 13 Johns. 418; *In re Wollstonecraft*, 4 Johns. Ch. 80; *People* v. *Mercein*, 8 Paige, 47; *Commonwealth* v. *Addicks*, 5 Binney, 520; *Commonwealth* v. *Briggs*, 16 Pick. 203; *State* v. *Smith*, 6 Greenl. 462.

The later cases in New York are founded upon a principle common to all the decisions cited; *People* v.——, 19 Wend. 16; *Mercein* v. *People*, 25 Wend. 63, 80; *People* v. *Mercein*, 3 Hill, 399; but in so far as they may seem to favor the latest adjudications in England, in respect to the fixed and controlling right of the father, as the true exposition of the common law rule, they are modified and overruled by the decisions of the Court of Errors. *Mercein* v. *People*, 25 Wend. 106; and Sittings 1844, MSS.

The petitioner in this case asks of the court the award of the common law writ of *habeas corpus ad subjiciendum*, with all of its common law attributes and efficacy.

That is a high mandate, by means of which courts or judges, in protection of the liberty of individuals, exercise functions appertaining to the sovereign power, and which in intendment of law rest only in the sovereign and are coëxtensive with his dominion. *Kendall* v. *United States*, 12 Pet. 524, 627, 629.

Note. In the Matter of Barry.

The writ is purely one of prerogative. Whether emanating from a King or a State, whether returnable before the King in person, (as it undoubtedly was in its origin,) or awarded and acted upon by magistrates as surrogates of the sovereign authority, it has always been made to bring the party imprisoned directly before the supreme power, that if there be not due cause of law for his detention, the sovereign may set him free of his restraint. 3 Black. Com. 131; Bac. Ab. Hab. Corp. 421; 3 Story Const. Law, 207; *Ex parte Watkins*, 3 Pet. 193, 202; 2 Kent Com. 26, 29.

In respect to married women or other adults, held in detention by private individuals, the sovereign, through this writ, acts as *conservator pacis* and *custos morum*, and, in regard to infant children, as *parens patriæ*, taking, in these high capacities, summary order that the party be forthwith set at liberty, if improperly and wrongfully detained. Lofft, 748, and 13 Johns. 418, above cited; *People* v. *Chegaray*, 18 Wend. 637; 8 Paige, 47, above cited; *United States* v. *Green*, 3 Mason, 482. The State, thus acting upon the assumption that its *parentage* supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare. *People* v. *Chegaray*, 18 Wend. 642–3; *Blisset's Case*, Lofft, 748.

The cases before cited show that the English and American courts act in this behalf solely upon the assertion of the right of the sovereign whose power they administer, to continue or change the custody of the child at his discretion, as *parens patriæ*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him.

Even in the extraordinary conclusions drawn from the facts brought to light in *Commonwealth* v. *Addicks*, 5 Binney, 520, and *The King* v. *Greenhill*, 4 Ad. & El. 624, both courts, in denying that these facts called for any change of the custody of the children, readjudged the principle, that it was their province, at common law, authoritatively to decide that question according to their legal discretion.

Does this common law prerogative, in relation to infants, rest in the government of the United States, and has the Circuit Court competent authority to exercise it?

The argument bearing upon the first branch of this inquiry assumes two propositions as its basis: (1), that the government of

the United States is supreme over all subjects within its cognizance; and (2), that the common law of England is embodied with, and has become a measure and source of authority to, the national government, and is to be enforced in the Circuit Court, whenever persons competent to sue in those courts prosecute their rights therein. It is believed that neither of these propositions can be maintained, and certainly not in respect to the subject matter of this proceeding.

Many of the powers of the general government are unquestionably supreme and exclusive, while others, especially those in relation to remedies afforded by its courts to private suitors, are only concurrent with similar powers possessed by the state governments. If the power in respect to parties competent to sue in the national federal courts could be supposed to exist in its absolute sense in the United States government, its exercise has been modified and restricted by Congress in the 11th section of the act of September 24, 1789, which gives the Circuit Courts no more than a concurrent jurisdiction with the state courts, of suits of a civil nature, at common law. 2 Stat. 60.

Nor again do all attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the States, in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant. *McCulloch* v. *Maryland*, 4 Wheat. 407; 2 Story Const. § 1907; *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government, that the common law became embodied in it, as an efficient principle of its authority and action, (Du Ponceau on Jurisd. 85–90,) yet the doctrine has never been declared or sanctioned by our courts.

So far as the decisions have gone, they tend to repudiate the principle *in toto*. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415.

There is, accordingly, no sure foundation for the assumption that the federal government possesses common law prerogatives inherent in the sovereign, which can be exercised without authority of positive law. *Martin* v. *Hunter*, 1 Wheat. 304, 329.

Note. In the Matter of Barry.

If any common law prerogative in relation to the administration of justice can be proved to exist in the sovereignty of the United States, it must, upon the same principle, be endowed with all such prerogatives, and can, on the like authority, unless inhibited by positive law, award writs of *mandamus*, *quo warranto*, *ne exeat*, *or mandates* to citizens abroad to return home on pain of confiscation of their estates, (Comyn's Dig. Prerogatives, D. 34, 35,) or this writ of *habeas corpus;* they being all common law writs *ejusdem generis.*

That such attributes or functions of sovereignty cannot be inherent in the United States government necessarily results from the character of the government and the objects of its constitution.

It is not designed, in its organization or aim, to regulate the individual or municipal relations of the citizen. These are left under the dominion of the state government; and there accordingly exists no relation between the nation and individuals, which affords foundation for these prerogatives.

The social or personal duties or liabilities of the citizens come within the control of the general government only when remitted to its charge by a special cession of authority, and then solely to the end that such regulations as are of a federal character may be enforced, — as in relation to land and naval forces, and persons in the employ of the United States, the punishment of offences, etc., etc., — but in other respects the national government does not supply the law governing the citizen in his domestic or individual capacity. These particulars appertain to the institutions and policy of the respective States.

This reasoning, however, may not be supposed to meet fully the case presented by the petitioner; for although, in the abstract, there may be no prerogative authority in the head of the United States government, yet the argument would maintain that its courts of justice, as organized, may possess all the powers exercised by superior courts at common law, and the issuing and acting upon writs of *habeas corpus ad subjiciendum* become thereby a branch of jurisdiction necessarily incident to the constitution of such courts.

This hypothesis overlooks the peculiar foundation of the United States judiciary, and the allotment of its functions in respect to the powers of the States.

Note. In the Matter of Barry.

The federal government came into force coördinately with, or as the concomitant of, state governments at the time existing, and in the full exercise of legislative, executive and judicial sovereignty.

These sovereignties are left entire under the action of the general government, except in so far only as the powers are transferred to the federal head, by the constitution, or are by that prohibited to the States, or, in some few instances, are allotted to be exercised concurrently by the two governments.

The United States judiciary is constituted and put in action in the several States, in subordination to this fundamental principle of the Union, and empowered to exercise only such peculiar and special supremacy, and not one in its absolute sense.

To render this connection of the United States judiciary with that of the States more intimate and entire, and to take away all implication that it was a paramount power acting irrespective of state laws, or that it possessed or could exercise any inherent jurisdiction countervailing those laws, the act of Congress organizing the courts establishes it as an element in their procedure, that the laws of the State where the court sits shall be its rule of decision in common law cases.

It necessarily results, as a consequence of this special character of the United States judiciary, that it can possess no powers other than those specifically conferred by the Constitution or laws of the Union, and such incidents thereto as are necessary to the proper execution of its jurisdiction. All other judicial powers necessary to the complement of supreme authority remain with and are exercised by the States.

This doctrine is sufficiently indicated in the decision of the Supreme Court made in this case at the last term, and it has been invariably recognized from the earliest adjudications of the court. *Chisholm* v. *Georgia*, 2 Dall. 419, 432, 435; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. at page 201; *Kendall* v. *United States*, 12 Pet. 524.

The jurisdiction of the United States courts depends exclusively on the Constitution and laws of the United States, and they can, neither in criminal nor civil cases, resort to the common law as a source of jurisdiction. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415; *Chisholm* v. *Georgia*, 2 Dall. 432; *Ex parte Bollman*, 4 Cranch, 75; *Pawlet* v. *Clark*, 9

Cranch, 333; *Ex parte Randolph*, 2 Brock. 477; *Wheaton* v. *Peters*, 8 Pet. 590, 658; *The Steamboat Orleans*, 11 Pet. 175; *Kendall* v. *United States*, 12 Pet. 524.

It is now argued that this principle is limited to the Supreme Court; but that in respect to the Circuit Courts, they have a common law jurisdiction incident to their constitution, inasmuch as judicial sovereignty resides in them, rendering the range of their original jurisdiction coëxtensive with the subjects of litigation arising under the Constitution and laws of the United States, and because all remedies not otherwise provided are, in the exercise of that judicial sovereignty, to be in conformity to the common law.

Although the speculations of our most eminent jurists may countenance this argument, (Du Ponceau, 85; 1 Kent Com. 341,) yet it has not received the sanction of the United States courts. *Chisholm* v. *Georgia*, 2 Dall. 435; *Kendall* v. *United States*, 12 Pet. pp. 616, *per cur.*, and 626, Taney, C. J.; *Ex parte Bollman*, 4 Cranch, 87; *Ex parte Randolph*, 2 Brock. 477, Marshall, C. J.; *Lorman* v. *Clarke*, 2 McLean, 568.

The distinction established by the cases is clear and practical, and embraces all United States courts alike, and is, in effect, that those courts derive no jurisdiction from the common law, but that in those cases in which jurisdiction is appointed by statute, and attaches, the remedies in these courts are to be according to the principles of the common law. *Baines* v. *Schooner James*, 1 Baldw. 544, 558; *Robinson* v. *Campbell*, 3 Wheat. 212, 223; *United States* v. *Hudson*, 7 Cranch, 32; *Ex parte Kearney*, 7 Wheat. 38; *Anderson* v. *Dunn*, 6 Wheat. 204; *Ex parte Randolph*, 2 Brock. 477.

It is not, accordingly, conclusive of their right to take cognizance of the subject matter, to show that the parties connected therewith are competent to sue or be sued in the United States courts, and that there is a perfect right of action or defence thereupon supplied such parties at common law. The evidence must go further, and prove that the particular subject matter is one over which the courts are by act of Congress appointed to act, or that the question has relation to the remedy alone, and not to the jurisdiction of the court. *United States* v. *Bevans*, 3 Wheat. 336, 389; *McCulloch* v. *Maryland*, *ubi sup.* at p. 407; *Rhode Island* v. *Massachusetts*, *ubi sup.* at p. 721.

The authority to take cognizance of the detention of infants by private persons, not held under claim, or color, or warrant of law,

rests solely in England on the common law. It is one of the eminent prerogatives of the crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the King, 12 Pet. 630, and afterwards, for his relief, by special officers, as the Lord High Constable, the Lord High Admiral and the Lord Chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of *habeas corpus ad subjiciendum*, became vested as an elementary branch of their jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle, out of which it sprang, that infants ought to be left where found, or to be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interest and safety.

The reference already made to the origin and object of our federal Union demonstrates that no prerogative of this character could be exercised as an incident to its qualified and peculiar sovereignty; and I think it equally clear, that the inherent authority of no branch of the judiciary can transcend that of the government in this behalf, and that it has no capacity to issue this writ, or act upon it, except under appointment by positive law. *Ex parte Bollman*, 4 Cranch, 75, 93.

It remains then only to consider whether such jurisdiction is conferred upon the Circuit Courts by statute; for, even if the language of the Constitution might import such authority to be within the competency of the judiciary, it is authoritatively established that the Circuit Courts, at least, cannot exercise jurisdiction as to individual rights, because authorized by the Constitution, unless Congress has specifically assigned it to them. They possess no jurisdiction other than that which both the Constitution and acts of Congress concur in conferring upon them. *Turner* v. *Bank of North America*, 4 Dall. 8, 10; *United States Bank* v. *Devaux*, 5 Cranch, 61; *Livingston* v. *Van Ingen*, 1 Paine, 45; *Hodgson* v. *Bowerbank*, 5 Cranch, 303; *Kendall* v. *United States, ubi sup.*; *Ex parte Bollman, ubi sup.* at p. 93; *McClung* v. *Silliman*, 6 Wheat., 598.

The 9th section of the first article of the Constitution, para-

graph 2, declaring that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of *habeas corpus* is suspended by any authority, to decide whether the exigency demanded by the Constitution exists to sanction the act.

So, although the 2d section of the 3d article gives the United States judiciary jurisdiction over *all cases* in law and equity between our own citizens and the citizens or subjects of foreign states, yet, as already shown, the Circuit Court cannot, under that provision, act on one of the subjects without an express authorization by statute. *McClung* v. *Silliman, ubi sup.*

In our government the judiciary power acts only to give effect to the voice of the legislature. *Osborn* v. *United States Bank*, 9 Wheat. 738, 866.

The material question in the case must, accordingly, be, whether Congress has given to the Circuit Courts the special jurisdiction appealed to by the petitioner.

Judge Story holds that the courts of the United States are vested with full authority to issue the great writ of *habeas corpus* in cases properly within the jurisdiction of the national government. 2 Story Const. § 1341.

The general doctrine the commentator is discussing, and the authorities supporting it, have relation to the law as it exists in England and in the respective States of the Union. The only case referred to as giving application of the general doctrine to the United States courts is that of *Ex parte Bollman, and Ex parte Swartwout*, 4 Cranch, 75.

That was a case of imprisonment on a criminal charge, under and by color of the authority of the United States, the prisoners having been committed by the Circuit Court of the District of Columbia, on a charge of treason against the United States; and the Supreme Court held, that though it could not take cognizance of the matter under any common law jurisdiction, yet the act of Congress of September 24, 1789, had conferred the jurisdiction, and they proceeded, by virtue of the statute, to exercise it in the case.

The court nowhere advert to an implied power in the Circuit Courts broader than that vested in the Supreme Court, which

Note. In the Matter of Barry.

would empower a Circuit Court to grant the writ upon the footing of a general jurisdiction in respect to the parties to be affected by it.

The positions adopted as the basis of the decision would seem to look to an entirely opposite conclusion. Chief Justice Marshall says: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. . . . It extends," in the case of United States courts, "only to the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question, the power to determine it must be given by written law."

This language of the Chief Justice is explicit against the theory that the United States courts have necessarily cognizance of all subjects of litigation arising between parties over whom they have jurisdiction.

So in respect to another prerogative writ, that of mandamus, the Supreme Court, in disavowing in itself the power to issue it in the common law sense, holds, in terms not less definite and decisive, that the Circuit Courts cannot award it but by virtue of express authority from statute, *Kendall* v. *United States*, 12 Pet. 524; and this conclusion has no exclusive connection with the particular writ of mandamus, but flows from the doctrine definitely announced by the court, that the United States judiciary has no authority to award prerogative writs of any character further than the power is specifically given by statute.

The relator refers to the argument of counsel, in the case of *Bollman and Swartwout*, as demonstrating that the 14th section of the act of Congress of September 24, 1789, imparts to the United States courts authority as ample as exists in the Supreme Courts of judicature at common law, in the application and enforcement of the writ of *habeas corpus*.

No judicial decision (unless it be that of *United States* v. *Green*, 3 Mason, 482) is found which sanctions that exposition of the statute; and it accordingly becomes necessary to examine with attention the foundation of the construction contended for.

The terms of the statute are "that all the before-mentioned

courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: *Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless when they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The scope and purport of this enactment were very carefully considered by the Supreme Court. *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 201. The courts being authorized to issue the writ "for the purpose of an inquiry into the cause of commitment," the Supreme Court regarded the provisions of the act as incorporating in a considerable degree the English law on the subject, and that the statute of 31 Charles II had defined the cases in England in which relief could be had, under the writ, by persons detained in custody, and was an enforcement of the common law in that respect.

The argument of the court tends clearly to the conclusion that our act was to be construed as applicable to the cases embraced within the English *habeas corpus* act, and as framed in reference to the law established by that statute.

If the term "commitment" in our act is used in its common acceptation, it would have reference to the forcible confinement of a person under color of legal protest or authority. In its common law sense, it imports an imprisonment under a warrant or order on a criminal charge and no other, 4 Bl. Com. 296; 2 Hawk. c. 16, §§ 1, 2, 3, 13, 14, 15, and under the statute, all the judges of England decided that the act of Charles did not extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters. 3 Bac. Ab. 438, note.

As our statute uses the term *commitment,* and drops the limitation of it in the English act "for any criminal or supposed criminal matter," it may be reasonable, in favor of liberty, to understand it in its broadest signification. A court of deservedly high

Note. In the Matter of Barry.

character decided that, under our statute, a writ of *habeas corpus* lies to inquire into the cause of *commitment*, though made on civil process. *Ex parte Randolph*, 2 Brock. 447, 476; see, also, *Bank of the United States* v. *Jenkins*, 18 Johns. 303, 309. But it is to be borne in mind that the Supreme Court hesitated as to the soundness of this interpretation of the statute; for, in *Ex parte Wilson*, Chief Justice Marshall, after consultation with the judges, on a motion for a *habeas corpus*, stated that the court was not satisfied that a *habeas corpus* is the proper remedy in a case of arrest under civil process, 6 Cranch, 52, and the writ was denied; and to the same effect was the decision of the Supreme Court of New York. *Cable* v. *Cooper*, 15 Johns. 152.

If the more extended interpretation of the term be adopted, and cases of commitment for civil or criminal matters may be brought under review by *habeas corpus*, yet in view of the qualified character of the federal government, and the special jurisdiction of its judiciary, the more reasonable inference would be that Congress intended the protection of this writ should be interposed by its courts only in cases of imprisonment under color or claim of the authority of the United States.

Rawle, an eminent commentator on the Constitution, says that the writ of *habeas corpus* is restrained to imprisonments under the authority of the United States. Rawle on Const. 115, 2d ed. 117.

Every adjudicated case in the United States courts, with one exception, has been under writs sued out for relief against an actual arrest of a party under process, or his confinement by claim of authority of the United States. *United States* v. *Hamilton*, 3 Dall. 17; *United States* v. *Johns*, 4 Dall. 412; *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milburn*, 9 Pet. 704; *United States* v. *Bainbridge*, 1 Mason, 71; *Ex parte Cabrera*, 1 Wash. C. C. 232; *Ex parte Randolph*, 2 Brock. 471, in which a doubt is made whether the writ may not apply in case of imprisonment on civil process.

Judge Washington, on *habeas corpus*, adjudged the matter not within the cognizance of the Circuit Court, because the prisoner was not in custody by authority of the United States, and was not committed for trial before any of its courts. *Ex parte Cabrera*, 1 Wash. C. C. 237.

Note. In the Matter of Barry.

The *proviso* to the 14th section, above recited, looks to such limitations of the writ. It is palpable that Congress did not intend that an inquiry into the cause of *commitment* of a person detained should authorize the United States courts to interfere with his custody, unless the subject matter upon which he was confined was to be acted on and decided by the United States tribunals.

This policy of the statute is emphatically indicated by the act of March 2, 1833, c. 57, § 7, in which special powers are conferred on the United States courts to liberate by *habeas corpus* even persons confined under authority of state law, for any act done or omitted to be done, in pursuance of a law of the United States, or in pursuance of any order, process, or decree of any judge or court thereof. Both clauses denote that it was the violation of a law of the United States or its just authority, in the imprisonment of the citizen, that was intended by Congress to be inquired into and remedied by *habeas corpus* before the courts of the United States.

My opinion upon this review of this subject is, that there is no foundation for the claim that there is vested in the United States government a common law prerogative, or that the Circuit Court can, upon the footing of common law prerogative, by writ of *habeas corpus*, assume and exercise this function of *parens patriæ* in relation to infant children held in detention by private individuals, not acting under color of authority from the laws of the United States.

And it also seems equally clear to me that the authority given by the 14th section of the Judiciary Act, to issue writs of *habeas corpus* "for the purpose of an inquiry into the cause of commitment," necessarily restricts the jurisdiction of the courts to commitments under process or authority of the United States.

I should, upon the conclusions against the competency of the court to take cognizance of the matter, feel constrained to deny the petition, but for the decision of the Circuit Court in the First Circuit, in an analogous case, where the relief now prayed for was granted. *United States* v. *Green*, 3 Mason, 482.

The jurisdiction of the court was not brought in question, and was undoubtedly conceded by the parties, but the acquiescence in a legal proposition so important, by a judge of the exact and varied learning of Judge Story, and one whose judicial habit is so cautious and investigating, is an imposing authority in its support.

Note. In the Matter of Barry.

A citizen of New York sued out a *habeas corpus* against a citizen of Rhode Island, the grandfather of his infant child, to recover possession of the child, which was retained and defended against the demand of the father. The court took cognizance of the subject matter, and, after full hearing, decided the question of rightful custody upon its merits in favor of the father. It was supposed that the Circuit Court possessed such authority under the provisions of the 11th and 14th sections of the Judiciary Act.

The 11th section gives Circuit Courts original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, etc., etc., when one party is a citizen of the State where the suit is brought and the other an alien, etc., etc. 2 Bioren's Laws U. S. 60, 61; 1 Stat. 78.

It is well settled that Congress has not, in this section, exhausted the powers vested in them by the 2d section of the 3d article of the Constitution, and imparted to the Circuit Courts cognizance of *all cases* at common law which might be within the control of the legislative power. *Turner* v. *Bank of North America*, 4 Dall. 11; *Bank of the United States* v. *Devaux*, 5 Cranch, 61.

The Supreme Court say there is manifestly some limitation to the authority of the Circuit Courts in respect to the cases therein brought within the purview of their jurisdiction, and that those courts have not jurisdiction, under the 11th section, of all suits or cases of a civil nature at common law. *Kendall* v. *United States*, 12 Pet. at p. 616.

Two particulars must concur as the foundation of a suit in a Circuit Court — that the litigant parties be competent to sue and be sued, and that the subject matter be one over which the court has cognizance. *Voorhees* v. *United States Bank*, 10 Pet. 449, 474.

A procedure by *habeas corpus* can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign, to ascertain whether the infant in this case is wrongfully detained, and in a way conducive to its prejudice.

Neither in England or the States in this country does the court regard this as *a suit* in which the right of guardianship is to be discussed or decided. *Rex* v. *Smith*, 2 Strange, 982; *People* v. *Mercein*, 8 Paige, 47; *In re Wollstonecraft*, 4 Johns. Ch. 80; *In re McDowle*, 8 Johns. 328, 332.

Judge Story, in the case cited, manifestly took the same view of the subject. 3 Mason, 482, *ubi sup.*

There would, moreover, be a technical objection to this proceeding, if a suit, which the court might not be permitted to overlook.

Neither in this country nor in England can an action be prosecuted by an individual in the name of the government, without express authority of the court, or the officer appointed by law to represent the public. And no distinction is made between actions popular in their nature and those in which the private suitor is solely the party in interest.

The authority of the Circuit Court to take cognizance of the case must, probably, then, be deduced from the provisions of the 14th section, in conjunction with those of the 11th; and the first clause or branch of the 14th section must be accepted as giving the courts of the United States power to issue the writ of *habeas corpus*, without the restriction of the subsequent clause, to "the purpose of an inquiry into the cause of commitment." And the 11th section must be regarded as supplying the parties in whose behalf such general power may be exercised.

The argument was pressed with great earnestness before the Supreme Court in *Bollman and Swartwout's Case*, that the first clause of this section was to be interpreted as a positive and absolute grant of power, 4 Cranch, 82; but the court does not seem to have yielded to that construction, for, in reference to that point they say that "the true sense of the words is to be determined by the nature of the provision and by the context." 4 Cranch, 94. And they evidently regard the whole section as having relation to one and the same matter.

The principles established by the Supreme Court and brought in review in that case, would seem to militate so strongly against the doctrine involved in the case of *United States* v. *Green*, as to prevent this court adopting the latter as its guide in determining this point; but without asserting that such diversity exists in the judgments of the Supreme and Circuit Courts, and admitting that the decision in 3 Mason stands unimpaired as an authority, I proceed to consider the remaining general inquiry, whether by the law of the land the petitioner is entitled to the relief asked for.

What, then, is the law which this court administers? For that will be the law of the land in respect to these parties and the subject matter of this petition.

Note. In the Matter of Barry.

The argument assumes it to be the common law of England as declared and enforced by her courts, and that the most recent adjudications in those tribunals is the highest and most important evidence of what the law is, and must supply the rule of decision to the United States courts. This view of the subject disregards the special organization of the United States Circuit Courts and the limited purposes they were designed to subserve.

They are distributed amongst the States to exercise that special jurisdiction bestowed upon the federal government, or shared with it by the state sovereignties, and not to carry with them an inherent power to resort to or employ any other law than that given them by express and written grant. *Chisholm v. Green,* 2 Dall. 432, 435; *Ex parte Barry,* 2 How. 65. Although the people brought with them, on their emigration to this country, the essential principles of the common law, and embodied them in their institutions, yet this was not done by them in a national capacity, (at the time no such character or capacity was contemplated,) but as distinct communities independent of each other. *Chisholm* v. *Georgia,* 2 Dall. 419, 435; *Bains* v. *Schooner James,* 2 Bald. 544, 557.

Nor has the common law been adopted by the United States as a system applicable to the States generally and to be administered as such in the national courts. *Kendall* v. *United States,* 12 Pet. 621.

This has been done specifically by act of Congress in relation to the District of Columbia, *Kendall* v. *United States,* 12 Pet. 621; but in respect to the States the common law is regarded in force only as adopted or modified by the Constitution, statutes, or usages of the States respectively. It came to them and was appropriated by them, and became an integral portion of the laws of the particular States, before the United States government had existence. 1 Story Com. Const. c. 16, 17; 1 Kent, 471, and notes; *Pawlet* v. *Clark,* 9 Cranch, 292, 333; *Southwick* v. *Postmaster General,* 2 Pet. 446.

In bringing this new government into action amidst sovereignties already organized and established, it would be a cardinal object to have the limited share of judicial authority possessed by the national judiciary administered, as far as practicable, in consonance with the laws and usages of the State where the court was placed.

Political considerations of the highest moment would exact this. The disquietude and jealousy in relation to this new power would

be aggravated tenfold if, in addition to its authority under appointment of positive law, it could, by its inherent jurisdiction, supplant local customs and usages, and substitute in their place the common law of England in its primitive plentitude and vigor.

There was a deep-rooted attachment in the States to their own laws and customs, whilst every influence acting on the public mind at that day would tend to induce alarm and distrust of English law, except only in so far as it had already been modified and adopted by express authority of the States.

All the early legislation of Congress manifests the purpose to affiliate the new system with that of the State, and especially, in the jurisprudence as between individuals, to have the writs of the one government or the other organs of the same law, and controlled by a common rule of decision.

This principle was varied only when the Constitution of the United States, treaties, or acts of Congress provided a specific law for the case.

Accordingly, when Congress assigned to the Circuit Courts sitting within the States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law," it was careful to direct "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act September 24, 1789, §§ 11 and 34, 1 Stat. 78, 92.

The Supreme Court has recently decided that the decisions of the state courts are not laws of the State, within the purview of this section of the act of Congress, in questions of a commercial character, and that such questions are to be determined according to general principles of mercantile law, recognized by American and English authorities. *Swift* v. *Tyson*, 16 Pet. 1. The argument upon which the decision is founded insists that only the statutes of the State, or long established local customs having the force of laws, are embraced within the language of the clause, and that the court has always understood the section to apply solely to state laws, strictly local — positive statutes — and their construction by the state tribunals, and to rights and titles to things having a permanent locality, immovable and intraterritorial in their nature or character.

Note. In the Matter of Barry.

This exposition by the Supreme Court, so far as it covers this question, is the law of the land, to the same extent and with equal force with the statute itself; and although a state statute, which should declare the laws of the United States a rule of decision in commercial questions, would scarcely be understood to exclude this decision as appertaining to that character, yet, under the authority of that adjudication, this court is bound to regard only certain classes of decisions made by the state tribunals as laws of the State within contemplation of the Judiciary Act, whatever may be their authority within the State itself.

But it would seem, from the opinion of the Supreme Court that long-established local customs, having the form of laws, come within the terms of the section and must be followed by the United States courts as rules of decision, and that the decisions of the state courts are evidence of what the laws of the State are.

The court in the same opinion declares that the decisions of the state courts upon even commercial questions are entitled to and will receive the most deliberate attention and respect of the Supreme Court, though they do not supply positive rules or conclusive authority. *Swift* v. *Tyson*, 16 Pet. at p. 19.

This decision confirms the general doctrine, before stated, that the Circuit Court is bound to administer the laws of the State. It perhaps renders indefinite and ambiguous to some degree the methods by which the United States court is to ascertain and determine what that law is; whether if it is not found on the statute book, it is to be authenticated by the dicta and decisions of English jurists, or by the adjudications of the local judicatories.

The proposition on which the petition rests is, that a subject of the Queen of Great Britain, resident in Nova Scotia, is entitled, as father of a female child under the age of seven years, born within this State, to have that child taken, by writ of *habeas corpus*, from the keeping of its mother, and transferred by the judgment of this court to his custody, the mother being a native and resident of this State, but residing in the family of her parents, separate from her husband, and without his consent, and refusing to cohabit with him.

Do the laws of the State of New York give him that right, and, if they do, can they be enforced in this court?

The United States courts cannot take cognizance of matters of

right created or conferred by local statutes. It is to be presupposed that a case at common law exists, of which the United States court acquires jurisdiction under an act of Congress, and the determination of that right is then to be made in conformity with the State law.

It is accordingly unnecessary to consider the question which has been raised in the state courts, whether, under the Revised Statutes, 2 Rev. Stats. N. Y. 477, § 88, (1st ed.,) there exists in this State any common law right or remedy by *habeas corpus*, because, if the 11th and 14th sections of the Judiciary Act bring the case within the jurisdiction of this court, it must proceed to adjudicate on it conformably to the general principles of the common law of England, *Ex parte Watkins*, 3 Pet. 201, unless that rule is varied by the local laws.

Nor need the point be discussed, whether, if an infant is brought before this court on *habeas corpus*, on the application of its father or guardian, the court can act on the matter as if the writ were presented at the instance of the mother, and accordingly regard the provisions in the Revised Statutes as the rule of decision for governing the case. 2 Rev. Stats. N. Y. (1st ed.) 82, §§ 1, 2.

The question now is, whether the petitioner can demand as his legal right the writ prayed for, on the facts stated in his petition?

The present posture of the case does not raise the point whether the individual cause of action has been adjudicated and settled by the state courts, so as to bar the party from again prosecuting it; but the proposition to be determined is one general in its nature whether the facts stated in this petition entitle any party, as matter of right, to relief by a *habeas corpus*.

This subject has undergone a most searching discussion before various tribunals of the State. Two of the local judges and the chancellor, on these facts, allowed a writ, but refused to award the custody of the child to the father. *People* v. *Mercein*, 8 Paige, 47.

The Supreme Court, on full discussion, adopted a different conclusion, and, by two solemn decisions, adjudged that the father, under such a state of facts, was by law entitled to the custody of the infant child. 25 Wend. 82, *ubi sup.*; 3 Hill, 405, *ubi sup.* These judgments of the Supreme Court were reviewed on error in the Court of Errors, and both reversed by that tribunal. *Mercein* v. *People*, 25 Wend. 106; MSS. Ops. Session 1844, *ubi sup.*

Note. In the Matter of Barry.

The Supreme Court based their decisions upon the doctrines of the common law, and not upon the terms of the Revised Statutes, 2 Rev. Stats. N. Y. 466, § 23, the language of which certainly comprehends the broadest range ever given the writ by the English courts, and might very plausibly be urged as extending it to matters not before embraced within that remedy. Revisers' notes, 3 Rev. Stats. N. Y. 784.

The substance of the enactment is, that a *habeas corpus* shall issue on the application of any person (by petition signed by himself, or another in his behalf) "committed, *detained*, confined, or *restrained* of his liberty, for any criminal or supposed criminal matter, or *under any pretence whatsoever*," 2 Rev. Stats. N. Y. 466, (1st ed.) §§ 23, 25, with some exceptions that need not now be noticed.

It must, therefore, be regarded as the settled law of this State, so far forth as the decision of the Court of Errors, twice rendered on this point, can furnish the law, that the keeping of an infant female child under seven years of age, from its father, by the mother, living separate from him, and who has it in her nurture, is not, in judgment of law, a detention or restraint of the liberty of the child; and that the father is not entitled by writ of *habeas corpus* to have such possession of the mother adjudged illegal, nor to have the custody of the child awarded him.

These decisions have been stigmatized on the argument as outrages upon the common law doctrine on this subject, and as devoid of all claims to professional consideration and respect.

Most earnest efforts were made to place them in disparaging contrast with the opinions of the individual judges of the Supreme Court, whose judgments upon the point are overruled by the Court of Errors; and this, not by weighing the arguments of one tribunal against those of the other on the subject, but by sharp invectives against the constitution of that high court, and the competency of its individual members.

This court was solicitous to allow the petitioner the opportunity to discuss his case in all its bearings, and, as his language was decorous in terms, did not feel called upon to check the course of remarks conducing and palpably intended to impute ignorance or disregard of the law, in this respect, to that high tribunal; but I should do injustice to my own convictions if I omitted to observe that, on a careful perusal of the opinions leading to the decisions

of the respective courts on this subject, I discover nothing in the ultimate judgments of the Court of Errors which places that judicatory in disadvantageous contrast with the one whose opinion it reviews and reverses.

Every lawyer, however, is well aware that a decision is not to be estimated merely by the ability or learning displayed in its composition, but essentially by the sanction it obtains.

Of what value toward establishing a principle or fixing a rule of law is the most erudite opinion of a high judge, when the full bench to whom it is submitted adopts a different conclusion, although *sub silentio?*

What court or lawyer, in searching for and applying a rule of law, rests upon the dissenting arguments of judges, in the courts of this country or England, whatever be their grade or reputation?

The judgment sanctioned by the court can alone answer the exigencies and meet the inquiry.

The more elevated the rank of the court may be, the higher becomes the sanction of its judgments.

Every system of jurisprudence imports in its organization that, upon questions mooted from tribunal to tribunal, the judgment of the one of last resort is conclusive proof of what the law is upon the points in dispute; and this entirely irrespective of the qualifications of the members of such *dernier* court.

A barrister would not be permitted to argue in Westminster Hall that a decision of the House of Lords, on a writ of error, weighed nothing in settling the law of the case, in comparison with the reasonings of the individual judges on the case, in the courts below.

A decision by the House of Lords ends all question before every tribunal of the kingdom as to the point adjudicated, and this is certainly not founded upon the fact that any extraordinary judicial learning or experience exists in that body, or is brought to act on the subject matter.

That court is lauded by Sir William Blackstone and English writers generally as one of the eminently excellent features of the British Constitution, and as the most august tribunal in the world.

Its judgments of reversal annihilate the decisions of the courts of Ireland and Scotland, rendered unanimously by all the judges, and also of the Lord Chancellor and all the judges, barons and lords of English courts of law and equity, and no party, subject

Note. In the Matter of Barry.

or foreigner, can be permitted to gainsay the efficiency and wisdom of such final determination.

And yet, in that court, on the decision of appeals from Ireland and Scotland, in admiralty and in equity, the Lord Chancellor almost invariably sits and acts as sole judge.

Lord Brougham asserts that he rarely or ever, when Lord Chancellor, could obtain the assistance of any other member of the court to sit with him on review of his own decisions, and that he, solely, had to decide questions brought from the Irish and Scotch courts where all the members of those tribunals had concurred in judgment upon points resting on local and peculiar laws.

When the House of Lords sits on writs of error only three lords need be in attendance. No more in fact do attend, and these three may change daily; and it results in practice that the three noble lords who ultimately decide that the twelve judges of England have erred in their opinion of the law were neither of them present at the argument on the writ of error. These facts are asserted by Lord Brougham, in the face of the House of Lords, and stand uncontradicted. 2 Chitty's Practice, 587, note 4.

Whatever obloquy may be aimed at the construction of the Court of Errors in this State, there are features in its constitution which elevate it most honorably in comparison with that of the House of Lords.

At least twenty-one members must be present at the hearing and decision of every case in the Court of Errors, and those members alone who hear the argument take part in the decision; and it is doubted whether any period can be referred to in the history of these two exalted tribunals, since they have had coëxistence, in which the professional learning and experience in the New York Court of Errors was not at least equal in amount to that contained in the English House of Lords.

The decisions of the Court of Errors are, within the State of New York, obligatory to the same extent as enactments by positive law. It no more diminishes their efficiency that the judgment of one court may be modified or varied by that of its successor, than the vitality of a statute is impaired, because it is liable to repeal at the will of the legislature. Such judgments are absolute rules of decision in all cases to which they apply in the state tribunals; *Hanford* v. *Artcher*, 4 Hill, 271; *Butler* v. *Van Wyck*, 1 Hill, 438, and although, within the doctrines declared by the Supreme Court

in *Swift* v. *Tyson*, 16 Pet. 19, they are not laws in a technical sense, and as such obligatory upon this court, still, on the inquiry as to what the law of the State is, such decisions must supply evidence of great weight and cogency.

Indeed, what particulars can be regarded as in principle more local or intraterritorial than those which pertain to the domestic institutions of a State — the social and domestic relations of its citizens; or what could probably be less within the meaning of Congress, than that in regard to these interesting matters, the courts of the United States should be empowered to introduce rules and principles because found in the ancient common law, which should extinguish or supersede the policy and cherished usages of a State, authenticated and sanctified as part of her laws by the judgments of her highest tribunals?

In my opinion, the rule indicated by the Supreme Court in *Swift* v. *Tyson*, if not limited strictly to questions of commercial law, does not embrace the present case, and that the adjudications of the Court of Errors, prescribing the laws of its citizens in respect to the custody of infant children resident in the State, and the relative rights of parents in respect to such children, are rules of decision in this court in all common law cases touching these questions.

But if not so, and the United States court is to act independently of all control by the decisions of the local courts, and is to determine for itself what the common law rule is in relation to such matters, the judgment of the local tribunal cannot but be of most imposing weight and significancy as a matter of evidence.

I do not discover that that judgment stands opposed to any authentic evidence of the common law rule as it existed in England anterior to our Revolution, or which has ever existed in this State; and if even a doubt might be raised on that point, the inclination of this court most assuredly must be to yield to the domestic and not to the foreign interpretation of the rule.

If it be conceded that the more recent decisions in England establish the law of that country now to be as claimed by the petitioner, they supply no authority here, further than they correspond with the law as clearly existing antecedent to 1775. I am not aware the doctrine has ever been countenanced in the Supreme Court of the United States that modern decisions in the English courts, unsanctioned by ancient tradition, are entitled to outweigh those of state courts in fixing the final laws of the State.

Note. In the Matter of Barry.

The value of the latest decision, the most relied on, that of *King* v. *Greenhill*, 4 Ad. & El. 624, when brought in competition with those of the American courts, upon an inquiry into the *reason* of the law, is essentially impaired by the declaration of Lord Denman in the House of Lords, (the judge who pronounced the decision below,) that he was ashamed of the necessity which exacted a decision of that character from a British court; and of a late Lord Chancellor, on the same occasion, that the rule of law announced by that decision was a disgrace to the English character.

But I do not feel that it is imposed on this court to revise the subject at large, and determine what is the true rule of the common law in this respect.

The United States court in no way acts in supervision of the state courts. The decisions of these tribunals are independent of the United States judiciary, and absolute in themselves, in all cases not subject to review in the method pointed out by the Judiciary acts. 4 Cranch 96, 97. This case is not in that predicament. The extent of the authority of this court, on the principle of its organization, is no more than to act concurrently with the state court upon the subject matter of this petition.

If that concurrence does not import and exact an entire coincidence, if each tribunal acting within its sphere may examine and declare for itself, independently of the other, what rule of law shall govern the decisions, that comity at least due between coördinate courts, if not that intimate and special relation of both to a common source and standard of law, would demand that neither should rigorously insist upon a principle which would bring it in collision with the other; the more especially that the United States courts should avoid, upon a balanced question, adopting conclusions which, carried into execution, must violate the domestic policy of the State, settled by the most solemn adjudications of its own judiciary.

The alienage of the petitioner would not vary this principle, even if it be conceded that by the laws of his domicil he is entitled as absolutely to the custody of his infant children as to that of his estate.

No interest, not even one resting in contract, is enforced by a court when it is repugnant to the laws or policy of the place where the action is prosecuted. *Pearsall* v. *Wright*, 2 Mass. 84, 89; *Vermont Bank* v. *Porter*, 5 Day, 316, 320; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589.

It by no means is an indisputable doctrine of public law, or of the law of this country, that the father of this infant can have here the same legal rights and dominion over it as if born within the country of his allegiance, for, if so, it might impart to him a power abhorrent to the civilization and Christianity of our age, giving him a dominion no less absolute than one over his chattels, animate or inanimate.

I do not, however, go into this topic, nor regard it as having any important bearing upon the decision now made. I apprehend it has been sufficiently shown that neither in England, before our Revolution, nor in this State since, has judgment been rendered under a *habeas corpus* in regard to infants, on the acceptation that the right of the father to their custody was anything in the nature of property, or so fixed in law as to afford a controlling rule of decision to the court. In the use of the remedy afforded by means of this writ, the courts have regarded the father as that guardian first to be looked to, in case a change of custody should be deemed proper, and the infant was not of competent age to make its own choice of guardian; but it has been purely in the application of the remedy and for the protection and interest of the infant, and not in subordination to the legal right of the father, that such award is ever made.

Nothing is clearer in international law than that a party prosecuting upon the clearest right under the laws of his country must still take his remedy in accordance with the law of the court he invokes, without regard to the law of his allegiance, and that his demand of this particular relief is no way aided by the consideration that it would be awarded him in England or Nova Scotia.

I close this protracted discussion by saying that I deny the writ of *habeas corpus* prayed for, because,

(1) If granted, and a return was made admitting the facts stated in the petition, I should discharge the infant, on the ground that this court cannot exercise the common law function of *parens patriæ;* and has no common law jurisdiction over the matter;

(2) Because the court has not judicial cognizance in the matter by virtue of any statute of the United States; or,

(3) If such jurisdiction is to be implied, that then the decision of the Court of Errors of New York supplies the rule of law, or furnishes the highest evidence of the common law rule, which is to be the rule of decision in the case; and,

Note. In the Matter of Barry.

(4) Because, by that rule, the father is not entitled, on the case made by this petitioner, to take this child out of the custody of its mother.

Petition denied.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES.

AT OCTOBER TERM 1889, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 1534. ALBRIGHT *v.* AMERICAN BELL TELEPHONE COMPANY. Appeal from the Circuit Court of the United States for the District of New Jersey. January 6, 1890: Docketed and dismissed, with costs, on motion of *Mr. Henry G. Atwater* for appellee.

No. 1517. ARMES *v.* KIMBERLY. Appeal from the Circuit Court of the United States for the Northern District of Ohio. November 25, 1889 : Docketed and dismissed, with costs, on motion of *Mr. Samuel Griffith* for appellee.

No. 222. BALDWIN *v.* HAYNES. Appeal from the Circuit Court of the United States for the District of Massachusetts. March 19, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Frederick P. Fish* for appellant. *Mr. Esek Cowen* for appellee.

No. 38. BALTIMORE AND OHIO RAILROAD COMPANY *v.* SUTHERLAND. Error to the Circuit Court of the United States for the Northern District of Ohio. January 29, 1890: Judgment reversed, costs in this court to be paid by plaintiff in error; and cause remanded with directions to remand to the state court. *Mr. John K. Cowen* and *Mr. Hugh L. Bond, Jr.*, for plaintiff in error. *Mr. John H. Doyle* and *Mr. G. R. Walker* for defendant in error.

Cases not Otherwise Reported.

No. 182. Baltimore and Ohio Railroad Company *v.* State of West Virginia. Appeal from the Circuit Court of the United States for the District of West Virginia. January 8, 1890: Dismissed, with costs, on motion of *Mr. Hugh L. Bond, Jr.*, for appellant. *Mr. John K. Cowen* and *Mr. Hugh L. Bond, Jr.*, for appellant. *Mr. D. B. Lucas* for appellee.

No. 178. Batcheller *v.* Adden. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. December 18, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. P. Blanc*, *Mr. G. A. Breaux* and *Mr. M. F. Dickinson, Jr.*, for appellants. *Mr. A. A. Ranney* for appellees.

No. 285. Bass *v.* Milmine. Appeal from the Circuit Court of the United States for the District of Indiana. May 5, 1890: Decree affirmed, with costs, by a divided court. *Mr. R. S. Taylor* for appellant. *Mr. L. M. Ninde* and *Mr. T. E. Ellison* for appellee.

No. 80. Bate Refrigerating Company *v.* Eastman. Error to the Circuit Court of the United States for the Southern District of New York. January 20, 1890: Dismissed, per stipulation, on motion of *Mr. Augustus H. Garland* on behalf of counsel. *Mr. E. N. Dickerson, Jr.*, for plaintiff in error. *Mr. John R. Bennett* for defendant in error.

No. 1311. Bippus *v.* Farmers' Loan and Trust Company. Appeal from the Circuit Court of the United States for the District of Indiana. April 29, 1890: Dismissed, per stipulation, on motion of *Mr. George H. Wickersham* for appellant. *Mr. John L. Cadwalader* for appellant. *Mr. Herbert B. Turner* and *Mr. Benjamin H. Bristow* for appellee.

No. 304. Birdseye *v.* Heilner. Appeal from the Circuit Court of the United States for the Southern District of New

York. April 24, 1890: Dismissed per stipulation. *Mr. Edmund Wetmore* for appellants. *Mr. Livingston Gifford* for appellees.

No. 255. BLADES *v.* RAND. Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 31, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles K. Offield* for appellant. *Mr. N. C. Gridley* for appellees.

No. 82. BLAIR *v.* WALKER. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 7, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Walter C. Larned* for appellants. No appearance for appellees.

No. 309. BOARD OF COUNTY COMMISSIONERS OF YELLOWSTONE COUNTY *v.* BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY. Appeal from the Supreme Court of the Territory of Montana. May 23, 1890: Decree affirmed, with costs, and cause remanded to the Supreme Court of the State of Montana. *Mr. E. W. Toole* and *Mr. W. F. Sanders* for appellant. *Mr. J. W. Strevell* for appellee.

No. 108. BRADLEY AND HUBBARD MANUFACTURING COMPANY *v.* CHARLES PARKER COMPANY. Appeal from the Circuit Court of the United States for the District of Connecticut. October 2, 1889: Dismissed pursuant to the 28th rule. *Mr. Charles E. Mitchell* for appellant. *Mr. C. R. Ingersoll* for appellee.

No. 303. BROWN *v.* BROWN. Appeal from the Supreme Court of the Territory of Dakota. April 24, 1890: Dismissed, with costs, pursuant to the 10th rule, and cause remanded to the Supreme Court of the State of South Dakota. *Mr. C. K. Davis* and *Mr. R. J. Wells* for appellants. *Mr. S. S. Burdett* for appellees.

Cases not Otherwise Reported.

No. 1463. BROWN *v.* LANSING WHEEL BARROW COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. October 21, 1889: Docketed and dismissed, with costs, on motion of *Mr. Charles J. Hunt* for appellee.

No. 364. BROWN *v.* MC CONNELL. Appeal from the Supreme Court of the Territory of Washington. August 26, 1889: Dismissed pursuant to the 28th rule. *Mr. Leander Holmes* for appellants. *Mr. W. W. Upton* and *Mr. A. H. Garland* for appellee.

No. 209. BRYANT *v.* CHARTER OAK LIFE INSURANCE COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 31, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles M. Osborn* for appellants. *Mr. A. P. Hyde* for appellee.

No. 292. BURNS *v.* VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. April 21, 1890: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. William L. Royall* for plaintiff in error. *Mr. R. A. Ayers* for defendant in error.

No. 272. BURROUGHS *v.* UNION MUTUAL LIFE INSURANCE COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 9, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edward Roby* for appellants. No appearance for appellee.

No. 62. CEDAR FALLS PAPER MANUFACTURING COMPANY *v.* BRADNER-SMITH PAPER COMPANY. Error to the Circuit Court of the United States for the District of Minnesota. November 4, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. John N. Rogers* and *Mr. E. W. Tolerton* for the plaintiff in error. *Mr. Anson B. Jackson* for the defendant in error.

Cases not Otherwise Reported.

No. 206. CELLULOID MANUFACTURING COMPANY *v.* TOWER. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 31, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Frederic H. Betts* for appellants. *Mr. H. M. Ruggles* for appellee.

No. 71. CENTRAL TRUST COMPANY *v.* BACON. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. November 6, 1889: Dismissed for the want of jurisdiction. *Mr. Henry B. Tompkins*, *Mr. W. M. Baxter*, *Mr. George Hoadly* and *Mr. Edgar M. Johnson* for appellants. *Mr. Henry H. Ingersoll* for appellee.

No. 118. CHICAGO AND ALTON RAILROAD COMPANY *v.* WATERMAN. Error to the Circuit Court of the United States for the Western District of Wisconsin. November 18, 1889: Judgment reversed, costs in this court to be paid by plaintiff in error; and cause remanded with directions to remand to state court. *Mr. Corydon Beckwith* and *Mr. O. H. Fethers* for plaintiff in error. *Mr. I. C. Sloan* and *Mr. William Ruger* for defendant in error.

No. 690. CHICAGO, PORTAGE AND SUPERIOR RAILWAY COMPANY *v.* ANGLE. Error to the Circuit Court of the United States for the Western District of Wisconsin. May 23, 1890: Dismissed, with costs, on motion of *Mr. A. H. Garland*, in behalf of counsel for plaintiff in error. *Mr. S. U. Pinney* for plaintiff in error. No appearance for defendant in error.

No. 1453. CHURCH *v.* KELSEY. Error to the Supreme Court of the State of Pennsylvania. January 6, 1890: Judgment affirmed with costs. Motions to dismiss or affirm submitted December 16, 1889, by *Mr. H. W. Palmer* in support of motions, and by *Mr. A. Ricketts* in opposition.

Cases not Otherwise Reported.

No. 248. CITIZENS' BANK OF TOPEKA *v.* CABOT. Error to the Circuit Court of the United States for the District of Vermont. March 27, 1890: Dismissed, per stipulation. *Mr. Martin H. Goddard* for plaintiff in error. *Mr. Kittredge Haskins* for defendants in error.

No. 157. CONTINENTAL LIFE INSURANCE COMPANY *v.* MITCHELL. Error to the Circuit Court of the United States for the Northern District of Illinois. December 6, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. H. Swift* for plaintiff in error. No appearance for defendants in error.

No. 290. CORNWALL *v.* VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. April 21, 1890: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. William L. Royall* for plaintiff in error. *Mr. R. A. Ayers* for defendants in error.

No. 818. DAVIE *v.* MCCORMICK. Error to the Supreme Court of the State of Texas. May 19, 1890: Dismissed, with costs, per stipulation, on motion of *Mr. William A. McKenney*, on behalf of counsel. *Mr. J. M. Burroughs* for plaintiffs in error. *Mr. F. Charles Hume* for defendant in error.

No. 1092. DELAWARE DIVISION CANAL COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. May 19, 1890: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick* and *Mr. John F. Sanderson* for defendant in error.

No. 1576. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. May 19, 1890: Dismissed, with

costs, on motion of *Mr. M. E. Olmsted*, for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick* and *Mr. John F. Sanderson* for defendant in error.

No. 175. DISBROW *v.* FIRST NATIONAL BANK OF STEVENS' POINT. Error to the Circuit Court of the United States for the Western District of Wisconsin. December 17, 1889: Dismissed per stipulation. *Mr. C. W. Felker* for plaintiffs in error. No appearance for defendant in error, the stipulation being signed by *W. B. Buckingham*, cashier of defendant in error.

No. 231. DISMAL SWAMP CANAL COMPANY *v.* VIRGINIA. No. 232. SAME *v.* LAMB, MAYOR, ETC. Error to the Supreme Court of Appeals of the State of Virginia. March 21, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. John S. Wise*, *Mr. Joseph Christian*, and *Mr. John Goode* for plaintiffs in error. No appearance for defendants in error.

No. 1478. DODDS *v.* CHAFFE. No. 1549. CHAFFE *v.* DODDS. Appeals from the Circuit Court of the United States for the Eastern District of Arkansas. May 19, 1890: Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, on behalf of counsel. *Mr. M. L. Bell* for Dodds. *Mr. U. M. Rose* and *Mr. G. B. Rose* for Chaffe.

No. 98. DOUGHERTY *v.* CITY AND COUNTY OF SAN FRANCISCO. Error to the Circuit Court of the United States for the District of California. November 18, 1889: Judgment affirmed with costs. No brief filed for plaintiff in error. *Mr. John B. Mhoon* and *Mr. Luther H. Pike* for defendant in error.

No. 905. DOUGLASS *v.* KENDALL. Appeal from the Supreme Court of the District of Columbia. March 10, 1890: Dismissed, per stipulation, on motion of *Mr. A. A. Birney* for

appellant. *Mr. J. W. Douglass* and *Mr. A. A. Birney* for appellant. *Mr. Job Barnard* for appellees.

No. 1593. ENSIGN *v.* BARSE. No. 1594. SAME *v.* MCKINNEY. Error to the Supreme Court of the State of New York. May 19, 1890: Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, on behalf of counsel. *Mr. E. D. Northrup* for plaintiffs in error. *Mr. M. F. Elliott* for defendants in error.

No. 1454. FELTS *v.* HOYSRADT. Error to the Supreme Court of the State of Pennsylvania. January 6, 1890: Dismissed with costs. Motions to dismiss or affirm submitted December 16, 1889, by *Mr. W. H. Jessup* in support of motions, and by *Mr. A. Ricketts* in opposition.

No. 230. FENTON *v.* SALT LAKE COUNTY. Appeal from the Supreme Court of the Territory of Utah. March 21, 1890: Dismissed, with costs, on authority of counsel for appellant. *Mr. Arthur Brown* for appellant. *Mr. Franklin S. Richards* and *Mr. Z. Snow* for appellees.

No. 1419. FRANK *v.* WHITE. Error to the Circuit Court of the United States for the Northern District of Illinois. December 12, 1889: Dismissed, per stipulation, on motion of *Mr. J. M. Flower*, on behalf of counsel. *Mr. M. Salomon* for plaintiff in error. *Mr. J. A. Baldwin* for defendants in error.

No. 218. GLOBE NAIL COMPANY *v.* SUPERIOR NAIL COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 14, 1890: Dismissed, with costs, per stipulation. *Mr. L. L. Coburn* for appellant. *Mr. Charles K. Offield* for appellees.

Cases not Otherwise Reported.

No. 413. GOSLIN *v.* HINRICHS. Error to the Circuit Court of the United States for the Northern District of Texas. November 11, 1889: Dismissed, with costs, on motion of *Mr. W. Hallett Phillips* of counsel for plaintiffs in error. *Mr. W. Hallett Phillips* and *Mr. A. S. Lathrop* for plaintiffs in error. *Mr. Frederick W. Hinrichs* for defendant in error.

No. 220. GWIN *v.* TALBOTT. Error to the Supreme Court of the Territory of Montana. March 18, 1890: Dismissed, with costs, pursuant to the 10th rule, and cause remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiffs in error. *Mr. W. H. Smith* for defendants in error.

No. 1493. HALE *v.* SCHERER. Error to the Supreme Court of the Territory of Montana. October 29, 1889: Docketed and dismissed, with costs, on motion of *Mr. W. K. Mendenhall* for defendants in error.

No. 1621. HAMMOND *v.* CONOLLY. Error to the Circuit Court of the United States for the Northern District of Texas. May 5, 1890. Docketed and dismissed, with costs, on motion of *Mr. Frederic D. McKenney* for defendants in error.

No. 313. HASSELMAN *v.* GAAR. Appeal from the Circuit Court of the United States for the District of Indiana. April 29, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles P. Jacobs* for appellant. *Mr. Edward Boyd* for appellees.

No. 312. HASSELMAN *v.* RUSSELL. Appeal from the Circuit Court of the United States for the District of Indiana. April 28, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles P. Jacobs* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 61. HAWLOWETZ *v.* KASS. Error to the Circuit Court of the United States for the Southern District of New York. November 4, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Paul Goepel* for plaintiff in error. *Mr. Arthur v. Briesen* for defendant in error.

No. 204. HAZARD *v.* AMES. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 20, 1889: Dismissed, per stipulation, on motion of *Mr. J. M. Wilson* in behalf of counsel. *Mr. Elias Merwin* for appellant. *Mr. John F. Dillon*, *Mr. S. Bartlett* and *Mr. Robert D. Smith* for appellees.

No. 205. HAZARD *v.* AMES. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 20, 1889: Dismissed, per stipulation, on motion of *Mr. J. M. Wilson* on behalf of counsel. *Mr. Elias Merwin* for appellant. *Mr. John F. Dillon*, *Mr. S. Bartlett* and *Mr. Robert D. Smith* for appellees.

No. 1522. HENNESSY *v.* BACON. Appeal from the Circuit Court of the United States for the District of Minnesota. December 9, 1889: Docketed and dismissed, with costs, on motion of *Mr. C. K. Davis* for appellees. January 13, 1890: On motion of *Mr. M. F. Morris* for appellant, order of December 9, 1889, set aside and leave granted to re-docket the case on payment of costs, and upon the further condition that the case be submitted on printed briefs on or before the first day of the next term.

No. 1518. HINDS *v.* HINDS. Appeal from the Supreme Court of the District of Columbia. November 25, 1889: Docketed and dismissed, with costs, on motion of *Mr. Martin F. Morris* for appellee.

Cases not Otherwise Reported.

No. 1175. HORSFORD *v.* GUDGER. Appeal from the Circuit Court of the United States for the Western District of North Carolina. January 27, 1890: Decree reversed per stipulation. *Mr. Theodore F. Davidson* and *Mr. Andrew Fiske* for appellants. *Mr. H. A. Gudger* for appellees.

No. 1557. HOWES *v.* KELLOGG. Error to the Supreme Court of the State of California. April 21, 1890: Dismissed for the want of jurisdiction. *Mr. Thomas Mitchell* for plaintiff in error. *Mr. H. A. Barclay* for defendants in error.

No. 827. IOWA FALLS AND SIOUX CITY RAILROAD COMPANY *v.* BECK. No. 828. SAME *v.* WENTWORTH. No. 829. SAME *v.* NICHOLS. No. 830. SAME *v.* NICHOLS. Error to the Supreme Court of the State of Iowa. March 24, 1890: Dismissed, with costs, on motion of *Mr. Isaac S. Struble* in behalf of counsel for plaintiffs in error. *Mr. William L. Joy* for plaintiffs in error. No appearance for defendants in error.

No. 70. JEFFRIES *v.* BARTLETT. Error to the Supreme Court of the State of Georgia. November 6, 1889: Dismissed, with costs, per stipulation of the parties. *Mr. Henry Jackson* for plaintiff in error. No appearance for defendant in error.

No. 317. JUMEL *v.* CHESTER. Appeal from the Circuit Court of the United States for the Southern District of New York. April 2, 1890: Dismissed, per stipulation, on motion of *Mr. Charles E. Hovey* in behalf of counsel. *Mr. Thomas M. Wheeler* and *Mr. George S. Boutwell* for appellants. *Mr. Douglas Campbell* for appellee.

No. 233. JUSTICE *v.* VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. March 21, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. John S.*

Wise, *Mr. Joseph Christian* and *Mr. John Goode* for plaintiff in error. No appearance for defendant in error.

No. 521. KINGSBURY *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. April 7, 1890: Dismissed for the want of jurisdiction, and cause remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 327. KITZMILLER *v.* PIERCE. Error to the Supreme Court of Appeals of the State of West Virginia. May 1, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Joseph T. Hoke* and *Mr. C. C. Cole* for plaintiff in error. No appearance entered for defendant in error.

No. 259. KRIPPENDORF *v.* HYDE. Appeal from the Circuit Court of the United States for the District of Indiana. April 1, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. D. V. Burns* for appellant. *Mr. J. L. McMaster*, *Mr. Augustin Boice*, *Mr. Benjamin Harrison*, *Mr. A. W. Hatch*, *Mr. Lew. Wallace*, *Mr. Horace Speed* and *Mr. Henry Wise Garnett* for appellees.

No. 1154. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. May 19, 1890: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick* and *Mr. John F. Anderson* for defendant in error.

No. 267. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* SCOFIELD. Error to the Supreme Court of the State of Ohio. April 3, 1890: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. George C. Greene*, *Mr. Ashley Pond* and *Mr. E. J. Estep* for plaintiff in error. *Mr. J. E. Ingersoll* for defendants in error.

Cases not Otherwise Reported.

No. 360. LAMSON CASH RAILWAY COMPANY *v.* MARTIN. Appeal from the Circuit Court of the United States for the District of Massachusetts. October 28, 1889: Dismissed, per stipulation, on motion of *Mr. M. B. Philipp*, of counsel for appellant. *Mr. M. B. Philipp* for appellant. *Mr. T. L. Livermore* and *Mr. Frederick P. Fish* for appellees.

No. 325. LAW *v.* FIRE ASSOCIATION OF PHILADELPHIA. Error to the Circuit Court of the United States for the Southern District of Ohio. May 1, 1890: Dismissed, with costs, on motion of *Mr. Joseph Wilby* for plaintiffs in error. *Mr. E. W. Kittredge* for plaintiffs in error. No appearance entered for defendant in error.

No. 1362. LE BRETON *v.* JENNINGS. Error to the Supreme Court of the State of California. March 17, 1890: Dismissed for the want of jurisdiction. *Mr. W. C. Belcher* for plaintiffs in error. *Mr. J. C. Bates* for defendant in error.

No. 1574. LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. May 19, 1890: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick* and *Mr. John F. Sanderson* for defendant in error.

No. 430. LEICHT *v.* MCLANE. Error to the Supreme Court of the State of Iowa. May 19, 1890: Dismissed, with costs, per stipulation, on motion of *Mr. William A. McKenney* on behalf of counsel. *Mr. P. Henry Smyth* for plaintiff in error. *Mr. W. E. Blake* and *Mr. S. W. Packard* for defendants in error.

No. 452. LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* MEDAY. Error to the Circuit Court of the United States for the Southern District of New York. January 13, 1890: Dis-

missed, per stipulation, on motion of *Mr. James Lowndes*, on behalf of counsel. *Mr. John L. Cadwalader* for plaintiff in error. *Mr. William P. Chambers* for defendant in error.

No. 260. MAAG *v.* HYDE. Appeal from the Circuit Court of the United States for the District of Indiana. April 2, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. D. V. Burns* for appellants. *Mr. A. M. Hatch* and *Mr. Lew. Wallace* for appellees.

No. 520. MCCAULEY *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. April 7, 1890: Dismissed for the want of jurisdiction; and cause remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 130. MAYOR AND ALDERMEN OF KNOXVILLE *v.* KNOXVILLE AND OHIO RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. November 19, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. C. L. Houk* for appellants. No appearance for appellees.

No. 287. MICHIGAN MUTUAL LIFE INSURANCE COMPANY *v.* ADAMS. Error to the Circuit Court of the United States for the District of Indiana. April 28, 1890: Judgment affirmed, with costs and interest, by a divided court. *Mr. Augustin Boice*, *Mr. Charles A. Kent* and *Mr. John L. McMaster* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 308. MILLER *v.* DOMESTIC SEWING MACHINE COMPANY. Error to the Circuit Court of the United States for the Eastern District of Michigan. April 25, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Frederick A. Baker* for plaintiffs in error. *Mr. George William Moore* for defendant in error.

Cases not Otherwise Reported.

No. 283. MILLIGAN *v.* SAVERY. Error to the Supreme Court of the Territory of Montana. April 17, 1890: Dismissed, with costs, pursuant to the 10th rule; and cause remanded to the Supreme Court of the State of Montana. *Mr. Thomas L. Napton* for plaintiffs in error. No appearance for defendant in error.

No. 1184. MILNE *v.* DEEN. Error to the Circuit Court of the United States for the Southern District of New York. January 13, 1890: Judgment affirmed, with costs and interest, by a divided court. *Mr. E. C. Perkins* for plaintiff in error. *Mr. Esek Cowen* for defendant in error.

No. 1555. MOBILE AND OHIO RAILROAD COMPANY *v.* TENNESSEE. Appeal from the Circuit Court of the United States for the Western District of Tennessee. February 3, 1890: Docketed and dismissed, with costs, on motion of *Mr. S. A. Champion* for appellees.

No. 54. MAFFIT *v.* ARTHUR'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. November 25, 1889: Judgment affirmed, with costs, by a divided court. *Mr. Edward Hartley* and *Mr. Walter H. Coleman* for plaintiff in error. *Mr. Attorney General* and *Mr. Assistant Attorney General Maury* for defendants in error.

No. 186. MONTROSS *v.* BULLARD. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 6, 1890: Dismissed, with costs, on authority of counsel for appellants. *Mr. J. W. Merriam* for appellants. *Mr. L. L. Coburn* for appellees.

No. 221. MORRIS *v.* TALBOTT. Error to the Supreme Court of the Territory of Montana. March 19, 1890: Dismissed,

with costs; and cause remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiff in error. *Mr. W. H. Smith* for defendants in error.

No. 749. MORSS *v.* MANCHESTER. Appeal from the Circuit Court of the United States for the Eastern District of New York. June 8, 1889: Dismissed pursuant to the 28th rule. *Mr. Charles H. Swan* for appellant. *Mr. Edwin H. Brown* for appellee.

No. 117. MUTUAL BENEFIT LIFE INSURANCE COMPANY *v.* SALENTINE. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. November 18, 1889: Judgment reversed, costs in this court to be paid by plaintiff in error; and cause remanded with directions to remand to the state court. *Mr. James G. Jenkins* and *Mr. F. C. Winkler* for plaintiff in error. *Mr. George P. Miller* for defendant in error.

No. 873. MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* KEARY. Error to the Circuit Court of the United States for the Eastern District of Missouri. April 21, 1890: Dismissed, with costs, on motion of *Mr. S. S. Henkle* on behalf of counsel for plaintiff in error. *Mr. Alfred Taylor*, *Mr. Fred S. Parker* and *Mr. W. C. Jones* for plaintiff in error. No appearance for defendants in error.

No. 1466. NELSON *v.* BLANDING. Error to the Circuit Court of the United States for the Northern District of California. October 21, 1889: Docketed and dismissed, with costs, on motion of *Mr. Calderon Carlisle* for defendants in error.

No. 73. NEW ORLEANS WATER WORKS COMPANY *v.* NEW ORLEANS. Error to the Supreme Court of the State of Louisiana. November 5, 1889: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. Gus. A. Breaux*,

Mr. S. P. Blanc, *Mr. Thomas J. Semmes*, and *Mr. J. R. Beckwith* for plaintiff in error. *Mr. Edgar H. Farrar* and *Mr. B. F. Jonas* for defendant in error.

No. 183. NEWPORT AND WICKFORD RAILROAD AND STEAMBOAT COMPANY *v.* BEATTIE. Error to the Circuit Court of the United States for the District of Rhode Island. December 20, 1889: Dismissed per stipulation. *Mr. Wheeler H. Peckham* for plaintiff in error. *Mr. Lynde Harrison* for defendant in error.

No. 291. NEWTON *v.* VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. April 21, 1890: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. William L. Royall* for plaintiffs in error. *Mr. R. A. Ayers* for defendant in error.

No. 1556. NORTH PENNSYLVANIA RAILROAD COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. May 1, 1890: Dismissed, with costs, on motion of *Mr. William B. Lamberton* for plaintiff in error. *Mr. George R. Kaercher* for plaintiff in error. No appearance entered for defendant in error.

No. 235. NUTT *v.* PARISH OF TENSAS. Error to the Circuit Court of the United States for the Western District of Louisiana. March 24, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. Prentiss Nutt* and *Mr. Wade R. Young* for plaintiff in error. No appearance for defendant in error.

No. 320. OREGON RAILWAY AND NAVIGATION COMPANY *v.* ERVIN. No. 321. SAME *v.* FAHNESTOCK. Appeals from the Circuit Court of the United States for the Southern District of New York. April 30, 1890: Dismissed per stipulation. *Mr. Artemas H. Holmes* and *Mr. John F. Dillon* for appellants. *Mr. Thomas H. Hubbard* for appellees.

Cases not Otherwise Reported.

No. 236. Oregon Railway and Navigation Company *v.* Oregonian Railway Company. No. 237. Same *v.* Same. No. 238. Same *v.* Same. Error to the Circuit Court of the United States for the District of Oregon. March 31, 1890: Judgments reversed, with costs, and causes remanded with directions to grant new trials, on authority of the decision of this court in the case between the same parties, reported in 130 U. S. 1. *Mr. J. N. Dolph* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. A. H. Garland* for defendant in error.

No. 211. Osborne *v.* Gheen. Appeal from the Supreme Court of the District of Columbia. March 17, 1890: Decree affirmed with costs. *Mr. W. Willoughby* and *Mr. S. F. Beach* for appellant. *Mr. A. S. Worthington* for appellee.

No. 254. Otis *v.* Crane Brothers Manufacturing Company. Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 31, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles K. Offield* and *Mr. M. B. Philipp* for appellants. *Mr. L. L. Bond* for appellees.

No. 1108. Pennsylvania Railroad Company *v.* Bowers. Error to the Supreme Court of the State of Pennsylvania. February 3, 1890: Dismissed, with costs, on motion of Mr. John Hampton Barnes for the plaintiff in error. *Mr. George Tucker Bispham* for plaintiff in error. No appearance for defendant in error.

No. 761. Pennsylvania Railroad Company *v.* Magee. Error to the Supreme Court of the State of Pennsylvania. December 23, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. E. D. F. Brady* on behalf of counsel. *Mr. Wayne MacVeagh* for plaintiff in error. *Mr. M. Hampton Todd* for defendants in error.

Cases not Otherwise Reported.

No. 139. PICKETT *v.* FERGUSON. Error to the Supreme Court of the State of Arkansas. November 22, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. P. Walker* and *Mr. C. W. Metcalf* for plaintiff in error. *Mr. D. H. Poston* for defendant in error.

No. 335. PIONEER PRESS COMPANY *v.* MITCHELL. Error to the Circuit Court of the United States for the District of Minnesota. July 29, 1889: Dismissed pursuant to the 28th rule. *Mr. William D. Cornish* and *Mr. Gordon E. Cole* for plaintiff in error. *Mr. W. T. Turnbull* and *Mr. Charles E. Flandrau* for defendant in error.

No. 127. PRATT MANUFACTURING COMPANY *v.* BERRY. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. November 19, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles H. Knox* for appellant. *Mr. J. W. Lee* for appellees.

No. 123. RAY *v.* NELSON. Appeal from the Circuit Court of the United States for the District of Colorado. November 18, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. L. C. Rockwell* for appellants. *Mr. John D. Pope* for appellees.

No. 104. RICHARDS *v.* HAYS. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. November 13, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles Howson* for appellant. *Mr. George Harding* and *Mr. Francis T. Chambers* for appellee.

No. 59. ROBERTSON *v.* LUTZ. Error to the Circuit Court of the United States for the Southern District of New York. November 4, 1889: Dismissed, with costs, on motion

of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Edward Hartley* and *Mr. Walter H. Coleman* for defendants in error.

No. 250. ROBERTSON *v.* ROLFE. Error to the Circuit Court of the United States for the Southern District of New York. March 28, 1890: Dismissed, with costs, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 249. ROBERTSON *v.* SCHNEIDER. Error to the Circuit Court of the United States for the Southern District of New York. March 24, 1890: Dismissed, with costs, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. H. E. Tremain* for defendant in error.

No. 65. ROWLAND *v.* ATLANTIC MILLING COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. November 5, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. George H. Forster* for appellant. *Mr. Arthur v. Briesen* for appellee.

No. 263. SCHOONER COMET, HER TACKLE, ETC., ALDRICH, MASTER *v.* STETSON. Appeal from the Circuit Court of the United States for the District of South Carolina. December 3, 1889: Dismissed, per stipulation, on motion of *Mr. James Lowndes* on behalf of counsel. *Mr. Theodore G. Barker*, *Mr. Henry T. Wing* and *Mr. Harrington Putnam* for appellant. *Mr. J. P. Kennedy Bryan* for appellees.

No. 129. SCHULTZ *v.* OSTRANDER. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 19, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. L. M. Hosea* for appellant. No appearance for appellee.

Cases not Otherwise Reported.

No. 280. SENSENDERFER *v.* KEMP. No. 281. SAME *v.* SWISHER. Error to the Supreme Court of the State of Missouri. April 28, 1890: Judgments affirmed, with costs. *Mr. William D. Baldwin*, *Mr. Levin M. Campbell* and *Mr. Samuel P. Sparks* for plaintiffs in error. *Mr. George P. B. Jackson* for defendants in error.

No. 165. SHAW RELIEF VALVE COMPANY *v.* NEW BEDFORD. Appeal from the Circuit Court of the United States for the District of Massachusetts. December 12, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Thomas H. Talbot* and *Mr. Charles H. Drew* for appellant. *Mr. Thomas S. Sprague* and *Mr. Chas. J. Hunt* for appellee.

No. 305. SHIRELY *v.* WELCH. Appeal from the Circuit Court of the United States for the District of Oregon. May 5, 1890: Dismissed for the want of jurisdiction. *Mr. John H. Mitchell* for appellant. *Mr. J. N. Dolph* for appellees.

No. 1098. SHORDON *v.* REED. Appeal from the Circuit Court of the United States for the District of Indiana. October 21, 1889: Dismissed, with costs, on motion of counsel for appellees: *Mr. W. G. Howard* in support of motion. *Mr. Edward H. Risley* opposing.

No. 185. SMITH *v.* EXCHANGE BANK. Error to the Court of Common Pleas of Greene County, State of Pennsylvania. December 20, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. P. A. Knox* for plaintiff in error. No appearance for defendant in error.

No. 12. SOBRAL *v.* MARCHAND. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 15, 1889: Dismissed, with costs, on authority of counsel for appellant. *Mr. J. R. Beckwith* for appellant. *Mr. J. D. Rouse* and *Mr. Wm. Grant* for appellee.

Cases not Otherwise Reported.

No. 751. South and North Alabama Railroad Company *v.* Planters' and Merchants' Mutual Insurance Company. Error to the Supreme Court of the State of Alabama. July 18, 1889: Dismissed pursuant to the 28th rule. *Mr. Thomas G. Jones* for plaintiff in error. *Mr. Gaylord B. Clark* for defendant in error.

No. 149. Southern Development Company *v.* Houston and Texas Central Railway Company. Appeal from the Circuit Court of the United States for the Eastern District of Texas. December 4, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. E. H. Farrar* and *Mr. E. B. Kruttschnitt* for appellant. No appearance for appellees.

No. 14. Springfield *v.* Thomas. Error to the Circuit Court of the United States for the Eastern District of Tennessee. October 15, 1889: Dismissed, with costs, on authority of counsel for plaintiffs in error. *Mr. Samuel F. Rice* for plaintiffs in error. No appearance for defendant in error.

No. 672. Steam Gauge Lantern Company *v.* St. Louis Railway Supplies and Manufacturing Company. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 19, 1889: Dismissed, per stipulation, on motion of *Mr. E. M. Marble* on behalf of counsel. *Mr. Edwin S. Jenney* for appellant. *Mr. F. N. Judson* for appellee.

No. 242. Stone *v.* Loud. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 18, 1889: Dismissed, with costs, on motion of *Mr. William A. McKenney* of counsel for appellant. *Mr. Thomas L. Wakefield* and *Mr. William A. McKenney* for appellant. *Mr. J. E. Maynadier* for appellee.

No. 519. Thomes *v.* Murray. Error to the Supreme Court of the Territory of Montana. April 7, 1890: Dismissed for

the want of jurisdiction, and cause remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 109. THORNTON *v.* WOOSTER. Appeal from the Circuit Court of the United States for the Southern District of New York. November 14, 1889: Dismissed per stipulation of counsel. *Mr. J. C. Fraley* and *Mr. B. F. Lee* for appellant. *Mr. Frederic H. Betts* for appellee.

No. 687. TOWN OF ELMWOOD *v.* DOWS. Error to the Circuit Court of the United States for the Northern District of Illinois. January 7, 1890: Dismissed, per stipulation, on motion of *Mr. Lyman Trumbull* for plaintiff in error. *Mr. Lyman Trumbull* and *Mr. H. B. Hopkins* for plaintiff in error. *Mr. T. S. McClelland* for defendant in error.

No. 1571. TRAGER *v.* JENKINS. Error to the Circuit Court of the United States for the Southern District of Mississippi. April 28, 1890: Dismissed for the want of jurisdiction. *Mr. Charles J. Boatner*, *Mr. Van H. Manning*, and *Mr. Duane E. Fox* for plaintiffs in error. *Mr. W. Hallett Phillips* for defendant in error.

No. 243. TRUM *v.* TURNEY. Appeal from the Circuit Court of the United States for the Southern District of Illinois. April 2, 1890: Decree reversed, with costs; and cause remanded with directions to remand the cause to the state court. *Mr. John M. Palmer*, *Mr. Joseph Wilby* and *Mr. E. W. Kittredge* for appellant. *Mr. H. Tompkins* and *Mr. R. P. Hanna* for appellees.

No. 203. TUBULAR RIVET COMPANY *v.* COPELAND. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 30, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Chauncey Smith* for appellant. *Mr. G. M. Plympton* for appellee.

Cases not Otherwise Reported.

No. 1499. TURNER *v.* SAWYER. Appeal from the Circuit Court of the United States for the District of Colorado. November 1, 1889: Docketed and dismissed, with costs, on motion of *Mr. Fillmore Beall* for appellee. January 27, 1890: Order of November 1, 1889, set aside and leave granted to redocket cause upon payment of costs.

No. 94. UNITED STATES *v.* AGAR. Appeal from the Court of Claims. November 8, 1889: Dismissed per stipulation. *Mr. Attorney General* and *Mr. H. J. May* for appellant. *Mr. S. T. Thomas* for appellee.

No. 1169. UNITED STATES *v.* IVES. Appeal from the Court of Claims. May 19, 1890: Dismissed per stipulation, on motion of *Mr. George A. King* for the appellee. *Mr. Solicitor General* for appellant. *Mr. George A. King* for appellee.

No. 258. UNITED STATES *v.* KINGSBURY. Error to the Circuit Court of the United States for the Western District of Texas. March 17, 1890: Dismissed on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. A. J. Falls* for defendants in error.

No. 386. UNITED STATES *v.* SAMUEL. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. March 17, 1890: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. John Samuel* for defendant in error.

No. 1573. UNITED STATES *v.* TUTHILL. Error to the District Court of the United States for the Northern District of Illinois. April 21, 1890: Dismissed, on motion of *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

Cases not Otherwise Reported.

No. 1528. VINAL *v.* CONTINENTAL CONSTRUCTION AND IMPROVEMENT COMPANY. Error to the Circuit Court of the United States for the Northern District of New York. December 23, 1889: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for defendant in error.

No. 156. VIRGINIA MIDLAND RAILWAY COMPANY *v.* WILKINS. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. October 17, 1889: Dismissed, with costs, on motion of *Mr. Linden Kent* of counsel for appellant. *Mr. John N. Staples* and *Mr. Linden Kent* for appellant. No appearance for appellee.

No. 650. WARREN *v.* HENDERSON. Appeal from the Circuit Court of the United States for the Eastern District of North Carolina. January 22, 1890: Dismissed, with costs, on motion of *Mr. R. H. Battle* for appellants. No appearance for appellee.

No. 21. WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA. Error to the Supreme Court of the District of Columbia. December 2, 1889: Judgment reversed, with costs, per stipulation, and on the authority of the decision of this court in the case of *The Metropolitan Railroad Company* v. *The District of Columbia*, No. 5 of October term, 1889, 132 U. S. 1; and cause remanded with directions to enter judgment for the defendant on the demurrer to the pleas of the statute of limitations. *Mr. Walter D. Davidge* and *Mr. Enoch Totten* for plaintiff in error. *Mr. Henry E. Davis* and *Mr. A. G. Riddle* for defendant in error.

No. 613. WESSELS *v.* STEAMSHIP ALENE, HER ENGINES, ETC. Appeal from the Circuit Court of the United States for the Eastern District of New York. October 9, 1889: Dismissed pursuant to the 28th rule. *Mr. James K. Hill, Mr. Henry T.*

Wing and *Mr. Harrington Putnam* for appellant. *Mr. Everett P. Wheeler* for appellee.

No. 208. WHEELOCK *v.* SHIRK. Appeal from the Circuit Court of the United States for the Northern District of Illinois. July 29, 1889: Dismissed, with costs, pursuant to the 28th rule. *Mr. Charles M. Osborn* for appellants. *Mr. John S. Miller* for appellees.

No. 210. WILSON *v.* GRUNWELL. Appeal from the Supreme Court of the District of Columbia. January 20, 1890: Dismissed, per stipulation, on motion of *Mr. W. Willoughby* for appellant. *Mr. A. L. Merriman* for appellee.

No. 265. WINE *v.* MULLIN. Appeal from the Circuit Court of the United States for the District of Colorado. March 10, 1890: Dismissed, per stipulation, on motion of *Mr. Nathaniel Wilson*, for appellant. *Mr. L. S. Dixon* for appellee.

No. 53. WORTS *v.* CITY OF WATERTOWN. Error to the Circuit Court of the United States for the Western District of Wisconsin. October 29, 1889: Dismissed, with costs, per stipulation. *Mr. James G. Jenkins* and *Mr. F. C. Winkler* for plaintiff in error. *Mr. Daniel Hall* for defendant in error.

INDEX.

CASES AFFIRMED.

1. *Ex parte Mirzan*, 119 U. S. 584, affirmed and applied. *In re Kemmler*, 436.
2. *Barnes* v. *District of Columbia*, 91 U. S. 540, has never been questioned and is again affirmed. *District of Columbia* v. *Woodbury*, 450.
3. *Hartranft* v. *Oliver*, 125 U. S. 525, affirmed and applied to this case. *Sherman* v. *Robertson*, 570.
4. *Wright* v. *Roseberry*, 121 U. S. 488, affirmed and applied to this case. *Irwin* v. *San Francisco Union*, 578.
5. *Glenn* v. *Fant*, 134 U. S. 398; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Andes* v. *Slauson*, 130 U. S. 435; and *Bond* v. *Dustin*, 112 U. S. 604; affirmed and applied to the stipulation filed in this case by counsel, the jury being waived. *Davenport* v. *Paris*, 580.

CHARITABLE USES.

See MORMON CHURCH.

CONFLICT OF LAW.

See LOCAL LAW, 11.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. An agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license-tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional. *McCall* v. *California*, 104.
2. A railroad which is a link in a through line of road by which passengers and freight are carried into a State from other States and from that State to other States, is engaged in the business of interstate commerce; and a tax imposed by such State upon the corporation owning such road for the privilege of keeping an office in the State, for the use of its officers, stockholders, agents and employés (it being a corporation created by another State) is a tax upon commerce among the States, and as such is repugnant to the Constitution of the United States. *Norfolk and Western Railroad Co.* v. *Pennsylvania*, 114.
3. A State is not liable to pay interest on its debts, unless its consent to pay it has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *North Carolina*, 211.
4. On bonds of the State of North Carolina, expressed to be redeemable on a day certain at a bank in the city of New York, with interest at

DISTRICT OF COLUMBIA.

EVIDENCE.

EXECUTIVE.

EXTRADITION.

JURISDICTION.

A. OF THE SUPREME COURT OF THE UNITED STATES.

B. Of Circuit Courts of the United States.

1. The Nashua and Lowell Railroad Corporation was incorporated by the State of New Hampshire June 23, 1835, "to locate, construct and keep in repair a railroad from any point in the southern line of the State to some convenient place in or near Nashua," seven persons being named as incorporators. The Nashua and Lowell Railroad Corporation, (three out of the seven being named as incorporators,) was incorporated by the State of Massachusetts on the 16th of April, 1836, "to locate, construct and finally complete a railroad from Lowell" "to form a junction with the portion of said Nashua and Lowell Railroad lying within the State of New Hampshire." The legislature of Massachusetts, on the 10th of April, 1838, enacted that "the stockholders" of the New Hampshire Company "are hereby constituted stockholders" of the Massachusetts Company, "and the said two corporations are hereby united into one corporation," and further provided that the act should "not take effect until the legislature of . . . New Hampshire shall have passed an act similar to this uniting the said stockholders into one corporation, nor until the said acts have been accepted by the said stockholders." The legislature of New Hampshire, on the 26th of June, 1838, enacted "that the two corporations . . . are hereby authorized, from and after the time when this act shall take effect, to unite said corporations, and from and after the time said corporations shall be united, all property owned, acquired or enjoyed by either shall be taken and accounted to be, the joint property of the stockholders, for the time being, of the two corporations." A common stock was issued for the whole line, and for the forty-five years which intervened the two properties were under the management of one board of directors; but there was no other evidence that the stockholders had acted on these statutes; *Held*, that the New Hampshire Corporation, being a citizen of that State, was entitled to go into the Circuit Court of Massachusetts, and bring its bill there against a citizen of that State; and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts, as to defeat its right to go into that court. *Nashua and Lowell Railroad* v. *Boston and Lowell Railroad*, 356.

See Extradition, 2;
Habeas Corpus, 1.

C. Of District Courts of the United States.

See Habeas Corpus, 3.

KENTUCKY.

The waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and the

wife was subject to the constitution of 1868, which made any property acquired by the wife, after it went into operation, her separate estate, free from his control; (3) When the deed of 1871 was recorded in 1875, if not before, the lands in dispute became free from the debts of A, and therefore were not liable for the debt contracted in 1881; (4) Neither the constitution of 1868 nor that of 1874 could take from the husband any rights vested in him prior to the adoption of either instrument. But when the constitution of 1868 was adopted A had no estate by the curtesy in these lands in virtue of his marriage; for his wife had then no interest in them. In Arkansas, as at common law, except when from the nature and circumstances of the real property of the wife, she may be regarded as conclusively in possession, marriage, actual seisin, issue and death of the wife are all requisite to create an estate by the curtesy; (5) It is competent for a State, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman, shall constitute her separate estate, not subject to the control, nor liable for the debts, of the husband; (6) It is the right of those who have a clear, legal and equitable title to land, connected with possession, to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. *Allen* v. *Hanks*, 300.

10. Saloy, being the owner of a plantation in Louisiana, leased it to B. P. Dragon and Athanase Dragon. The Dragons arranged with Bloch to furnish them with goods, supplies and moneys necessary to carry on the plantation, for which he was to have a factor's lien or privilege on the crops, which were also to be consigned to him for sale. Saloy contracted before the same notary as follows: "And here appeared and intervened herein Bertrand Saloy, who, after having read and taken cognizance of what is hereinbefore written, declared that he consents and agrees that his claim and demands as lessor of the aforesaid 'Monsecours plantation' shall be subordinate and inferior in rank to the claims and privileges of said Bloch as the furnisher of supplies or for advances furnished under this contract; and that said Bloch shall be reimbursed from the crops of 1883 made on said place the full amount of his advances hereunder without regard and in preference to the demands of said Saloy for the rental of said plantation; provided, however, that three hundred and fifty sacks of seed rice shall remain or be left on said plantation out of the crop of this year for the purposes thereof for the year 1884;" *Held*, (1) That under the laws of Louisiana the privilege or lien of the landlord over the crops of the tenant was superior to that of the factor; (2) That the effect of Saloy's agreement was only the waiver of that priority, and that it did not commit him in any degree to the fulfilment by the Dragons of their agreements with Bloch; (3) That if Saloy asserted his privilege by taking possession of the crops, (which he did,) he thereby became liable to account to Bloch, and that this liability